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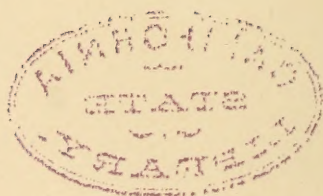


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# INSTITUTES

INV. 1892

OF

## COMMON AND STATUTE LAW.

BY

JOHN B. MINOR, LL. D.,

PROFESSOR OF COMMON AND STATUTE LAW IN THE UNIVERSITY OF  
VIRGINIA.

VOLUME II.

THE RIGHTS WHICH RELATE TO THINGS REAL.



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## PREFACE TO THE FIRST EDITION.

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THE reader has been apprised by the preface to the first volume of this work, of how great a change has occurred in its scope and extent, as compared with the original design; and that, as it was printed in instalments, as the health and leisure of the author enabled him to prepare it for the press, occasional traces of want of homogeneousness would discover themselves, especially in reference to the Statutes of Virginia, which, down to page 496 of the present volume, are to the Code of 1860, and the subsequent Sessions Acts, whilst afterwards they are to the Code of 1873, and the Sessions Acts following.

As this volume may fall into the hands of some who have not seen the preface to the first, it may be expedient to reprint therefrom the following explanation of the plan and arrangement adopted:

“The reader who opens the volume for the first time cannot fail to be struck, and perhaps will be repelled, by the very peculiar arrangement, which, though familiar enough to those who for the last thirty years have pursued their legal studies at the University of Virginia, requires explanation. The arrangement is designed to exhibit *to the eye*, on the page, not only the carefully digested *order* of the propositions, but their *relative subordination* also, indicated by their standing more or less *to the right*. The most prominent propositions are designated by the Roman numerals, I., II., III., &c., on the *extreme left* of the page; and then, as a guide to the reader, the intended position of the subordinate headings (designated by the Arabic numerals, 1, 2, 3, &c.) is shown by small letters attached to the figures (1<sup>a</sup>, 1<sup>b</sup>, 1<sup>c</sup>, &c.). Thus, the subordinate heading *first* in importance and comprehensiveness is indicated by 1<sup>a</sup>, and the subsequent topics corresponding to that (being placed as nearly under it as possible) are

designated as 2<sup>a</sup>, 3<sup>a</sup>, &c. So the next in subordination is represented by 1<sup>b</sup>, placed a little further to the right, and subsequent corresponding heads (as nearly under 1<sup>b</sup> as possible) by 2<sup>b</sup>, 3<sup>b</sup>, &c.

“ If the reader will turn to the Table of Contents, which is arranged upon this analytical method, he will have little difficulty in understanding and following the plan, which, indeed, is only novel in the extent to which it has been carried.”

As was indicated in the preface to the first volume, the author proposes to complete the work in two volumes more, viz. :

Volume III., The Rights which *relate to Things Personal*; and

Volume IV., The *Remedies for Wrongs*, including an exposition of the general Practice of the Law, and the subject of Pleading.

The materials for these are for the most part gathered and arranged, and if the health, and other necessary engagements of the author shall permit, may be ready for the press perhaps within the next twelve or eighteen months.

UNIVERSITY OF VIRGINIA, *July*, 1875.



## PREFACE TO THE SECOND EDITION.

---

ADVANTAGE has been taken of the occasion to print a second edition of this work, to revise and correct it ; to introduce some additional matter, and yet to lessen its bulk ; and by that means, and by printing a larger edition than before, to reduce the price ; and also to append a table of cases cited, which the author hopes will tend to make it more acceptable to practitioners of the law, if not to students.

UNIVERSITY OF VIRGINIA, *January*, 1877.

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## PREFACE TO THE THIRD EDITION.

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NO INCONSIDERABLE labor and pains have been bestowed to render this, the third edition of Volumes I. and II. of the "Institutes of Common and Statute Law," more worthy of the favor with which the work has been received in other States as well as in Virginia. Whether he has labored successfully, the author submits to the candid judgment of the reader.

UNIVERSITY OF VIRGINIA, *August*, 1882.

## PREFACE TO THE FOURTH EDITION.

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THE author has sought, in this Fourth edition of the "INSTITUTES OF COMMON AND STATUTE LAW," not only to perfect the expositions of the law, as made in the preceding editions, but also to incorporate the provisions of the Virginia Code of 1887, taking effect the first day of May, 1888; together with the subsequent legislation of the Commonwealth, and numerous additional authorities derived from the Reports of Virginia, of the United States, of the sister States, and of England, thus bringing the work down to date.

The reader is desired to read page vi. of the preface to the first edition (of volume I.) and especially the note thereto, as explaining why the work has not been encumbered by citations from the Statutes of other States.

UNIVERSITY OF VIRGINIA, *October*, 1891.

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# THE OBJECTS OF THE COMMON AND STATUTE LAW.

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## BOOK THE SECOND.

### OF THE RIGHTS WHICH RELATE TO THINGS REAL.

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It will be remembered that, at the beginning of the first book of these Institutes, it was proposed to arrange the whole subject of the “Objects of the Common and Statute Law” (omitting the consideration of crimes and punishments), under the several heads of—I. RIGHTS WHICH CONCERN OR RELATE TO THE PERSON; II. RIGHTS WHICH CONCERN OR RELATE TO THINGS REAL; III. RIGHTS WHICH CONCERN OR RELATE TO THINGS PERSONAL; and IV. MODES OF SECURING RIGHTS AGAINST INVASION, AND OF OBTAINING REDRESS FOR WRONGS.

Having now unfolded the topics belonging to the first head—namely: THE RIGHTS WHICH CONCERN OR RELATE TO THE PERSON—we come to the second great division, to wit:

#### II. THE RIGHTS WHICH CONCERN OR RELATE TO THINGS REAL.

The rights which relate to things real may be set forth under the heads following, namely; (1), The Nature and Origin of Property; (2), The Nature and Several Kinds of Real Property; (3), The Tenures whereby Things Real are Holden; (4), The Estates in Things Real; and (5), The Title to Things Real;  
WHEREIN CONSIDER,

#### CHAPTER I.

##### OF THE NATURE AND ORIGIN OF PROPERTY.

##### 1<sup>a</sup>. The Nature and Origin of Property.

The rights which relate to *things*, whether real or personal, constitute *property*, which is an institution of *divine origin*,—that is, proceeding necessarily from the ordinances of Jehovah in respect to man's nature and wants. That nature and those wants demonstrate irresistibly that man was ordained by the

Creator to live in society, and society without the recognition of ownership in the subjects of property, would be, if not absolutely impracticable, yet far less beneficent than if such ownership were admitted. No history acquaints us with any period when property did not exist, and it was doubtless coeval with human society.

Without it, neither industry, ingenuity nor thrift would flourish amongst men. The arts of civilization would never come into being, or would languish in premature decay. The beneficent gifts of the Creator would be unimproved and unacknowledged. Vicious indulgence, violent outrage, and every form of wickedness would follow in the train of idleness, to be followed in turn by famine and pestilence, and all "the painful family of death."

The institution of property averts these evils, and turns the baleful passions of men, — their covetousness, their pride, their lust of power and distinction, and of ease, their selfishness, and even their envy, — into channels which multiply comforts to the race, prolong human life, improve the understanding, exalt the character, refine the sentiments, and convert the naked and starving savage into that wonderful creature, "so excellent in faculties," who can

"Instruct the planets in what orbs to run,  
Reform old Time, and regulate the sun!"

These conclusions are not without the sanction of actual and ample experience. Many attempts have been made to constitute communities without individual property and having all things common, but in every instance signal failure has, soon or late, attended the experiment.

In the first settlement of Jamestown this doctrine of communion had a prominent place, and had more than once well nigh led to the total extinction of the colony. Stith, one of our historians, in a few simple words thus describes the effect of the system: "And now the English began to find the mistake of forbidding and preventing *private property*. For whilst they all labored jointly together, and were fed out of the common store, happy was he who could slip from his labor, or *slubber* over his work in any manner; Neither had they any concern about the increase; presuming, however the crop prospered, that the public store *must still maintain them*. Even the most honest and industrious would scarcely take so much true pains in a week as they would have done for themselves in a day." To the same effect is the testimony of Bancroft. After mentioning the timely and welcome relief brought to the wretched outcasts of the colony by Sir Thomas Gates in 1611, the historian says: "But the greatest change in the condition of the colonists resulted from the incipient establishment of *private property*. To each man a few acres

of ground were assigned for his orchard and garden, to plant at his pleasure, and for his own use. So long as industry had been without its special reward, reluctant labor, wasteful of time, had been followed by want. Henceforward the sanctity of private property was recognized as the surest guaranty of order and abundance."

The experience of the Plymouth colony was the same, and there, as in Virginia, the institution of separate property is said to have had a sudden and very beneficial effect in exciting a spirit of industry. (Stith's Virginia, 131; 1 Bancr. U. S. 144; 2 Kent's Com. 319, 328, n. (b).)

To these instances might be added several more recent, the offspring of fanaticism or licentiousness, under the guidance of Rapp, Owen, Fourier and others, which, originating in various motives, and conducted with different degrees of wisdom and partial success, have yet had a common fate—a fate which demonstrates that He who made man *ordained property* as one of the grand stimulants of human effort, and a principal regulator of society.

But although it be admitted that property is an ordinance of God, the question yet remains, how did it at first become vested in *particular individuals*. Upon this point much speculation has been expended, developing wide diversities of opinion. (2 Bl. Com. 8; 2 Kent's Com. 318 & seq.; Rutherf. Insts. B. I., ch. III., § viii.) To the writer it seems the better conclusion that, as *between nations*, property originated in *occupancy*, whilst as to *individuals*, who are citizens of the same state, the appropriation of particular portions of territory, and of certain movable chattels, was by virtue of the *actual or implied* sanction of the political authority of the state, for the time being.

This heaven-ordained institution it is the province and the duty of government to adapt, by wise laws, to the peculiar exigencies of each separate community. Freedom to acquire it, and freedom of disposition, are fundamental principles which may be regulated and restrained, but cannot, without tyranny and mischief, be either forbidden or too much encumbered. Devised for the comfort and improvement of the race, it is not to be perverted to retard the growth of society, nor to enfeeble its energies. That a man shall be permitted to *do what he will with his own*, is a maxim both just and wise, but with the reservation that he shall *not choose to do with it aught detrimental to the common weal*.

But whilst property is thus needful, in general, for the progress and welfare of human society, there are some things which, either because their use is inexhaustible, or because they may be enjoyed alike by all, without injury or privation to any, or because the possession of them, from their nature, is un-permanent and temporary, are not susceptible of abso-



lute appropriation. Of this character are the open sea, running waters, the elements of air and light, and to a certain extent, animals *fera natura*. But these subjects which are more or less *incapable of appropriation*, must not be confounded with those which, by neglect or design, may sometimes prove to have for the time *no owner*, and so to be open to the occupancy of whosoever shall first take possession. It should be the purpose and effort of every well-ordered state to have *none of this latter class*, but to provide by law that every proper subject of ownership shall, under all circumstances, have a *definite and known owner* by law assigned, and if there be none else, that it shall be the *property of the state*. (V. C. 1873, ch. 119, § 11; Id. ch. 9, §§ 3, &c.; Id. ch. 78, § 66; V. C. 1887, ch. 113, § 2558; Id. ch. 66 § 1505.)

Having thus traced property to its divine original, let us advert to its *subjects*, and their due classification. One cannot look around without observing that of the subjects of property, one class is fixed, permanent, and immovable, such as *land*, whilst another class is susceptible of being removed from place to place, and is endued with no fixedness or permanency, as *cattle, jewels, &c.* All property is accordingly divided into property REAL, which is of the fixed, permanent, and immovable class, and property PERSONAL, which is of the movable kind, and may attend the *person*.

## CHAPTER II.

### OF THE NATURE AND SEVERAL KINDS OF REAL PROPERTY.

2<sup>a</sup>. The Nature and Several Kinds of Real Property; Wherein consider,

1<sup>b</sup>. The Nature of Real Property.

Things *real* are such as are permanent, fixed, and immovable, such as *lands*, and rights issuing out of, or connected with lands. (2 Bl. Com. 15.)

2<sup>b</sup>. The Several Kinds of Real Property.

Things real consist in *lands, tenements and hereditaments*. (2 Bl. Com. 15);

Wherein consider,

1<sup>c</sup>. Lands.

The term *lands* includes the surface of the earth, embracing any ground, soil, or earth, whatsoever; as arable lands, meadows, pastures, woods, waters, marshes. It includes also all trees or crops growing, and all structures or buildings thereupon; in short, everything *fixed on it*, and everything belonging or attached to it above and below the surface, *ab solo usque ad celum*. (2 Bl. Com. 17 & seq. 1 Th. Co. Lit. 197 & seq.; 4 Kent's Com. (12th ed.)

468; 2 Wash. R. Prop. 625; (Crews v. Pendleton, 1 Leigh, 305.)

There are several subordinate terms, descriptive of different kinds of lands, of which it will suffice to name more especially the following, namely: (1), Messuage; (2), House; (3), Curtilage; (4), Croft; and (5), Toft;

Wherein consider,

1<sup>d</sup>. Messuage.

The term messuage includes the *dwelling, garden, and curtilage*, and probably *the orchard*. (2 Bl. Com. 19, n. (7); 1 Th. Co. Lit. 215, and n. (35).)

2<sup>d</sup>. House.

The word house has the same meaning as *messuage*. (2 Bl. Com. 19, n. (7); 1 Th. Co. Lit. 115, and n. (35).)

3<sup>d</sup>. Curtilage.

The term curtilage means the space included *within the general fence* which immediately surrounds the principal *messuage*, and the out-buildings and yard closely adjoining a *dwelling*. (1 Chit. Gen. Pr. 175; see V. C. 1873, ch. 188, § 3; V. C. 1887, ch. 181, § 3696; Synops. Crim. L. 85.)

4<sup>d</sup>. Croft.

A croft is a little close *adjoining a dwelling-house*, for pasture, or other particular use. Usually highly *manured by art or craft*. (2 Bl. Com. 19, n. (9); Jac. L. Dict. *Croft*.)

5<sup>d</sup>. Toft.

A toft is a piece of ground where a dwelling *formerly stood*. (2 Bl. Com. 19, n. (8); Jac. L. Dict. *Toft*.)

Land, of what description soever, may be conveyed by the name of *land*, but it may also pass by any of these less comprehensive names which may be appropriate. Besides these here mentioned, there is, at common law, a vast number of particular designations, which are *practically* not employed by us, although proper to be used if there were occasion; *e. g.* *boscus, hirst* or *hurst,holt, shawe*, all meaning a *wood*; *home, dunum, or duna, cope, laue*, all signifying a *hill*; *hope, combe, store, clough*, all meaning a *valley*; *lexues, or leuxes, lea* or *ley*, meaning *pastures*, etc. (1 Th. Co. Lit. 201-'2.)

2<sup>c</sup>. Tenements.

The term tenement is more comprehensive than *land*. It includes everything of a *permanent nature*, capable of being *holden of a superior*, in a feudal sense; *e. g.*, lands, houses, advowsons, franchises, commons, rents, etc. (2 Bl. Com. 16, 17; 1 Th. Co. Lit. 219.)

3<sup>c</sup>. Hereditaments.

Hereditaments, says Lord Coke, "is the largest word in that kind." It comprehends lands and tenements, and also whatever else is capable *of being inherited*; *i. e.*, which

passes, upon the death of the owner, *to the heir, and not to the personal representative.* (2 Bl. Com. 17; 1 Th. Co. Lit. 219.)

Hereditaments are (1). Corporeal; and (2). Incorporeal; Wherein consider,

#### 1<sup>d</sup>. Corporeal Hereditaments.

Corporeal hereditaments consist wholly of *substantial and permanent* objects, which may be apprehended by the senses; all of which may be included under the denomination of *land* only. For land, as we have seen, comprehends, in its legal signification, any ground whatsoever; as arable, meadows, pastures, woods, *waters*, marshes. It includes, also, all *structures* thereupon. Hence, if one were about to convey a *lake*, it would not be proper to describe it as so many *acres of waters* (for that would pass only the *right of fishery*, etc.), but so many *acres of land, covered with water.* (1 Bl. Com. 17, 18; 2 Th. Co. Lit. 199, 200.)

### CHAPTER III.

#### OF INCORPOREAL HEREDITAMENTS.

#### 2<sup>d</sup>. Incorporeal Hereditaments.

The doctrine touching incorporeal hereditaments may be exhibited under the heads of (1). The nature of incorporeal hereditaments; and (2). The several sorts of incorporeal hereditaments;

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#### 1<sup>o</sup>. The Nature of Incorporeal Hereditaments.

Incorporeal hereditaments are *rights* issuing out of things corporate, or concerning or annexed to, or exercisable within the same, and must not be confounded with the *profits* arising from them. They are not the *objects of the senses* (being only *rights*), but merely of *intellectual perception*, and, therefore, pass, even at common law, by *deed only*, without livery, and for that reason are said to *lie in grant*; whilst corporeal hereditaments, being transferred at common law, no otherwise than by *actual delivery* of the possession, are said to *lie in livery.* (2 Bl. Com. 19-20, 316.)

#### 2<sup>o</sup>. The Several Sorts of Incorporeal Hereditaments.

The several sorts of incorporeal hereditaments are (1), Advowsons; (2), Tithes; (3), Commons; (4), Ways; (5), Outgo; (6), Dignities; (7), Franchises; (8), Corodies; (9), Annuities; and (10), Rents;

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#### 1<sup>o</sup>. Advowsons; Wherein of

#### 1<sup>o</sup>. The Nature of Advowsons.

Advowson (*advocation*) is the right of presentation to a *church-benefice*. He who possesses the right is called *the patron*. The origin of it is that the lords of manors having built churches on their demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common, had of common and of natural right the power of nominating the ministers to those churches which they themselves had thus built and endowed. (2 Bl. Com. 21.)

2<sup>g</sup>. The Several Kinds of Advowsons, in Respect of their *Origin*; w. c.

1<sup>h</sup>. Advowsons *Appendant*.

Advowsons appendant are advowsons annexed *by prescription* to the manors whence they were originally endowed. (2 Bl. Com. 22.)

2<sup>h</sup>. Advowsons *in Gross*.

Advowsons in gross occur where the property of the advowson has been once separated by legal conveyance from the ownership of the manor, and is annexed to the *person of the owner*, and not to his lands. (2 Bl. Com. 22.)

3<sup>g</sup>. The Several Kinds of Advowson, in Respect to the *Mode of Exercising the Right*; w. c.

1<sup>h</sup>. Presentative Advowsons.

Presentative advowsons are where the patron presents to the bishop, who *institutes* or *inducts*, if upon examination he finds the candidate prepared. (2 Bl. Com. 22.)

2<sup>h</sup>. Collative Advowsons.

Collative advowsons are where the bishop is also the patron, and at *once presents and institutes*. (2 Bl. Com. 22.)

3<sup>h</sup>. Donative Advowsons.

Donative advowsons are where the patron, though not a bishop, has the privilege of *instituting*, as well as of *presenting*, without reference to the bishop. (2 Bl. Com. 23.)

There are *no advowsons in Virginia*, there being no established church here.

2<sup>f</sup>. Tithes; w. c.

1<sup>g</sup>. The Nature of Tithes.

Tithes are the tenth part of the increase arising from the *profits of lands*; from the *stock upon lands*; and from the *personal industry* of the inhabitants. (2 Bl. Com. 24. &c.) w. c.

1<sup>h</sup>. *Prædial* Tithes.

*Prædial* tithes are tithes of the products of the soil, as of corn, grass, hops, &c. (from *prædium*, a farm.)

2<sup>h</sup>. *Mixed* Tithes.

Mixed tithes are tithes of natural products, but nurtured and preserved in part by the care of man, such as of wool, milk, pigs, &c. (2 Bl. Com. 24.)



## 3. Personal Tithes.

Personal tithes are tithes from profits arising from *manual occupations*, trades, fisheries, etc.; *i. e.*, the tenth part of the *clear gains*. (2 Bl. Com. 24.)

At present, *personal* tithes are nowhere paid, except for *fish caught in the sea*, and *corn-mills*. (2 Bl. Com. 24, n. 7.)

## 2. Origin of Tithes.

Tithes were ordained for the support of the clergy, and of religion, before the Conquest, successively, by Alfred, Edward the Elder, and Athelstan—(A. D. 900 to 930. See 2 Bl. Com. 25.)

## 38. To whom Tithes are Payable.

At first tithes were payable to *any priest* the payer should designate, or to the *bishop*, to be by him dispensed; but afterwards, when parishes were instituted, to the *parish priest*. (2 Bl. Com. 26.)

## 4. Mode of Exempting Lands from Tithes; w. c.

1<sup>a</sup>. Real Composition.

A real composition is an *actual arrangement* made between the owner of the lands and the parson. (2 Bl. Com. 28.)

2<sup>a</sup>. Prescriptive Composition—called a *Modus*; w. c.1<sup>i</sup>. Prescription *de modo decimandi*.

A *modus decimandi* is where, by the *immemorial usage* of a parish, or particular locality, a *special manner of tithing* is allowed, different from the general law of taking tithes in kind, which are the *actual tenth part* of the annual increase. (2 Bl. Com. 28-'9.)

2<sup>i</sup>. Prescription *de non decimando*.

A prescription *de non decimando* is where the claim is, by *immemorial local usage*, to be *entirely discharged of tithes*, and to pay no compensation in lieu of them. This privilege was originally limited to *spiritual persons and corporations*, as monasteries, bishops, etc., and a layman can only claim it by showing that he has succeeded to lands formerly held by a monastery; all of which were suppressed by Henry VIII. (2 Bl. Com. 31-'2.)

## 5. Doctrine Touching Tithes in Virginia.

There are *no tithes* in Virginia, there being no established church. Previous to the Revolution of 1776, the Episcopal Church (that is, the Church of England), was established here by law; but the clergy were supported, not by tithes, but *by taxes*. By the construction of an early colonial statute, the parishes were understood to possess the right to *nominate* the minister to the governor, who *inducted* him into the living, whereby he gained a *freehold estate* therein for his life. It generally happened, therefore, that the vestries of the parishes declined to present the minister to the governor for

*induction*, but kept him always, as it were, on trial, so that they could dismiss him at pleasure.

Originally, the stipend allowed a minister was £80 a year, which was collected under direction of the *church wardens*, by an assessment *per capita* upon all *male whites*, and all *slaves* of a certain age, whence the word *tithables* is to this day applied to the subjects of *per capita* assessments for the maintenance of the poor, and other *county purposes*. The stipend thus provided was payable in *tobacco* (as much the colonial currency as gold and silver), at *twelve shillings a hundred*, or *in corn* at *ten shillings a barrel of five bushels*. (Act of 1652, 2 Hen. Stats. 45.) Afterwards, tobacco having depreciated, it was enacted, in 1748, that the minister's annual stipend should be 16,000 pounds of tobacco. (6 Hen. Stats. 88.)

It was under this law—which was alleged to have been suspended in 1758, by an act allowing the planters to *commute* at 16s. 8d. per hundred, which, however, was expressly limited to *one year* (7 Hen. Stats. 240)—that the claims of the clergy arose which were the subject of controversy in the celebrated "*Parsons' Cause*," wherein, in 1763, in the county court of Hanover, Patrick Henry achieved his first marvellous triumph of eloquence. (Wirt's Henry, 38 & seq.)

3<sup>d</sup>. Common, or *Right of Common*; w. c.

1<sup>g</sup>. Nature of Common.

Common, or right of common, is the *right to a profit* which a man has in the lands of another *in common with the owner of the lands*, *e. g.*, to feed his cattle thereon, to dig turf, to catch fish, to get wood, &c. (2 Bl. Com. 32; 1 Th. Co. Lit. 230, 229; 3 Kent's Com. 406, &c.)

2<sup>g</sup>. Doctrine touching Apportionment of Common.

In general, the *apportionment*—that is, the proportionate abatement of the enjoyment, or else the division of the right, or of the burden, amongst several persons—may take place, with two qualifications: 1st, that it shall not lead to *overcharging the land*; and 2d, that it is *not contrary to feudal policy*. (1 Th. Co. Lit. 227 '8; Id. 229, n. (Y.); Id. 687; *Post*, 11, 12, 13.)

3<sup>g</sup>. The Several Sorts of Common.

The several sorts of common which occur frequently enough to have a specific name assigned to them are, (1), Common of pasture; (2), Common of  *piscary*, or fishing; (3), Common of turbary; and (4), Common of estovers;

w. c.

1<sup>h</sup>. Common of *Pasture*; w. c.

1<sup>i</sup>. Nature of Common of Pasture.

Common of pasture is the right of *feeding one's beasts* on another's lands *in common with the owner* of the lands. (2 Bl. Com. 32.)

2<sup>d</sup>. Several Sorts of Common of Pasture.

The several sorts of common of pasture are, (1), Common of pasture *appendant*; (2), Common of pasture *appurtenant*; (3), Common *because of vicinage*; and (4), Common *in gross*;

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1<sup>k</sup>. Common of Pasture *Appendant*.

In contemplating common of pasture *appendant*, we note: (1), The general meaning of the word *appendant*; (2), The origin of common of pasture *appendant*; (3), Beasts commonable by virtue of common *appendant*; (4), Limitation to the *number* of beasts commonable; (5), Appportionment of common *appendant*; and (6), Doctrine in Virginia touching common of pasture *appendant*.

W. C.

1<sup>l</sup>. Meaning of the Word *Appendant*, in General.

*Appendant* means *annexed* to lands *by prescription*, in contradistinction to *appurtenant*, which means *annexed* to lands, either *by grant or by prescription*. (1 Th. Co. Lit. 206.)

2<sup>l</sup>. Origin of Common of Pasture *Appendant*.

When the lords of manors at first granted out parcels of lands to tenants, for military services to be done, the tenants could not plough or manure the lands without beasts, which could not be sustained without pasture. Hence, as the grant included little, if any, other than *arable* land, it came to be an *implied incident* to the grant, as between the feudal superior and his tenant, that the latter should have the right to pasture the beasts needed to *plough or manure* the land, upon the *lord's unenclosed wastes*. The right of common, in favor of the tenant, being thus annexed to the lands granted him, by general and *immemorial usage alone*, is properly described as common *appendant*. It follows from this origin of common *appendant*, that it can be annexed only to *arable land*; and that wherever it exists, it must have originated at a very remote period, when such military tenures as above described were frequent. (2 Bl. Com. 33; *Supra*, 1<sup>l</sup>; *Bennett v. Reeve*, Willes' R. 227.)

3<sup>l</sup>. Beasts *Commonable*, by Virtue of *Common Appendant*.

Beasts commonable by virtue of common *appendant* are such as are required to *plough or manure* the land, as horses, oxen, etc., but not hogs or goats; and cattle not belonging to the commoner may be included, if *in his use*. (2 Bl. Com. 33; 1 Th. Co. Lit. 226-27, n's (R.) and (S).)

4<sup>l</sup>. Limitation to the *Number of Beasts* which may be put on the Common.

As many beasts may be pastured on the common dur-

ing the *summer* as the land to which the right of common is appendant *can supply food for in the winter*, unless the *custom* designates some *certain number*. (Bennett v. Reeve, Willes, 231-2; Tyrringham's Case, 4 Co. 37 b; Id. 37 a, n. (F.); Benson v. Chester, 8 T. R. 396.)

# 5<sup>l</sup>. Apportionment of Common Appendant; w. c.

- 1<sup>m</sup>. Apportionment, by Reason of Partition amongst Several, of the *Land to which the Common is Appendant*, or in which it is to be Enjoyed.

Whether the partition proceed from the alienation of part of the land by the tenant, or from a division of it amongst several joint-owners, the common is to be *apportioned to each parcel*, in proportion as its produce is capable of maintaining beasts in winter. (1 Th. Co. Lit. 228; Bennett v. Reeve, Willes, 231; Tyrringham's Case, 4 Co. 37 a, and n. (F.); Wild's Case, 8 Co. 78 b; Bac. Abr. Common, (E).)

- 2<sup>m</sup>. Apportionment when the Commoner, by *his own Act*, acquires Part of the Land *in which the Common is Enjoyed*.

The common *is to be apportioned* upon the principle stated, *Ante*, p. 9, 2<sup>k</sup>. It will not lead to *over-charging* the common, nor is the acquisition of such common *contrary to feudal policy*; it arose, indeed, as has just been explained, by implication of the law itself, which out of regard to the public advantage, attached to the grant of arable land, as a necessary incident, the right of common in question. Hence, when the commoner, that is, the *tenant*, acquired a part of the land in which the common was, by the law's implication, to be enjoyed, the law very naturally to that extent apportioned, that is, *abated* the right of common. (1 Th. Co. Lit. 217; Tyrringham's Case, 4 Co. 37 a, and n. (F.); Wild's Case, 8 Co. 78 b; Bac. Abr. Common, (E).)

- 6<sup>l</sup>. Doctrine in Virginia Touching Common of Pasture Appendant.

Common of pasture appendant cannot exist in Virginia, because its origin *is connected historically with grants to military tenants by lords of manors*, of which there have never been any instances with us; and even in England, the instances of such common must be traced back to the *first existence of manors*, not later than the time of Edward I.

- 2<sup>k</sup>. Common of Pasture Appurtenant.

The doctrine applicable to common of pasture *appurtenant* may be developed after the same manner as common *appendant*, having regard to (1). Its origin; (2). The beasts commonable thereby; (3). The limitation to the



number of beasts; (4), The apportionment of the common; and (5), The doctrine in Virginia touching common *appurtenant*.

W. C.

1<sup>l</sup>. Origin of Common of Pasture *Appurtenant*.

Common of Pasture *appurtenant* has no necessary connection with feudal military tenures, and may be created either *by grant, or by prescription*. It follows hence that it may be annexed to *any sort of land*, and is not, like common *appendant*, confined to *arable land alone*. (1 Th. Co. Lit. 228, n. (6); Cowlam v. Slack, 15 East. 108; 1 Th. Co. Lit. 227, n. (S.))

2<sup>l</sup>. Beasts Commonable by Virtue of Common *Appurtenant*.

The character of the beasts may be ascertained by the grant, or by the prescription; but if they are silent, it seems *any beasts are commonable*. (1 Th. Co. Lit. 227.)

3<sup>l</sup>. Limitation to the *Number of Beasts* which may be Pastured in Pursuance of Common *Appurtenant*.

The *number of beasts* may be regulated *by the terms* of the grant or prescription, and if not so prescribed, is regulated, as in the case of common *appendant*, by *levancy and couchancy*, that is, by the number which can be maintained *during the winter*, on the land to which the common is annexed, *by its own produce*. (1 Th. Co. Lit. 227, n. (S.))

4<sup>l</sup>. Apportionment of Common *Appurtenant*; w. c.

1<sup>m</sup>. Apportionment by Reason of *Partition* amongst Several of the Land to which the Common is *Appurtenant*, or in which it is to be Enjoyed.

The apportionment is admissible, as in the corresponding case of common *appendant*. (*Supra*, p. 11, 1<sup>m</sup>; Wild's Case, 8 Co. 78 b; Bac. Abr. Common (E).)

2<sup>m</sup>. Apportionment, when Commoner, *by his own Act*, acquires Part of the Land *in which the Right of Common Appurtenant is to be Enjoyed*.

The common in this case is *extinct*, from considerations of *feudal policy*. The creation of common *appurtenant* did not suppose, as common *appendant* did, the introduction of a new tenant and vassal into the manor; but on the contrary tended to *diminish the capacity* of the tenant who granted the common, to render the *stipulated military services*, whence it was said to be *against common right*. Whilst, therefore, the law *did not actually prohibit* such grants, it regarded them *with disfavour*; and when justice and right did not permit them to be enforced *literally and entirely*, it declined to *modify them* by implication, and so *held them to be extinguished*. But if the land in

which the common is to be enjoyed, were acquired, not by the commoner's *own act*, but by the *act of the law* (as by *descent*), the common is then *apportioned*. (1 Th. Co. Lit. 227; Wild's Case, 8 Co. 78 b; Bac. Abr. Common, (E.); Gilb. Rents, 156.)

5<sup>l</sup>. Doctrine in Virginia Touching Common *Appurtenant*.

Common *appurtenant* may exist in Virginia subject to the same general principles as at common law.

3<sup>k</sup>. Common *because of Vicinage*; w. c.

1<sup>l</sup>. Common because of Vicinage *in England*.

Common because of vicinage is the *quasi* right enjoyed, whereby the cattle belonging to the inhabitants of two *contiguous manors*, which have *immemorially intercommuned*, are allowed to stray upon the *unenclosed* lands in either. It is simply a right, if it can be called a *right*, to *commit a permissive trespass*. (2 Bl. Com. 33; 1 Th. Co. Lit. 228, & n. (U).)

2<sup>l</sup>. Common because of Vicinage *in Virginia*.

A *quasi* right corresponding to common because of vicinage exists in Virginia, by reason of the *fence-law*, which allows no action and imposes no fine for trespasses committed by cattle, unless the fence is *five feet high*, and close enough to prevent the animals in question from creeping through. (V. C. 1873, ch. 97, §§ 1, 8; V. C. 1887, ch. 93, §§ 2038, 2042.)

In consequence of the ravages of the late war the fence-law may be suspended in any county at the discretion of the board of supervisors; and the boundary line of any tract of land may be declared to be a lawful fence. And in that case the owner or manager of any stock must not permit it to run at large beyond the limits of his own lands. (V. C. 1873, ch. 97, §§ 15 to 18, 23 to 25; V. C. 1887, ch. 93, §§ 2048–2050.)

4<sup>k</sup>. Common *in Gross*.

Common in gross is a right of common which is not *annexed to land* at all, but to a *man's person*. It may be created *by grant or by prescription*. (1 Th. Co. Lit. 228, and n. (W).)

2<sup>h</sup>. Common of *Piscary*, or of *Fishing*; w. c.

1<sup>l</sup>. The *Modes* by which a *Common of Fishing* may be Created.

Common of fishing may be created by *grant* or by *prescription*. (1 Th. Co. Lit. 226, n. (Q); Id. 230.)

2<sup>l</sup>. Common of Fishing in *Public Waters*.

In *public waters* all men may fish *in common*; and if any one claims an exclusive right there, he must show either a *grant* from the commonwealth, or *prescription*, which *supposes a grant*. This right of everybody to fish in public waters is not, however, properly a *common*, as

that term has been already defined. (Bac. Abr. Prerogative, (B.) 3.)

*Public waters* mean *navigable* waters, and at common law they are waters wherein the tide *ebbs and flows*. In Virginia, however, any water is *navigable* (and therefore *public*) which is *capable of being navigated* by vessels employed in commerce (say of 20 tons burden or more), and which communicates with other States or countries, whether the tide ebbs and flows therein or not, and whether connected with the sea or not. (Waring v. Clark, 5 How. 441; N. J. St. Nav. Co. v. Merchants Bank, 6 How. 344; Genessee Chief v. Fitzhugh, 12 How. 443; Jackson v. Magnolia, 20 How. 296; The Hine v. Trevor, 4 Wal. 561; The Daniel Ball, 10 Wal. 563; Bouv. L. Dict. *Navigable*.) The river, and consequently the public domain, extends, at common law, to the *usual high water mark*; but in Virginia it is bounded, as to tide-water at least, and probably as to all waters, by *low water-mark*. (1 Lom. Dig. 661; 3 Kent's Com. 344; V. C. 1873, ch. 62, §§ 1, 2; V. C. 1887, ch. 60, § 1339.)

The power of the legislature of a State over the public rights of navigation, and fishing in any waters within its bounds, is unrestricted, provided it does not interfere with the power of the United States *to regulate commerce*. (Cooley v. Philadelphia Board of Wardens, 12 How. 299; Gilman v. Philadelphia, 3 Wal. 713. See Smith v. Maryland, 18 How. 71.) Hence, it is admitted that a State may by law regulate the use of fisheries and oyster-beds within its territorial limits, though in navigable waters, provided only that the free use of the waters for *purposes of navigation and commercial intercourse*, be not interrupted. (1 Kent's Com. (12th ed.) 439; Ang. Wat. Courses, 71, § 65 a; Cortfield v. Coryell, 4 Wash. C. C. 371; Burnham v. Webster, 5 Mass. 266; Dunham v. Lamphire, 3 Gray (Mass.), 268; Com'th v. Vincent, 108 Mass. 447; Smith v. Maryland, 18 How. 71.)

In Virginia, the legislature has recognized and allowed no inconsiderable encroachment upon the *common rights*, by authorizing the county court of any county in which is a *fishing shore*, upon the application of the proprietor or occupant thereof, to appoint commissioners to designate the "ebb and flood hauls" of adjoining fishing shores; and any encroachment on the limits thus ascertained is visited with the considerable penalty of \$250. (V. C. 1873, ch. 120, §§ 10 to 12; V. C. 1887, ch. 114, §§ 2573 to 2575.) And in the like spirit, a property is recognized in *planted waters*, to steal which is made a *penitentiary offence*. (V. C. 1873, ch. 101, §§ 53, 54; V. C. 1887, ch. 97, §§ 2154 & seq.) And riparian proprietors and others are permitted

to acquire the exclusive privilege of planting or depositing oysters in the public waters of the commonwealth, in some cases for an indefinite, and in others for a definite, period. (V. C. 1873, ch. 101, §§ 4, 6 & seq.; V. C. 1887, ch. 97, §§ 2137 & seq.)

On the other hand, by the Code of 1860, the *shores and beds of all streams*, whether public or private, not previously granted, in the eastern part of the State, by act of 1780, and in the western part by act of 1802, were reserved *as common* to all, and it is provided that "any of the people of this State may *fish, fowl, or hunt on the said shores or beds.*" (V. C. 1860, ch. 62, §§ 1, 2; 1 Lom. Dig. 661 to 663.)

The Code of 1873 and that of 1887 (V. C. 1873, ch. 62, §§ 1, 2; V. C. 1887, ch. 60, §§ 1338 & seq.), somewhat modify the tenor of these provisions without materially affecting their substance. They enact that "all the beds of the bays, rivers and creeks, and the shores of the sea, within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the commonwealth, . . . and may be used as a *common* by all the people of the State for the purpose of *fishing and fowling*, and of taking and catching *oysters and other shell fish*, subject to the provisions of chapters 95, 96 and 97 of the Code of 1887; and no grant shall hereafter be issued by the register of the land-office to pass any estate or interest of the commonwealth in any natural oyster-bed, rock or shoal, whether the said bed, rock or shoal shall ebb bare or not." See also V. C. 1873, ch. 101, §§ 1 to 5 & seq.; V. C. 1887, ch. 60, § 1338; *Post*, p. 20.

### 3<sup>d</sup>. Common of Fishing in *Private Waters*.

As *public waters* are those which are navigable, *private waters* are those *not navigable* for craft used in commerce. In private waters, the proprietor alone, in general, can fish; and if any one claims to share with him, he must show it either by a deed of grant, or by prescription. The proprietor of a private stream is usually the person who owns the banks; and if different persons own the opposite banks, the domain of each, for the most part, extends to the middle of the water-course, *ad filum fluminis*. (1 Lom. Dig. 663-4.)

### 3<sup>h</sup>. Common of Turbary.

Common of turbary is the right of getting turf *for fuel* from another's lands, *in common with him*; and there may also be a *common* of digging for coals, clay, gravel, sand, minerals, etc., or of *any other profit*. (2 Bl. Com. 34);

W. C.

#### 1<sup>st</sup>. Mode of Creating Common of Turbary.

Common of turbary may be created by grant, or by pre-



scription, and it may be *appendant* or *appurtenant* (*i. e.*, annexed to lands), or *in gross* (*i. e.*, annexed to the person of the grantee). But in this, as in all other cases, there must be a *fit relation* between the right and the property to which it is appendant or appurtenant. Hence, common of *turbary* can only be appendant or appurtenant to a *dwelling*, and not to lands merely, the turf being used for fuel, and the use must be confined to the *commoner's own house*. (Tyringham's Case, 4 Co. 37 a; 2 Bl. Com. 34, n. (26).)

2<sup>i</sup>. Apportionment of Common of Turbary; w. c.

1<sup>k</sup>. Apportionment where the Land to which the Common is annexed is *Divided Amongst Several*.

There is no apportionment, because it would *over-charge* the land in which the common is to be enjoyed. The common is to belong to him who *has the house*.

2<sup>k</sup>. Apportionment where the Land in which the Common is to be Enjoyed is *Divided amongst Several*.

Where the land in which the common is to be enjoyed is divided amongst several, in consequence of a descent to several co-heirs, or of a conveyance to several parties, or otherwise, a corresponding apportionment of the burden of the common is to be made.

3<sup>k</sup>. Apportionment where, *by his own Act*, the Commoner becomes seised of Part of the Land *in which the Common is to be Enjoyed*.

The common is *extinct* for the reason of feudal policy, stated *Ante*, p. 12, 2<sup>m</sup>. (1 Th. Co. Lit. 227; Bac. Abr. Common, (E.).)

3<sup>i</sup>. Doctrine Touching *Common of Turbary* in Virginia.

Common of turbary may exist here, just as in England, subject to the general principles applicable there. (1 Lom. Dig. 659.)

4<sup>b</sup>. Common of *Estovers*.

The word *estovers* (*estoffer*—to furnish), means *supplies*, not of *every* kind, but of *wood*, for various purposes. The Anglo-Saxon appellation is *botes*. (Ang. Sax. *bot*, amends, compensation, or allowance). *Common of estovers*, therefore, is the right of taking from another's woods, in *common with him*, a reasonable sufficiency of wood or timber, for certain purposes, presently to be named; and it must be distinguished from the *exclusive right* which every tenant for life or years has, of getting from the premises occupied by him similar supplies, which are also called *estovers* or *botes*, but not *common of estovers*. (2 Bl. Com. 35, & n. (27).) w. c.

1<sup>i</sup>. The Several Kinds of *Estovers* or *Botes*; w. c.

1<sup>k</sup>. House-bote.

House-bote is a sufficient allowance of wood to *repair the house*, or to supply it *with fuel*, which latter is some-

times called by the distinctive name of *fire-bote*. (2 Bl. Com. 35.)

2<sup>k</sup>. Plough-bote, or *Cart-bote*.

Plough-bote, or Cart-bote, is a sufficiency of wood *to make and repair all instruments of husbandry*. (2 Bl. Com. 35.)

3<sup>k</sup>. Hay-bote, or Hedge-bote.

Hay-bote, or hedge-bote, is an allowance of wood for *making and repairing hay* (Ang. Sax. *hage*—*haw*), hedges or fences.

2i. Modes of Creating *Common of Estovers*.

Common of estovers is created by *grant*, or by *prescription*. From its nature it can seldom be in *gross*, but is usually *appendant* or *appurtenant* to land. (Dean, &c. of Windsor's Case, 5 Co. 25; 2 Bl. Com. 35, & n. (27); 1 Lom. Dig. 659.)

3i. Apportionment of Common of Estovers.

Apportionment called for in consequence of the land to which the right is annexed *being divided into several parcels*, is always admissible, unless it would lead to the *overcharging* of the land in which it is to be enjoyed; a result which would generally take place in case of *fire-bote*, and often in the other cases; but if the commoner acquire *by his own act* a part of the land in which the common is to be exercised, the right of common becomes *extinct*, upon the principle of feudal policy, so repeatedly referred to. (*Ante*, p. 12, 2<sup>m</sup>; 1 Th. Co. Lit. 227; Bac. Abr. Common, (E).)

4i. Doctrine as to *Common of Estovers* in Virginia.

Common of estovers may exist in Virginia just as in England, with the same qualities and incidents; but this, like all the other rights of common, is in practice little known amongst us, in consequence of the cheapness of land. (1 Lom. Dig. 659.)

4i. Ways.

Ways include both *highways* and *private-ways*, but the latter meaning is the one usually intended, and it is in that sense alone that it belongs to the subject of incorporeal hereditaments. A *highway* is a way *common to all persons*, and at common law may be a *footway* or horse-way, as well as one *for carriages*. If it is not common *to all persons*, but only to the residents of a *particular locality*, it is at common law distinguished as a *common way*. Anciently, there were but four *highways* in England, all of Roman construction, viz: Watlingstreat, Ikenildstreat, Fosse, and Erminstreat; the first two traversing *the length*, and the last two *the breadth*, of the kingdom (Jac. Law Dict. Watling Street); and until a period comparatively recent, the legal idea of a highway was, that it should lead *from town to town*, and, therefore, the ancient form of indictment for obstructing it showed the *termini*. The

modern idea, however, of a highway, as above stated, is that it is *common to all people alike*; and yet in Virginia (true to English traditions), until 1849, no road could be established as a highway, unless one *terminus*, at least, was at the courthouse, a public warehouse, landing, ferry, or designated *public place*. No such requirement at present exists; and the road-laws seem to abolish the distinction between *highways* and *common ways*, and constitute all alike highways, open to every mode of transit, on foot, on horseback, with cattle, or in carriages. (Bac. Abr. Highways, (A.); 1 Lom. Dig. 677 & seq.; 1 Th. Co. Lit. 234, n. (C. 1).)

The mode of opening highways by public authority, and the circumstances under which a dedication to the public use may be presumed, without a formal order, have been stated in the first book, Chapter IX. What is now to be dealt with is the subject of *private ways*.

The doctrine touching private ways may be exhibited under the heads following, namely: (1), The definition of the right of way; (2), The modes whereby a right of way may originate; (3), The extent of privilege conferred by a right of way; (4), The modes whereby a right of way is extinguished; and (5), Easements and aquatic rights assimilated to rights of way; w. c.

#### 1<sup>st</sup>. Definition of the Right of Way.

The right of way is "*the right of going over another's land*," and may be *in gross*, or annexed to lands, as *appendant* or *appurtenant* thereto. (2 Bl. Com. 35; 1 Lom. Dig. 670-71, 673.)

#### 2<sup>nd</sup>. Modes whereby a Right of Way may Originate.

A right of way may originate by, (1), Grant; (2), Reservation; (3), Prescription; and (4), Necessity, or Implication; w. c.

##### 1<sup>st</sup>. Grant.

As where A grants B a right of way through his land, or, what is equivalent thereto, covenants that B shall enjoy it. (2 Bl. Com. 35, n. (18).)

##### 2<sup>nd</sup>. Reservation.

As where A grants land to B, *reserving* a right of way over it. (2 Bl. Com. 36, n. (28).)

##### 3<sup>rd</sup>. Prescription.

Prescription *supposes a grant*, being founded on honest, uninterrupted and *adverse* enjoyment for a period whereof the memory of man runneth not to the contrary. This *immemorial* enjoyment, however, is considered as *conclusively* established by a continuance (honest, uninterrupted and *adverse*) for more than twenty years. (2 Bl. Com. 35, n. (28); 1 Lom. Dig. 786-7; Coalter v. Hunter, 4 Rand. 58; Stokes v. Upper Appomattox Co. 3 Leigh, 318; 3 Kent's Com. 441.)

4<sup>b</sup>. Necessity, or rather Implication.

A way of *necessity* arises no otherwise than as incident to a grant of land surrounded wholly by that of the grantor, when otherwise the land granted *would not be accessible*, and the grantee would derive no benefit from the grant. It is an instance of the maxim previously referred to, that one is always understood to intend, as incident to the grant, whatever is *necessary* to give effect thereto, which is in the grantor's power to bestow. *Cuiusque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit.* (Liford's Case, 11 Co. 52<sup>a</sup>; Pomfret v. Ricroft, 1 Wms. Saund. 322, b. n. (5), (6); Broom's Max. 362, 366; 2 Bl. Com. 36, and n. (28); 1 Lom. Dig. 675; Gayety v. Bethune, 14 Mass. 55 (7 Am. Dec. 188); Nichols v. Luce, 24 Pick. 102 (35 Am. Dec. 303); Kimball v. Cohees R. R., 27 N. H. 448 (59 Am. Dec. 387, 388, note); Linkenhoker v. Graybill, 80 Va. 838.)

If one's land is so situated that he can have no access to it without passing over the premises of another person (not his grantor), he cannot demand a right of private way as of *necessity*, but must apply to have a *public highway* opened, which is *in the discretion* of the county court to order, even to subserve the convenience of a *single person*, although the court might generally hesitate to exercise its discretion when only one person was concerned. (V. C. 1873, ch. 52, §§ 24 & seq.; Acts 1874-'5, p. 177, ch. 1, § 1; V. C. 1887, ch. 43, §§ 947 & seq.; Lewis v. Washington, 5 Grat. 265; 1 Lom. Dig. 675.)

3<sup>d</sup>. Extent of Privilege Conferred by a Right of Way: w. c.1<sup>h</sup>. The Use of the Way *must be as Stipulated*.

The several classes of private ways are a foot-way, a horse or *drift-way* (for a horse or for the driving of cattle), and a cart-way (for any manner of wheel-vehicle). A cart-way includes, in general, all the rest, and a horse or drift-way includes a foot-way; but one who has only a foot-way cannot ride or drive cattle over it, nor can one entitled only to a drift-way pass along with a vehicle. (1 Th. Co. Lit. 233-'4, and n. (B. I.); Ballard v. Dyson, 1 Taunt. 279.)

So, it is said, the grantee having a right of way over another's lands to a designated place cannot justify *going beyond*, apparently because it would tend to make the right of way (being more used) a greater burden upon the land. (1 Lom. Dig. 680; Lawton v. Ward, 1 Lord Raym. 75; 1 Th. Co. Lit. 234, n. (D. 1).) Hence, in a grant of a right of way it is expedient to stipulate for it to the place designated, *and to all places beyond*.

2<sup>h</sup>. The Grantee can Come in only at the *Usual Entrance*.

See 2 Bl. Com. 35, n. (28); Woodyer v. Hadden, 5 Taunt. 132.



## 3. Repairs of the Way.

When there is no stipulation to the contrary, it is the duty of the grantee of the way to repair it, and he has always a right to enter on the premises for that purpose; and the grantor is only bound to repair when it has been so agreed. When it is the grantor's duty to repair, and he fails to do it, the grantee may go upon the grantor's adjacent lands whenever the way becomes foundrous and impassable; but he has no such privilege if it is his own business to repair. (2 Bl. Com. 35, n. (28); 1 Lom. Dig. 676, 680-'81; *Pomfret v. Ricroft*, 1 Wms. Saund. 322 a, n. (3); *Gerrard v. Cooke*, 2 Bos. & Pul. (N. R.) 115 '16; 1 Th. Co. Lit. 234, n. (D. 1).)

It seems, in case of a *highway* which is for the service of the public, if the usual track is impassable, it is for the general good that people should be entitled to pass in another line; and the party whose lands are thus invaded must seek his redress, it is presumed, against the overseer or other public officer whose duty it is to keep the road in repair. (2 Bl. Com. 36; *Taylor v. Whitehead*, 2 Dougl. 749.)

## 4. Modes whereby a Right of Way may be Extinguished; w. c.

1<sup>h</sup>. Release of the Right of Way to him who has the Land.

See Bac. Abr. Release, (D.).

2<sup>h</sup>. Union of *Seisin* of the Fee-simple in the Same Person as the Right of Way.

The lesser right of way *is merged* in the greater right to the fee-simple of the land. But if one who has a right of way over certain lands takes a lease of the premises for twenty years, the right of way is merely *suspended*, and after the term is ended, will revive again. (2 Bl. Com. 35, n. (28); 1 Lom. Dig. 682.)

## 5. Easements and Aquatic Rights, Assimilated to Rights of Way.

Easements and aquatic rights assimilated to rights of way include the discussion of, (1), Riparian rights; (2), Extent of ownership of lands lying adjacent to highways; (3), Easements generally; (4), Party walls and division-fences; (5), Running waters; and (6), Rights by license;

w. c.

1<sup>h</sup>. Riparian Rights; w. c.

1. Rights of Towing on the Banks of Navigable Rivers.

At common law there is no such right. If it exists, it is in pursuance of a grant, or of prescription, which supposes a grant, or of a local custom. It is otherwise by the civil law. (*Ball v. Herbert*, 3 T. R. 253; 3 Kent's Com. 426 '7.)

2. Extent of Ownership of Riparian Proprietors; w. c.

1<sup>k</sup>. As to Navigable Waters.

At common law, the ownership of the riparian proprietor stopped at *high-water mark*. In Virginia it extends, at least as to tide-waters, and probably as to all waters, to *ordinary low-water mark*. (3 Kent's Com. 427; V. C. 1873, ch. 62, § 2; V. C. 1887, ch. 60, § 1339.)

"All the beds of the bays, rivers and creeks, and the shores of the sea, within the jurisdiction of the commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shell-fish, subject to the reservations and restrictions imposed by chapters 96 to 97 of the Code of 1887; and no grant shall hereafter be issued by the register of the land-office to pass any estate or interest of the commonwealth, in any natural oyster-bed, rock or shoal, whether the said bed, rock or shoal shall ebb bare or not." (V. C. 1873, ch. 62, § 1; Id. ch. 101, §§ 1, 2; V. C. 1887, ch. 60, § 1338; Id. ch. 97, § 2136.)

It is further enacted that "The rights and privileges of the owners of such lands, acquired as aforesaid, shall extend to *ordinary low-water mark*, and no further, unless where a *creek or river*, or some part thereof, is comprised in the limits of a lawful survey. (V. C. 1873, ch. 62, § 2; Id. ch. 101, § 5; V. C. 1887, ch. 60, § 1339.) And "If any *creek, cove or inlet* makes into or runs through the land of any person, and is comprised within the limits of his lawful survey, such person or other lawful occupant shall have the exclusive right to use said creek, cove or inlet for sowing or planting oysters and other shell-fish, notwithstanding the reservation hereinbefore made." (V. C. 1887, ch. 97, § 2136). But in the county of Mathews, it is declared that this provision shall not be applicable, but that § 3, ch. 254, of Acts of 1884, shall continue in force therein, which section contains the provision above set forth, and the following also, namely, that—

"The owners or occupants of lands on *both sides* of any creek, cove or inlet suitable for planting oysters, *above* the point where such creek, cove or inlet is *one hundred yards* in breadth, shall have the exclusive right to use said creek, cove or inlet for *sowing or planting* oysters therein; but this right shall not be construed to prohibit other *citizens* from taking oysters from the *natural beds or rocks* of such creek, cove or inlet; but the right of each owner or occupant on *opposite sides* shall extend to the *middle of the channel*, wherever that may be, from time to time." (V. C. 1873, ch. 101, §§ 3, 4; V. C. 1887, ch. 97, §§ 2136 & seq.)

And yet further, for the protection of owners of *fishing-shores*, it is enacted, as we have seen, that "On the application of any proprietor or occupant of a *fishing-shore*, the court of the county in which such fishing-shore may be (on proof that *notice thereof* had been given to the proprietor or occupant of each adjoining shore), may appoint three commissioners to designate the *ebb and flood banks* of the said adjoining fishing-shores, and report their proceedings to court," and "after their report is confirmed by the court, if any person shall lay out a seine from either shore so as to interfere with the haul of the adjoining shore, as so designated, he shall forfeit \$250," and if the offender be a *non-resident* of the State, a justice of the peace may oblige him to give security to answer an indictment. (V. C. 1873, ch. 120, §§ 10-12; V. C. 1887, ch. 114, §§ 2573 to 2575.)

Other enactments have been made, in aid of the common law, to empower riparian proprietors to construct wharves, etc., from their water-front, to the navigable channel. The provision is as follows: "Any person *owning land* upon a water-course may erect a wharf on the same, or a pier or bulkhead, in such water-course opposite his land, so that navigation be not obstructed thereby," nor that it shall "otherwise injure the private rights of any person." But the court of the county, on ten days' notice, may abate the same if it appear to obstruct navigation, or to prevent the free use of any public landing. (V. C. 1873, ch. 52, § 59; V. C. 1887, ch. 43, § 998.) This statute is only affirmatory of the common law, which recognizes the right of a riparian proprietor, on a navigable stream, to obtain access to the navigable channel, from the front of his land, by means of landings, wharves or piers, for his own use or that of the public, subject to such regulations as the legislature shall think fit to prescribe for the protection of the public. And this riparian right is acknowledged to be *property*, and to be entitled to the same protection as other property. (*Dutton v. Strong*, 1 Black, 23; *R. R. Co. v. Morgan*, 7 Wal. 272, 289; *Yates v. Milwaukee*, 10 Wal. 504; *Norfolk Co. v. Cooke*, 27 Grat. 430; *Alex. & P. R. R. Co. v. Faunce*, 31 Grat. 765.)

Where a boundary is designated as running along, and near, a river or other water, notwithstanding it may call, from point to point, for monuments or marked objects, which are described as connected by straight lines with course and distance indicated, yet the presumption is, that the river or water, being much more definite and certain, was designed to be the true boundary; for it is difficult to conceive that the parties should have deliber-

ately preferred, as a line, the invisible course and distance, to the visible and always obvious water-line, and at least as hard to imagine that they intended to leave a narrow slip between the water and the bounds of the land, of no use to the grantor, and likely to be a source of great annoyance to the grantee, if it does not belong to him. Such a conclusion can only be sustained by the clearest evidence of so eccentric a purpose. (Ang. Wat. Cours. §§ 29, 30; *Starr v. Child*, 20 Wend. (N. Y.) 149; *McCullough v. Aten*, 2 Ohio, 425; *Bruce v. Taylor*, 2 J. J. Marsh. (Ky.) 160; *Handley v. Anthony*, 5 Wheat. 374; *French v. Bankhead*, 11 Gratt. 155, 156 & seq.; *Vat. Internat. Law*, B. I., § 268.)

2<sup>k</sup>. As to Rivers *not Navigable*.

At common law, their beds are always *private*, and belong to the neighboring riparian proprietors, each owning *ad filum fluminis*; or if the same person owns both banks, the *whole bed* belongs to him, subject, however, in both cases, to whatever use the public may be able to make of the stream as a public highway for boats and rafts. In Virginia, this principle is only so far changed as that by statute the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of the commonwealth, are reserved, which were granted by the State east of the Blue Ridge after 1780, and west of it after 1802. (V. C. 1873, ch. 62, §§ 1, 2; V. C. 1887, ch. 60, §§ 1338, 1339; 1 Lom. Dig. 661 to 663; 3 Kent's Com. 427 & seq.; Hargrave's Law Tracts, 5, 8, 9; *Home v. Richards*, 4 Call, 441; *Hayes v. Bowman*, 1 Rand. 417; *Mead v. Haynes*, 3 Rand. 35-36; *Crenshaw v. Slate Riv. Co.* 6 Rand. 261 & seq.; *Palmer v. Mulligan*, 3 Cai. R. (N. Y.) 318-19; *Shaw v. Crawford*, 10 Johns. (N. Y.) 236-7; *The People v. Platt*, 17 Johns. 209 & seq.; *Hen. Stats.* 227; 2 *Stats. at Large* (N. S.), 317.)

In navigable waters, if the *water* is designated as the boundary of land, it is understood to be *ordinary low-water-mark*. Hence Virginia, in ceding the North-western territory, having granted the region *northwest of the Ohio river*, reserving the river and its islands within the limits of Virginia (V. C. 1873, ch. 1 § 2; V. C. 1887, ch. 3, § 9), it is considered that the domain and jurisdiction of Virginia was thereby extended to ordinary *low-water mark* on the further side of the river. (*Handley's Lessee v. Anthony*, 5 Wheat. 374; *Garner's Case*, 3 Gratt. 655; 3 Kent's Com. 431-2.)

It may be remarked that in case of a dispute between mill-owners, who take the water for their mills from the same stream, the controversy is a proper subject for equitable jurisdiction, in order to avoid a multiplicity of



suits, and that with that view the court ought to proceed at once to ascertain, define and settle permanently the rights of the parties respectively to the use of the water. (*Hanna v. Clarke*, 31 Grät. 36, 41.)

2<sup>h</sup>. Extent of Ownership of Lands Lying Adjacent to Highways.

The ownership extends, usually, to the *middle* of the road, as in the case of a *private stream*; or if the same party owns on both sides, the whole road belongs to him, subject to the public easement of the *right of passage* in either case. (3 Kent's Com. 432 & seq.)

3<sup>h</sup>. Easements Generally.

Easements are incorporeal rights annexed to lands, and existing in the property of another. They are known to the civil law as *servitutes*; and whilst not confined to cities, principally prevail there, *c. g.*, the right of *support*, the right of *drip*, of *drain*, etc. (3 Kent's Com. 434 & seq.)

The tenement in which the easement is to be enjoyed is styled the *servient*, and that to which the benefit belongs is denominated the *dominant* tenement.

The right of support is the right that one man's wall, house or land shall be supported by the wall, house or land of another. Every one has a *natural* right to support for his *land* from the adjacent or *sub-jacent* soil; a right to which he is as much entitled as to the land itself, without any grant by the servient owner, or any act of acquisition on his own part. (*Humphries v. Brogden*, 12 Q. B. (64 E. C. L.) 739.)

But whilst this natural right to support remains though houses are built, yet it must be observed that it exists in respect of *land* only. (*Brown v. Robins*, 4 Hurlst. & Norm. 192, &c.; *Stroyan v. Knowles*, 6 Hurlst. & N. 454.) If a right to support of *buildings* exists at all, it must be acquired as an *easement*, either by express grant, or by grant implied from an adverse enjoyment of twenty years or more, or from reservation. (*Hide v. Thornborough*, 2 Carr. & R. (61 E. C. L.) 254; *Humphries v. Brogden*, 12 Q. B. (64 E. C. L.) 739; *Richards v. Rose*, 9 Welsb. H. & Gord. 220; *Gayford v. Nicholls*, Id. 708; *Stevenson v. Wallace*, 27 Grät. 86 & seq.) And this right of support, when it exists, is so absolute that with whatever care the neighboring proprietor may remove the support, he is notwithstanding liable for any damage that may ensue (cases *supra*), whilst if the right to support of buildings has not been acquired in one or the other of the ways above indicated, but be such as arises merely from contiguity, no other obligation rests upon the adjacent proprietor than to proceed in the removal of the support with due care, caution and warning. (*Doehls v. Holmes*, 1 Ad. & El. (28 E. C. L.) 493.)

To this class of interests, namely, of the nature of easements, belong whatever of dominion or ownership may be had in the elements of running water, air and light. Fugitive as are these subjects, one can have no absolute permanent property therein. They admit of only a precarious and qualified ownership, which lasts no longer than whilst they are in actual use and occupation in connection with the possession of lands. To obstruct another's windows, through which he has long received the light; to corrupt or cut off the air of his house or gardens; to foul his water course, or unpen or let it out, or to divert the stream from its ancient channel, whereby it used to run to the other's mill or meadow; these are regarded by the law as grievous injuries, which it seeks to prevent and redress. But the property in these elements ceases the instant they are out of possession; and they thus become again common, and are liable to be appropriated by some one else. (2 Rob. Pr. (2d ed.) 677 & seq., 672 & seq.; Aldred's Case, 8 Co. 58 b, 59 a, 58 a, n. (B).)

A single sentence will presently be bestowed upon *running waters*, but the general subject will be postponed to be discussed in Volume III., ch. ii., treating of *Personal Property*.

In Virginia, a right to drain one's lands through those of another, or under the beds of mill-canals, may be acquired as an easement, by grant, reservation or prescription (Sanderlin v. Baxter, 76 Va. 299), or by an order of the *county court*, the damages to be paid to the land owner being ascertained by means of a writ of *ad quod damnum*, by five commissioners, freeholders (any three of whom may act). (V. C. 1873, ch. 120, §§ 13 to 17; V. C. 1887, ch. 114, §§ 2576 to 2579.)

A question has been raised as to the constitutional power of the legislature to authorize the taking of one man's lands, although for just compensation, for the *private benefit* of another.

It seems to be generally admitted that it is not competent to a constitutional government to do it. But where, although a private person is the immediate beneficiary, an advantage results *to the public*, the appropriation is thereby legitimated. In the case under consideration, the public is or may be benefited in point of health, and of the increased production of the lands, so that there would seem to be no room to impeach the provision in question on the ground suggested. See Cooley's Const. Lim. 532 & seq.; 539 & seq., 538, & n. 2.

The public necessity which may exist for thus exercising the State's right of *eminent domain* is to be determined exclusively and finally (like all other *political questions*) by

the *legislature*, or as the legislature shall direct. And the courts can interpose, if at all, only where there is *no foundation for a pretence* that the public is to be benefited thereby, if such a case can occur. (Cool. Const. Lim. 538; *People v. Smith*, 21 N. Y. 597; *Varick v. Smith*, 5 Pai. (N. Y.) 159; *Beckman v. S. S. R. R. Co.* 3 Pai. 45; S. C. 22 Am. Dec. 684; *Id.* 686 & seq., elaborate and lucid note of the editor. But see *Loan Assoc. v. Topeka*, 20 Wal. 662 & seq., 668 '9; a case which seems to be too unqualified in its conclusions, yet it was approved and followed in *Con. Channel Co. v. Cent. Pac. R. R. Co.* 51 Cal. 269, and in *Parkersburg v. Brown*, 16 Otto (106 U. S.) 500.)

The right to an easement, as has been above incidentally remarked, may arise either by grant, expressly or by implication, or by prescription, arising out of long, honest and uninterrupted adverse enjoyment. When the grant of the easement is in direct terms, no difficulty is likely to arise, and the character and extent of the easement will be ascertained by the tenor of the grant. But where the grant is not in distinct and direct terms, and resort must be had to construction and inference, the conclusion as to the intent and purpose of the parties will sometimes be clouded by not a little uncertainty, which the courts have sought to obviate as much as possible by wholesome and in the main definite rules. Thus it is the established doctrine that where the owner of two heritages, or of one heritage consisting of several parts, has so arranged and adapted them that one derives from the other a benefit or advantage of an *obvious, continuous, and reasonably necessary* character, and he sells one of them, or the heritages any otherwise come to the possession of different owners, without its being expressly provided whether such benefit or advantage shall continue to subsist as between the heritages or parts of the heritage, or not, there is in the silence of the parties an *implication*, in the nature of an understanding and agreement, that these advantages and burdens, respectively, shall continue as before the separation of the title. But in order to give this effect, it is required that the servitude or easement should be *reasonably necessary*, as well as *continuous and obvious*, or at all events *made known* to the new acquirer of the property in which it is claimed. (Washb. Easements, ch. 1, § 3, pp. 54 '7, 88 '9; *Nicholas v. Chamberlain*, 3 Cro. (Jac.) 121; *Lampman v. Mills*, 21 N. Y. 545; *Elliott v. Rhett*, 5 Richards (S. C.), 405; S. C. 57 Am. Dec. 753, 759, note; *Scott v. Bentel*, 23 Grat. 6, 7; *Hardy v. McCullough*, *Id.* 258 '9; *Sanderlin v. Baxter*, 76 Va. 304 '5.)

Thus, in *Sanderlin v. Baxter*, the case last cited, two estates, Woodlawn and Fairfield, separated only by a public road, were both owned by W, who drained Woodlawn by

ditches through Fairfield to the river. In 1811 W *granted* Woodlawn to A (under whom plaintiff claimed), and in 1820 he *devised* Fairfield to D (under whom defendant claimed). The deed and will were both silent about draining; but at the time Woodlawn was conveyed to A these draining ditches were open and visible, and were then, as they continued to be, necessary for the convenient and beneficial use and enjoyment of the Woodlawn tract, for which purpose they were continuously used down to 1878, when they were obstructed by Sanderlin, the then owner of Fairfield. Thereupon Baxter, the proprietor of Woodlawn, filed a bill in equity to enjoin Sanderlin from obstructing the ditches, and a perpetual injunction was granted accordingly. In *Scott v. Bentel*, 23 Grat. 6, 7, a like relief was denied because the easement or servitude which was claimed was *not obvious* or *apparent to view*, nor known to the purchaser to exist, at the time of the purchase.

The reason upon which this doctrine rests of an implied grant of apparent, continuous and necessary easements, on the transfer of one of two tracts or parts of a tract, is said to be found in the maxim that when a thing is granted, everything necessary to the enjoyment thereof, which is in the grantor's gift, is also presumed to be granted (*Liford's Case*, 11 Co. 52 a; *Pomfret v. Ricroft*, 1 Saund, 321); and in the kindred maxim, that "no man can derogate from his own grant." (*Washb. Easmt's*, 31; 57 Am. Dec., note to *Elliott v. Rhett*, p. 760.)

What constitutes an easement. *apparent* or *obvious*, *continuous* and *necessary*, respectively, is illustrated by many cases cited in 57 Am. Dec., note to *Elliott v. Rhett*, pp. 760-763.

The particular classes of easements as to which a grant is implied upon severance, relate chiefly to aqueducts, raceways, drains, wells, and other water-rights, party-walls, light and air, and ways, but not to the exclusion of other easements also. (57 Am. Dec., note to *Elliott v. Rhett*, pp. 763-767.)

The mode of severance does not appear to affect the doctrine in question. An implied grant of the easement in favor of one tract against another, belonging to the same owner, upon a severance of ownership, is believed to arise not only in cases of direct conveyance, but also when the ownership is severed by partition, by assignment of dower, by a sale effected under a decree for the foreclosure of a mortgage, by devise, or by any other mode of alienation. (57 Am. Dec., note to *Elliott v. Rhett*, p. 767.)

In the United States statutes the better opinion seems to be that, upon a severance of the ownership, a grant of any easement created by the owner before the severance, will



arise alike by implication in favor of the *grantor*, when the servient tenement is conveyed, and the dominant one retained, or in favor of the *grantee*, where the dominant tenement is conveyed, and the servient one is retained. (Lampman v. Mills, 21 N. Y. 505; Seibert v. Levan, 3 Penn. St. 383; S. C. 49 Am. Dec. 525-'6, 529; 57 Am. Dec. note to Elliott v. Rhett, p. 768; Pyer v. Carter, 1 H. & N. 916.) In England, however, this last case is overruled, and it appears to be the settled doctrine there that an easement is only implied in favor of the part retained by the grantor, when the easement is of *strict and obvious necessity*. (57 Am. Dec., note to Elliott v. Rhett, p. 768.)

#### 4<sup>th</sup>. Party-Walls and Division-Fences.

The common law does not oblige adjoining proprietors to contribute to party-walls and division-fences, independent of any agreement, express or implied, nor of course will it carry the obligation beyond the apparent terms of such agreement. (3 Kent's Com. 437 & seq.) But this has been felt to be no inconsiderable grievance, and in many of the States, statutes have been enacted enabling adjoining proprietors to compel contributions to the making and separation of division-fences. Such statutes exist in Massachusetts, New York, Ohio, Illinois, and Alabama, and probably in other States also. (3 Kent's Com. (12th ed.) 438, & n's (a) and (b); Rust v. Low, 6 Mass. 95; Newell v. Hill, 2 Mete. (Mass.) 182; Walker v. Watrons, 8 Ala. 493.) In Virginia also enactments looking to the same result and by very summary proceedings have recently been made, which at first were confined to but a few counties (Acts 1881-'2, p. 35, ch. 36; Id. p. 365, ch. 40; Acts 1885-'6, p. 336, ch. 293; Id. 369, ch. 328), but by the revisal of 1887, are made general. (V. C. 1887, ch. 93, §§ 2053 to 2059.)

#### 5<sup>th</sup>. Running Waters.

Every proprietor of lands on the banks of a running stream has an equal right to use the water as it flows past his premises, in a *reasonable manner*, for domestic, agricultural, and manufacturing purposes, but not (at least as to agricultural and manufacturing operations) so as to destroy, render useless, or materially diminish the supply to the proprietors below. (3 Kent's Com. 440, & n. (a). See *Supra*, p. 24, 3<sup>th</sup>.)

#### 6<sup>th</sup>. Rights by License.

A *license* is an authority to do a particular act or series of acts upon another's land, without *possessing any estate therein*. An *easement*, on the other hand, carries *an interest in the land*. A license, therefore, is not within the statute of *joint agreements*, or of *conveyances*, and is not required to be *in writing or by deed* (V. C. 1873, ch. 140, § 1; Id. ch. 112, § 1; V. C. 1887, ch. 133, § 2840; Id. ch. 107, § 2413).

whilst the grant of an *easement* for more than five years must be *by deed*, in order to be complete; and in order to be binding *as a contract*, must be *in writing*, if for more than one year. A license, it is said, being a mere authority, founded in personal confidence, is *not assignable*; an easement is *permanent*, whilst a license is generally *revocable*, namely, where, if it is countermanded, it leaves the party *in statu quo*. (3 Kent's Com. 452-3.)

## 5<sup>f</sup>. Offices.

The exposition of the law concerning offices will oblige us to advert to, (1), The definition of an office; (2), The origin of offices; (3), The different classes of offices; (4), The modes of appointment to office; (5), The security exacted for faithfulness in office; (6), The sale of offices; and (7), The modes whereby offices may be determined;

W. C.

### 1<sup>g</sup>. Definition of an Office.

A *right*, and a *correspondent duty*, to exercise a public or private employment, and to take the emoluments thereto belonging. (3 Kent's Com. 454; Bac. Abr. Offices, (A).) Hence it appears that offices may be *private*, although they are well nigh universally *public*.

Of private offices such as that of *steward* to a man of large property, nothing need be said. The attention of the student will be directed exclusively to *public* offices.

### 2<sup>g</sup>. Origin of Public Offices.

Some offices exist *at common law* (as that of sheriff and coroner), whilst others are *statutory* (as that of justice of the peace and overseer of the poor.) (Bac. Abr. Offices, (A.), (B).)

### 3<sup>g</sup>. Different Classes of Public Offices.

Public offices are either, (1), Civil; or (2), Military;

W. C.

#### 1<sup>h</sup>. Civil Offices.

Civil offices may be classed as, (1), Political; (2), Judicial; and (3), Ministerial.

See Bac. Abr. Offices, (A.);

W. C.

#### 1<sup>i</sup>. Political Offices.

Political offices are such as are concerned with the direction and control of the *policy* of the country, domestic and foreign, as for example, those held by members of the legislature, the President of the United States, ambassadors, and other ministers, etc.

#### 2<sup>i</sup>. Judicial Offices.

Judicial offices are such as relate to the administration of justice, or the actual exercise thereof. The person administering a judicial office, having a *personal trust* reposed in him, must execute his office *in person*, and can-

not make a deputy, unless *specially authorized* so to do. (Bac. Abr. Offices, (A.), (L.); 3 Kent's Com. 457.)

### 3<sup>d</sup>. Ministerial Offices.

Ministerial offices are such as give the officer no power or discretion to judge of the matter to be done, and require him to obey the mandates of a superior, *i. g.*, the office of sheriff and constable. The reason which requires a judicial officer to act in person does not apply to a ministerial officer, who may therefore *appoint a deputy*. (Bac. Abr. Offices, (A.) & (L).)

### 2<sup>h</sup>. Military Offices.

Military offices are such as are held by persons who serve in the army or navy of the United States, or in the militia. (Bac. Abr. Offices, (A).)

## 4<sup>g</sup>. Modes of Appointment to Public Office; w. c.

### 1<sup>h</sup>. Transmission of office by *Inheritance*.

At common law, offices were of inheritance, of freehold, for years, or at will; but no *judicial* office could be of *inheritance*, and indeed, in no case was an office allowed to descend as an inheritance where any inconvenience could ensue to the public. In Virginia, a yet more rigorous rule is prescribed, it being provided by the Bill of Rights that, as the capacity to render service is not descendible, so neither ought the offices of magistrate, legislator, or judge to be hereditary. (Va. Const. 1869, Art. I. § 6; Bac. Abr. Offices, (H).)

### 2<sup>h</sup>. Ordinary *Modes of Appointment*; w. c.

#### 1<sup>i</sup>. Election by the People.

The mode of appointment or election by the people, which we were once satisfied to limit to the members of the legislature, and which might with great propriety be confined to the legislature and the chief executive, is now extended to an immense proportion of the officials of the commonwealth, and what is to be deplored, to the *least important of them*, as well as the most important. (Va. Const. 1869, Art. VI., §§ 14 to 20; Id. Art. VII., §§ 1 to 4; Id. Art. IV., §§ 2, 9; Id. Art. V., §§ 2, 3.)

#### 2<sup>i</sup>. Election or Appointment by some other Authority than the People, but Derived from Them.

In Virginia, the secretary of the commonwealth, treasurer, and the auditors of public accounts; the judges of all the courts, and the superintendent of public instruction, and some others are elected by the legislature. (Va. Const. 1869, Art. IV., §§ 2, 9, 12; Art. VI., §§ 5, 11, 13.)

## 5<sup>g</sup>. Securities Exacted for *Faithfulness in Public Office*; w. c.

### 1<sup>h</sup>. Oaths of Office; w. c.

#### 1<sup>i</sup>. In what Cases Oaths of Office are Required in Virginia.

An oath of office is exacted of all persons entering upon

the discharge of any function as *officers of this State*. (Va. Const. 1869, Art. III., § 6; V. C. 1873, ch. 12, § 1; V. C. 1887, ch. 13, §§ 168 to 170.)

## 2<sup>d</sup>. The Oath of Office Prescribed in Virginia.

The oath of office as prescribed by the State constitution, and by the Act of Assembly of April 21, 1882, is to support and maintain the constitution and laws of the United States, and the constitution and laws of Virginia; to recognize and accept the civil and political equality of all men before the law; and faithfully to perform the duty of his office. And also that the affiant, since May 1, 1882, has not fought, or been otherwise directly or indirectly concerned in a duel, and will not be during his continuance in office. (Va. Const. 1869, Art. III., § 6; V. C. 1873, ch. 12, § 1; Acts 1881-'2, p. 404, ch. 69; V. C. 1887, ch. 13, §§ 168, 169.)

Not only is an anti-duelling oath now exacted, but all persons concerned in a duel since 26 January, 1870 (the day when the constitution of 1869 took effect), are *disqualified for office* under the commonwealth. (Va. Const. 1869, Art. III., § 1, (cl. 3); V. C. 1873, ch. 7, § 1, (cl. 3), Id. ch. 11, § 1; V. C. 1887, ch. 8, § 62, (cl. 3), Id. ch. 12, § 162.) Unhappily, however, by an amendment of the constitution, the legislature is allowed by a vote of two-thirds to *remove the disabilities* incurred, and so the provision has ceased to have any effect, the removal being expected as a thing of course. (Amended Const. Art. V., § 24.) But the Act of April 21, 1882, denounces upon all holders of any post or office under the commonwealth, including members of the general assembly, the penalty of *forfeiture of office*, for being in any wise concerned in a duel since that date, and this *penalty*, it is supposed, the legislature is not competent to remit. (Acts 1881-'2, p. 405, ch. 6-9; V. C. 1887, ch. 12, § 162.)

## 2<sup>h</sup>. Official Bonds; w. c.

### 1<sup>st</sup>. In what Cases Official Bonds are Required.

Whenever the officer is to be *concerned with property, or money belonging to others*, *e. g.* sheriff, constable, etc.

### 2<sup>d</sup>. To whom the Official Bond is Payable, and its Terms.

It is payable to the *commonwealth* of Virginia, with surety deemed sufficient by the court, board, or officer before whom it is given, and is conditioned for the faithful discharge of the officer's duties. County and township officers (*e. g.* sheriffs, clerks, treasurers, supervisors, etc.), qualify by taking the oath and giving the bond prescribed, before the *judge for the circuit or county court* of their county, either in term-time or vacation. (V. C. 1873, ch. 12, §§ 6, 3; Id. ch. 46, §§ 2, 3; Id. ch. 47, § 1; V. C. 1887, ch. 13, §§ 172 & seq.; Id. § 177; Id. ch. 35, §§ 812, 814.)



### 3<sup>d</sup>. Penalties for Acting in Office without Taking the Oath and Giving the Bond Prescribed.

Forfeiture of \$100 to \$1,000. (V. C. 1873, ch. 12, § 9; V. C. 1887, ch. 13, § 182.)

### 6<sup>c</sup>. Sale of Public Offices.

The policy of the Stat. 5 and 6 Edw. VI., c. 16, has been adopted in Virginia substantially, and somewhat more comprehensively. (2 Bl. Com. 36.)

w. c.

### 1<sup>h</sup>. General Doctrine Touching the Sale of Offices.

The policy of the common law imperatively forbids the sale, or any contract to sell, a public office; a doctrine which was enforced by 5 and 6 Edw. VI., c. 16. (Bac. Abr. Offices. (F.))

w. c.

### 1<sup>i</sup>. Effect of Contract, or Security for the Sale or Deputation of an Office.

Such contract is wholly void. (V. C. 1873, ch. 11, §§ 5, 6; V. C. 1887, ch. 12, § 166.)

### 2<sup>i</sup>. Effect as Respects the *Contracting Parties*; w. c.

#### 1<sup>k</sup>. Effect as to the Contracting Parties, *as Touching the Office*.

Each of them is for ever disabled from holding the post or deputation thus dealt with, but acts done before removal are valid. (V. C. 1873, ch. 11, §§ 5 to 7; V. C. 1887, ch. 12, §§ 166, 167.)

#### 2<sup>k</sup>. Effect as Respects the Contracting Parties, *as Touching Penalties to be Visited on Them*.

Each is to be confined in jail one year, and fined not exceeding \$1,000, and to be for ever incapable *of that office* or deputation. The *seller of the office*, etc., to be, moreover, for ever incapable of *any State office whatsoever*. (V. C. 1873, ch. 190, §§ 4, 5; Id. ch. 11, §§ 5, 6; V. C. 1887, ch. 183, §§ 3744, 3745; Id. ch. 12, § 166.)

### 2<sup>b</sup>. Exception in Respect to the *Deputation of the Sheriffalty*.

Formerly it was allowed to a sheriff, or one who expected to be sheriff, to contract to sell or let to farm the deputation of his office. (V. C. 1873, ch. 11, § 6; Goodloe v. Dudley, Jeff. Rep, 59; Salling v. McKinney, 1 Leigh, 42; O'Rear's Adm'r v. Kiger, 10 Leigh, 627.)

The check upon the sheriff was that he could appoint no one his deputy *without consent* of the county court, and until recently the court was required to *enter of record* that the supposed deputy was a man of *honesty and good behavior*; but this entry is now unhappily not in terms provided for. It is required only that the appointment shall be made "with consent of the court, or of the judge in vacation (the said consent in vacation being given in writing)." But this extraordinary privilege to the sheriff of selling the

deputation of his office is no longer allowed by the Code of 1887. (V. C. 1887, ch. 12, § 166 ; V. C. 1873, ch. 49, § 21.)

7<sup>g</sup>. Modes whereby Public Offices *may be Determined*.

The contemplation of the modes whereby offices may be determined will lead us to observe, (1), The grounds on which they may be determined ; (2), The mode of effecting a removal from office ; and (3), The civil liability of officers for their official conduct ;

W. C.

1<sup>h</sup>. The Grounds on which Offices may be Determined.

The circumstances which may lead to offices being determined may be enumerated as follows: (1), Resignation, expiration of term, and removal from office by competent authority ; (2), Acceptance of an incompatible office ; (3), Acceptance of any post of profit or trust, or of any emolument under the government of the United States ; (4), Removal of residence permanently from the sphere of duty ; and (5), Forfeiture of office for misconduct ;

W. C.

1<sup>i</sup>. Resignation, Expiration of Term, and Removal by Competent Authority.

2<sup>i</sup>. Acceptance of an Incompatible Office.

Offices are said to be incompatible when, from the multiplicity of business in them, they cannot be both executed by the same person with due care and ability ; or when they, being subordinate and interfering the one with the other, induce a presumption that they cannot be executed by one person with impartiality and honesty ; *e. g.*, the offices of justice of the peace, clerk of court, sergeant, coroner, or constable, are incompatible, and the acceptance of either actually vacates any other of them which the party may hold ; and this, independently of the statute, seems to be the general rule. (Bac. Abr. Offices, (K.) 2 ; V. C. 1873, ch. 48, § 6 ; V. C. 1887, ch. 140, §§ 2939 & seq.; *Amory v. Gloucester Justices*, 2 Va. Cas. 523.)

3<sup>i</sup>. Acceptance of *any Post* of Profit, Trust, or Emolument, or of *any Emolument* under the government of the United States.

This proceeds upon the idea of *incompatibility*, and is accompanied by a few exceptions. Thus, members of congress may act as justices, visitors of the University and of the Military Institute, and also as militia officers ; and military pensioners of the United States, and militia officers and soldiers in the service of the United States may hold any office. (V. C. 1873, ch. 11, §§ 2, 3 ; V. C. 1887, ch. 12, §§ 163, 164.)

This principle, however, that the acceptance of any Federal office or emolument, determining the tenure of a State office, must be taken in subordination to the provi-

sion in the Constitution of Virginia, that “all persons *entitled to vote* shall be eligible to any office within the *gift of the people*, except as *restricted in this constitution*. (Va. Const. Art. III., § 2.) An instance of such restriction occurs in Art. V., Sect. 5, which provides that “no person holding a *salaried office* under the State government shall be *capable of being elected* a member of either house of the general assembly.”

4<sup>l</sup>. Removal *permanently* from the Sphere of Duty.

*e. g.*, Removal of a justice from the county. (Chew v. Justices of Spottsylvania, 2 Va. Cas. 208; Poulson v. Accomac Justices, 2 Leigh, 43.)

5<sup>l</sup>. Forfeiture of Office in Consequence of Misconduct.

See Bac. Abr. Offices, (M.);

W. C.

1<sup>k</sup>. Conviction of Felony.

This, even at common law, seems to have been a cause of forfeiture, at least of all *public offices*; and in Virginia it is expressly declared to be so by statute. (Fugate's Case, 2 Leigh, 725; 13 Vin. Abr. Forfeiture (H.) Pl. 2; V. C. 1873, ch. 11, § 4; V. C. 1887, ch. 12, § 165.)

2<sup>k</sup>. Fighting or Being Concerned in a Duel.

See Va. Const. 1869, Art. III., § 1, cl. 3; V. C. 1873, ch. 11, § 1; V. C. 1887, ch. 12, § 162.

3<sup>k</sup>. Bribery, Extortion, and Corruption.

See V. C. 1873, ch. 190, §§ 4, 5, 21 to 25; V. C. 1887, ch. 183, §§ 3744, 3745, 3761 to 3766. Synops. Crim. L. 145 to 149; Bac. Abr. Offices, (M.) & (N.).

4<sup>k</sup>. Misuser or Non-user of Office.

Neglect of any duty enjoined by law, or any abuse of his office, is always indictable in an officer, and punishable by fine, as well as by *amotion* from office. (Bac. Abr. Offices, (M.) & (N).)

2<sup>b</sup>. Mode of Effecting the Removal from Office of one on the Grounds above Named.

Resignation, expiration of term, and removal by competent authority, of course terminate the office *proprio vigore*; but in cases of delinquency, the office is not determined, *ipso facto*, by the occurrence of the cause. There must be a *judgment of amotion*, after a *judicial ascertainment* of the fact; which may be by indictment, or information, by writ of *quo warranto*, or by impeachment. (1 Tuck. Com. 11, B. 11; Alexander's Case, 1 Va. Cas. 156; Mann's Case, Id. 308; Wallace's Case, 2 Va. Cas. 130.)

3<sup>b</sup>. Civil Liability of Officers for their Official Conduct;

W. C.

1<sup>l</sup>. Judicial Officers.

A judicial officer acting *honestly*, in a case where he has jurisdiction, is not liable to a party prejudiced by his mis-

takes; but if he *has not jurisdiction*, he is liable. (Bac. Abr. Offices, (O).)

## 2<sup>d</sup>. Ministerial Officers.

It is required of a ministerial officer to act *according to his judgment and opinion*, and he is liable to public penalties for neglect. It seems, however, that he is not liable in damages to a party for an omission arising from neglect or want of skill, if acting *bona fide*. But in general, an action lies against a ministerial officer for any neglect of duty, and *a fortiori* for fraud, in the execution of his office. (Bac. Abr. Offices, (O.); Jenkins v. Waldman, 11 Johns. (N. Y.) 114; Vanderhyden v. Young, 11 Johns. 150.)

## 6<sup>t</sup>. Dignities.

Titles of honor were originally annexed to estates, and accompanied by some official function. They are deemed incompatible with republican institutions, and do not exist in the United States. (2 Bl. Com. 37; 1 Th. Co. Lit. 110 & seq.; U. S. Const. Art. I., § ix., 8; Id. § x., 1.)

## 7<sup>t</sup>. Franchises; w. c.

### 1<sup>st</sup>. Definition of a Franchise.

A franchise is a special right or privilege conferred on individuals, by grant (actual or presumed) from the government, and which otherwise they could not exercise. (2 Washb. Real Prop. 18.)

### 2<sup>nd</sup>. Several Instances of Franchises; w. c.

#### 1<sup>h</sup>. Franchises Conferred on *Corporations*.

The privilege of *being a corporation* is itself a franchise, to which may be added the privilege of issuing paper-money, as a currency; of constructing a canal, a railroad, or a turnpike, and taking tolls, etc., thereon. (2 Bl. Com. 37.)

#### 2<sup>h</sup>. Franchises Conferred on *Natural Persons*.

To have a mill, ferry, toll-bridge, ordinary, &c.—these are all franchises. (2 Bl. Com. 37-8; 3 Kent's Com. 458-459.)

Let it be observed, that if a franchise has no relation to lands, or other property real, it cannot be denominated a *real hereditament*, but is only *personal*.

### 3<sup>rd</sup>. Exclusiveness of Franchises; w. c.

#### 1<sup>h</sup>. Exclusiveness as to the *Identical Franchise*.

The identical franchise is exclusive always, and necessarily; and as to encroach upon it would violate the contract implied in the franchise, it is protected against invasion by the State government by that clause of the Federal Constitution which forbids a State to pass any law *impairing the obligation of contracts*. (U. S. Const. Art. I., § x., 1; Dartmouth College v. Woodward, 4 Wheat. 629; Providence Bank v. Billings, 4 Pet. 514; Planters Bank v. Sharp, 6 How. 301; Curran v. Arkansas, 15 How. 304; The Binghanton Bridge, 3 Wal. 51; Jefferson Bank v. Kelly, 1



Black, 436; Wilmington R. R. v. Reid, 13 Wal. 264; Humphrey v. Pegues, 16 Wal. 249; Robinson v. Gardiner, 18 Grat. 509; Anderson v. Commonwealth, 18 Grat. 295; Homestead Cases, 22 Grat. 266; Antoni v. Wright, 22 Grat. 833; 1 Min. Insts. 535, 565; Cool. Const. Lim. 279.) This consequence, however, may be obviated generally by a special or general reservation in the charter or grant, or by statute, of the right to modify, or do away with the franchise. (V. C. 1873, ch. 56, § 1; Id. ch. 61, §§ 55 to 61; V. C. 1887, ch. 46, § 1069; Id. ch. 51, §§ 1239, 1240; 1 Min. Insts. 591.) And in the exercise of its right of *eminent domain*, the State independently of any reservation of power to do so, may modify or abolish the franchise upon condition of making just compensation therefor. (1 Min. Insts. 535, 565; Jas. River & Ka. Co. v. Thompson & als. 3 Grat. 270.)

2<sup>b</sup>. Exclusiveness as to a *Rival Franchise*; w. c.

1<sup>a</sup>. Doctrine of the New York Courts.

The New York courts hold that, although the franchise be not declared to be exclusive, yet it is necessarily implied in the grant that the government will not directly or indirectly interfere with it, so as to destroy or materially impair its value. Every such interference, whether by the creation of a rival franchise or otherwise, is in violation or in fraud of the grant. (1 Min. Insts. 663; 3 Kent's Com. 459; Ogden v. Gibbons, 4 Johns. Ch. R. (N. Y.) 160; N. Bingham Turnpike Co. v. Miller, 5 Johns. Ch. R. 111.)

2<sup>a</sup>. Doctrine in Virginia.

The franchise is *exclusive* only when it is *declared in the grant to be so*. Monopolies are odious, and are never to be implied, being unfriendly in the main to the prosperity and convenience of society. (1 Min. Insts. 663; Tuckahoe Canal Co. v. Tuckahoe Railroad Co. 11 Leigh, 69; Trent, &c. v. Cartersville Bridge Co. Id. 521; Somerville v. Wimbleish, 7 Grat. 231.)

This doctrine is sanctioned also by the supreme court of the United States, as well as by that of Massachusetts. (1 Min. Insts. 663; 4; Charles River Br. Co. v. Warren Br. Co. 11 Pet. 420; S. C. 7 Pick. 344; Richmond, &c. R. R. Co. v. Louisa R. R. Co. 13 How. 71.)

4<sup>a</sup>. Remedy in Case of the Usurpation of a Franchise.

The proper remedy in case of the usurpation of a franchise is by a writ of *quo warranto*, calling upon the party exercising the franchise to say *by what authority* he does it. (Bac. Abr. Informns. (A.); Commonwealth v. Birchett, 2 Va. Cas. 51; Commonwealth v. Jas. Riv. Co. Id. 190.)

5<sup>a</sup>. Mode of Cancelling a Franchise; w. c.

1<sup>a</sup>. Where the Right to Cancel has *been Reserved* in the Grant.

The franchise may be determined according to the terms of the reservation. (Penn. College Case, 13 Wal. 190; Tomlinson v. Jessup, 15 Wal. 454; Miller v. N. York, 15 Wal. 478; Holyoke Co. v. Lyman, 15 Wal. 500.)

In Virginia a mining or manufacturing company cannot be continued beyond thirty years, and the charter may be modified or repealed after fifteen years. (V. C. 1887, ch. 47, § 1145.) So an internal improvement company may be modified or repealed at pleasure by the legislature. (V. C. 1887, ch. 51, § 1240); and any other corporation which was or might have been created by a circuit or corporation court or judge, may be altered or amended, or the name of the company changed, by the said court or judge in vacation. (V. C. 1887, ch. 47, § 1145.)

2<sup>h</sup>. Where Right to Cancel has *not been Reserved* in the Grant.

The franchise can be cancelled in Virginia only by the exercise of the right of *eminent domain*, which is inherent in every sovereignty, enabling it to employ *any part of the property of the citizens* of a community, to promote the well-being thereof, and franchises as well as any other property. But no undue proportion of the loss must fall on the owner. The State is required to provide for him a *just compensation*. (U. S. Const. Art. I., § x. 1; Id. Am'd'ts. V.; Va. Const. 1869, Art. V., § 14; Jas. River & Ka. Co. v. Thompson & al. 3 Grat. 270; W. Riv. Br. Co. v. Dix, 6 How. 507; Richmond, F. & P. R. R. Co. v. Louisa R. R. Co. 13 How. 83.)

8<sup>f</sup>. Corodies; w. c.

1<sup>g</sup>. Definition of a *Corody*.

A corody is a right to receive a certain periodical allotment of victual and provision for one's maintenance, in fee-simple for life or for years, chargeable on the *person only* of the grantor. (2 Bl. Com. 40; Jac. Law Dict. *Corody*.)

A corody may be granted in fee-simple, for life or for years; and if granted in fee-simple to one and *his heirs*, it will, at the grantee's death, although only a personal thing, pass to *his heirs*, according to the limitation, thus constituting the corody a *hereditament*.

So also it may be with *annuities*. If limited to the grantee and *his heirs*, they too, at the grantee's death, will pass to the heirs.

2<sup>g</sup>. Remedy to Recover Arrears of a Corody; w. c.

1<sup>h</sup>. Writ of Assize.

A writ of assize lies for the arrears of a corody, by virtue of the Stat. Westm. II., 13 Edw. I. c. 25; and as all remedial and judicial writs, granted by any general act of parliament prior to 4 Jac. I., are reserved in Virginia, unless repealed, the same writ is admissible with us. (Jac. Law Dict. *Corody*; V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2, § 3.)

2<sup>h</sup>. Action of Covenant, or of Trespass on the Case in *Assumpsit*.

These actions recover *in damages* the amount in arrears, as for a breach of the agreement of the grantor. Covenant is proper if the grant were under seal, as properly it should be, and assumpsit if not under seal. (1 Chit. Pl. 131, 113.)

#### 9<sup>th</sup>. Annuities; w. c.

##### 1<sup>st</sup>. Definition of an Annuity.

An annuity is a right to receive a certain *yearly* (or periodical) *sum*, in fee-simple, for life or for years, and chargeable only on the *person of grantor*. (1 Th. Co. Lit. 449.)

##### 2<sup>nd</sup>. Several Kinds of Annuity; w. c.

##### 1<sup>st</sup>. Annuities Originally Charged only on the Person of the Grantor.

An annuity granted to one and *his heirs*, when not charged on lands, is a fee-simple *personal*, forfeitable at common law for treason (Nevil's Case, 7 Co. 34 b), but as being only *personal*, it is not a hereditament within the statute of *mortmain* (7 Ed. I., St. 2), nor is it entailable (not being a *tene-ment*) within the statute *de donis* (13 Ed. I., c. 1; 2 Bl. Com. 40, & n. 34); 1 Th. Co. Lit. 492). But when limited to the grantee *and his heirs*, they pass to the heirs at the death of the grantee.

##### 2<sup>nd</sup>. Annuities by Election, when Granted Issuing out of Lands.

When periodical payments are granted, issuing out of *lands*, it is in the election of the grantee to treat them as *charged on the lands*; and they are then called *rents* (very improperly), and are real estate: but *by election of the grantee*, the charge on the land may be waived, and then they become simply *annuities*, and are only personalty. (1 Th. Co. Lit. 449-50.)

##### 3<sup>rd</sup>. Remedies to Recover Arrears of Annuities; w. c.

##### 1<sup>st</sup>. Writ of Annuity.

See 1 Th. Co. Lit. 450.

##### 2<sup>nd</sup>. Action of Covenant, of Trespass on the Case in Assumpsit, or of Debt.

See 1 Chit. Pl. 132, 118, 125.

#### 10<sup>th</sup>. Rents.

The subject of rents, which in itself is simple and easily understood, has been complicated by treating under the same *name* (of rents) things essentially different in *nature*. This source of obscurity will be more apparent as we proceed. Let us meanwhile advert to, (1), The definition of a rent; (2), The qualities of one; (3), The several sorts of rent; (4), Out of what things rent may issue, and on what conveyances it may be reserved; (5), The terms in which rent should be reserved; (6), The time for the payment of rent; (7), The person to whom rent should be reserved payable; (8), To whom rent is payable; (9), The estate which may be had in a rent, and the incidents thereof; (10), The apportionment of rents; (11), The

assignment of rents; (12), At what place rents are demandable and payable; and (13), Remedies for rent;

W. C.

### 1<sup>st</sup>. The Definition of a Rent.

A rent is a *right* to a *certain profit* issuing *annually* (or rather *periodically*) out of *lands and tenements corporeal*, in *retribution* (reditus), for the *land* that *passes*. (Gillb. Rents, 9; 1 Th. Co. Lit. 442.)

If a contract is not conformable to this definition, it is not a *rent* proper, and ought not to be so described; but it may be very good as a *contract*, and may be enforced as such. (1 Th. Co. Lit. 441, n. (B.); ——— v. Cooper, 3 Wils. 375; Dean of Windsor v. Glover, 2 Wms., Saund. 302.)

### 2<sup>nd</sup>. Qualities of a Rent.

The qualities of a rent arise out of the definition. Thus we find that they comprehend, (1), A right to a *certain profit*; (2), Issuing *periodically*; (3), Out of *lands and tenements corporeal*; (4), In *retribution* or *return*; (5), For the *land* that *passes*;

W. C.

### 1<sup>h</sup>. A Right to a Certain Profit.

Let it be observed that a rent is a *right*, of which the arrears, periodically accruing, are merely the *fruits*. In consequence of omitting to note this obvious distinction between the incorporeal right and the fruits or profits which periodically arise from it, we have it laid down that for a *freehold rent* reserved on a lease *for life*, or *in fee-simple*, no action of debt lay by the common law during the continuance of the freehold out of which it issued, for that the law would not suffer a *real injury* to be remedied by an action *merely personal*. (1 Rol. Abr. 595; 3 Th. Co. Lit. 270, n. (U).) And provision had to be made for the case by Stat. 8 Anne, c. 12, which has been, in substance, enacted with us. (V. C. 1873, ch. 134, § 7; V. C. 1887, ch. 127, § 2787.) And under the influence of the same confusion of thought, not discriminating between *rent* and the *arrears of rent*, a prohibition was awarded in *Miller v. Marshall*, 1 Va. Cas. 158, to prevent a justice of the peace from taking cognizance of a claim for *arrears* of a freehold rent, because it was a *freehold estate*.

The *rent* or *right* itself, where the estate, or interest therein, is an estate *of freehold*, cannot be recovered in a *personal action*; but the *arrears*, like the severed fruits of the soil, are not real property, but *personalty*; and the injury of withholding them is a *personal injury*, which a *personal action* is well fitted to redress.

The reservation, in order to come within the definition of *rent*, must be of a *profit* (something not in the grantor before), whether in labor, provisions, part of the annual



product, money, or other thing; and it must be *certain*, or ascertained *in amount*, or at least capable of being *made certain*. Hence, a reservation of the trees or of the *vesture* or herbage growing on the land *at the time*, would not be a rent, because not a profit; and still less would a reservation of part of the *land itself*, which, moreover, would be *repugnant to the grant*. Hence, also, a reservation of *labor* or of *money*, without affording any means of determining *how much*, is not a rent, because *not certain*; but if it were of so much money as *W shall name*, or of the shearing of *all the sheep on the grantor's estate*, that would be certain enough, upon the maxim *id certum est quod certum reddi potest*, and would be a good rent. (Gilb. Rents, 10; 1 Th. Co. Lit. 440-41.)

### 2<sup>d</sup>. Issuing Periodically.

It need not be from *year to year*, but may be from *period to period*, whether the period be less or more than a year; *e. g.*, from month to month, from half year to half year, every two years, etc. (2 Th. Co. Lit. 414.) But it must be reserved from *period to period* during the *whole continuance* of the grantee's estate. Hence, if the purchase-money of land is payable *in instalments*, but not at intervals continuing throughout the duration of the estate, *it is not a rent*.

### 3<sup>d</sup>. Out of *Lands*, and Tenements *Corporeal*.

Hence, if one seised in fee-simple, of a way, or common, should lease it for years, reserving a periodical compensation therefor, it is *not a rent*, because it issues out of an *incorporeal*, and not a *corporeal* tenement. (Gilb. Rents, 20, &c.; 1 Th. Co. Lit. 441-2.)

The reasons assigned for this doctrine are that the person entitled *cannot distress* for the amount in arrear where the tenement is incorporeal; nor can he have a writ of *assize*, inasmuch as the recognitors of *assize* cannot *have a view* of the subject out of which the rent issues; and that incorporeal hereditaments were originally created and allowed for the *public good*, and, therefore, were not deemed fit subjects of *private profit*. Hence, although a reversion and remainder are *incorporeal*, yet upon a grant of either, reserving a return or compensation, such compensation is a *proper rent*, because the estate was created to *make profit of*; and although there can be no distress until, by the determination of the particular estate, the interest in reversion or remainder comes into possession, yet *then the grantor of the land may distress for all arrears*. (Gilb. Rents, 21 to 23; 1 Th. Co. Lit. 442.)

### 4<sup>th</sup>. In Retribution or Return (*reditus*).

Hence, it must be reserved to the *grantor of the land*, or his heirs, and *not to a stranger*, for else it would *not be a return*. And not only is not a reservation to a stranger

good at common law, *as a rent*, but it is altogether void, as inimical to public policy; since, if permitted, the reservation might be made to men of power and influence, who might extort from the tenant more than was contracted for, thus tending to *maintenance*, and also coming within the purview of the favorite maxim that *choses in action shall not be assigned*. (Gilb. Rents, 54 & seq.; 1 Th. Co. Lit. 442, and n. (C.); Bac. Abr. Rents, (G.).)

5<sup>b</sup>. For the *Land* that *Passes*.

Hence, it is *not a rent*, if it be a compensation not for *land*, but for a *right* which passes; *e. g.*, where *disseisor* releases his right to *disseisor*, reserving a periodical return. So, if the owner of lands grant a periodical payment issuing out of his lands, that is *not properly a rent* (although, unhappily, it has been so designated), because it is not a *retribution for land*. This, indeed, is the crowning characteristic of a *proper rent*, and it is to be regretted that it was ever lost sight of in the nomenclature connected with this subject. (Gilb. Rents, 26-'7; 1 Th. Co. Lit. 442.)

3<sup>e</sup>. The Several Sorts of Rent.

The several sorts of rent are to be presented, (1), According to their *original nature*; and (2), According to their *existing character*;

W. C.

1<sup>b</sup>. The Several Sorts of Rent, According to their *Original Nature*.

The important discrimination to be here made is between rents *proper*—that is, rents *reserved*—on the one side, and rents *improper*—that is, rents *granted*—on the other;

W. C.

1<sup>i</sup>. Rents *Proper*, or Rents *Reserved*.

Rents *proper* are rents *reserved upon a grant of lands*, being such as correspond to the definition, *supra*, p. 39, 1<sup>e</sup>. Had the designation *rent*, never been otherwise applied than to such rents as these, it would have saved much confusion of thought, which must of course result from the use of the same word to signify very different things.

2<sup>i</sup>. Rents *Improper*, or Rents *Granted*.

A rent *improper*, or rent *granted*, is where a certain sum is *granted*, payable periodically, *issuing out of the grantor's lands*. Such grants were found very convenient, as a security for debts, as marriage portions, and for other domestic occasions, especially if, as generally happened, the grantor charged the lands *with a distress* to enforce the payment of arrears. Because this transaction resembled a rent in several particulars (*e. g.*, in stipulating for a sum *certain*, payable *periodically*, and issuing out of *lands and tenements*), it was very infelicitously so named, although it wanted the most characteristic attribute of a rent, and that

whence it derives its name, viz.: the being a *retribution* or *return for land that passes*.

This discrimination between rents *reserved* and rents *granted* is incomparably the most important connected with the subject, and affords a clue which in general suffices to guide the student through whatever intricacies belong to it.

2<sup>d</sup>. The Several Sorts of Rent, According to their *Existing Character*.

“Three manner of rents there be,” says Littleton, “that is to say, rent-service, rent-charge, and rent-seck”; and although this distinction is not nearly as important as that between rent *reserved* and rent *granted*, yet it is well worthy of being followed out. (1 Th. Co Lit. 442);

W. C.

1<sup>i</sup>. Rent-Service.

The exposition of the doctrines applicable to a *rent-service* may be arranged under the heads following: (1), The definition of a rent-service; (2), The circumstances which must concur therefor; (3), The origin of the term *rent-service*; and (4), The characteristics of rent-service;

W. C.

1<sup>k</sup>. The Definition of *Rent-service*.

A rent-service is a rent *reserved* upon a *grant of lands*, when a *reversion exists* in the grantor. (1 Th. Co. Lit. 443-4; Gilb. Rents, 9, 15; Bac Abr. Rents, (A.).)

2<sup>k</sup>. The Circumstances Necessary to a *Rent-Service*; W. C.

1<sup>l</sup>. The Rent must be *Reserved* upon a *Grant of Lands*. (Gilb. Rents, 26.)

2<sup>l</sup>. A *Reversion must Exist* in the *Grantor* of the land; that is, the estate of the grantee must be such that, at its termination, the land will *revert* or return to the grantor. (1 Th. Co. Lit. 444.)

3<sup>k</sup>. The Origin of the Term *Rent-Service*.

It is called a *rent-service*, as the old writers tell us, because it hath some *corporal service* incident unto it, which at the least is *fealty*, and, for the most part, consisted originally of *military service*. (1 Th. Co. Lit. 442; Bac. Abr. Rent, (A.) 1.)

4<sup>k</sup>. The Characteristics of *Rent-Service*.

The characteristics of *rent-service* are, (1), That it arises *by reservation*, and is always in retribution for the land out of which it issues; (2), That it *supposes a tenure* of the grantor, and a reversion in him; and (3), That the arrears are recoverable *by distress, as of common right*;

W. C.

1<sup>l</sup>. It Arises by *Reservation*, and is always in *Retribution* for the Land out of which it Issues.

See 1 Th. Co. Lit. 442.

- 2<sup>d</sup>. It Supposes a *Tenure* of the Grantor, and a *Reversion* in Him.

See 1 Th. Co. Lit. 444; 2 Bl. Com. 42.

- 3<sup>d</sup>. The Arrears are Recoverable by *Distress*, as of *Common Right*; w. c.

- 1<sup>m</sup>. Reasons *Originally* for Allowing Distress for *Rent-Service*; w. c.

- 1<sup>a</sup>. Rent-Service Implies a Tenure.

Rent-service implies a *tenure* (of which the *sign* is the service of *fealty*), and tenure was the *basis* of the political system of feuds, so that it was highly necessary to enforce its prompt recognition, by compelling, by means of distress, the rendition of the services which were its symbol.

- 2<sup>a</sup>. Rent-Service Originally Involved, for the most part, *Military Services*.

Such military services the safety of the realm required should be *promptly rendered*.

Taxes are recoverable by distress, for the same reason, namely, because the public necessities require to be punctually provided for. (V. C. 1873, ch. 37, §§ 2 to 6; V. C. 1887, ch. 27, §§ 622 & seq.)

- 2<sup>m</sup>. Modern Reason for Allowing Arrears of Rent-Service to be Recovered by Distress.

The modern reason for allowing the arrears of *rent-service* to be recovered by distress is for the *benefit* of the *poorer class* of tenants. By making the recovery of rent easy and prompt, landlords are induced to admit the poorest class of tenants more readily, and with less demand for collateral security, the tenant's household goods being generally security enough, at least for a quarter or half-year's rent, if they can be seized summarily, as soon as default of payment occurs. Thus the right of distress, which was first introduced for the sake of the *public safety*, is continued for the benefit of *poor tenants*, the landlord's interest not being the *inducing motive* at either period. Nor is there much risk of any considerable abuse of the power, the fact of the land-holding being generally too notorious to be safely sworn to if not true.

In Virginia, the legislature, losing sight, it would seem, of the reason for allowing the power of distress in case of *rent-service*, and of the great difference in *nature* between the several kinds of rent, upon a mistaken idea of introducing *uniformity* of procedure, has enacted, in imitation of the English Stat. 4 Geo. II., c. 28, that "rent of *every kind* may be recovered by *distress*," whether "he to whom it is due *have the reversion or not*." (V. C. 1873, ch. 134, §§ 7, 8; V. C. 1887, ch.



127, §§ 2787, 2788.) Thus, rent *granted* may be distreined for, as well as rent *reserved*, notwithstanding there be no agreement to that effect between the parties, and although not only no reason of policy seems to demand it, but on the contrary, the *danger of the fraudulent abuse* of the process in such cases is imminent and obvious.

A further incongruity presents itself in our statutes. The power of distress, summary as it is, is justified as between *landlord and tenant*, by the interests of the tenant-class, and especially the *poorer class*. Yet very inconsistently, the statutes, under the guise of relieving the poor, exempt from distress, in case of every *householder residing in Virginia*, in addition to the homestead exemption, much more household property than *most poor tenants possess*, thus obliging them either to pay the rent in advance, to pay a higher rent, or to provide collateral security for the payment, and thereby exposing them to the necessity of occupying worse tenements than otherwise might be accessible to them. (V. C. 1873, ch. 49, §§ 33, 34; V. C. 1887, ch. 178, §§ 3650 to 3653.) Nor ought the *moral effect* to be forgotten of allowing one to enjoy property which is not liable for his debts, such a policy generally being to encourage unthrift, reckless expenditure, and fraud.

## 2<sup>i</sup>. Rent-Charge.

Let us note, (1), The definition of a rent-charge; and (2), The modes of creating one;

W. C.

### 1<sup>k</sup>. The Definition of a *Rent-Charge*.

A rent-charge is a right to a *certain* profit issuing *periodically* out of lands and tenements corporeal, to secure which the land is *specially charged* with a distress, usually by the *terms of the grant*, and not, as in case of *rent-service*, of *common right*. (2 Bl. Com. 42; 1 Th. Co. Lit. 445 '6.)

## 2<sup>k</sup>. Modes of Creating a Rent-Charge.

We have seen that *rent-service* is always *rent reserved*. But *rent-charge* may be either rent reserved or rent granted;

W. C.

### 1<sup>l</sup>. Rent *Reserved*.

Upon grant of one's *whole estate* in the land, reserving a rent, with a *clause of distress* (e. g., a conveyance *in fee-simple*, reserving rent, subsequent to the statute of *Quia emptores terrarum*, 18 Edw. I. c. 1), such rent is a *rent-charge*. Prior to that statute, the grantee would have held of the grantor as his *under-tenant*, by sub-infeudation, *alienation* not being permitted; and thus

there being a *tenure of*, and consequently a *quasi reversion* in him, the rent would have been a *rent-service*; but the statute of *Quia emptores* having directed that in such cases the grantee should hold, *not of the grantor*, but of the *chief lord of the fee*, there was no longer any *tenure* of the grantor, upon a conveyance in fee-simple, and so the rent ceased to be *rent-service*, and became *rent-charge*, if the lands were *expressly charged* with distress for arrears, or if not so charged, *rent-seck*; for where there is *no tenure of the grantor*, even rent reserved is not distreinable for *of common right*, but only *by express stipulation*. (Gilb. Rents, 14 to 16; 1 Th. Co. Lit. 444 to 448.)

In Virginia, the same result follows from the abolition of *all tenures*, in case of fee-simple proprietors. (10 Hen. Stats. 64.) The land upon a grant in fee not being *held of the grantor*, nor of *any one else*, it follows that any rent reserved upon such a grant *cannot be a rent-service*, but is either a *rent-charge* or a *rent-seck*.

## 2<sup>l</sup>. Rent Granted.

Rent granted, as already explained, is an *improper rent*, and must be either a *rent-charge* (if the land be *specially charged*, by the terms of the grant, etc., with distress), or a *rent-seck* (if not so charged), but can in no case be a *rent-service*. (1 Th. Co. Lit. 448.)

The words are not necessarily words of *express grant*. It will suffice, if it appears to be the *intent* to charge the lands with distress for a *sum certain*. The words may be words of *covenant*, etc., as that the grantee *may distrein* in the land for a certain sum annually. (Gilb. Rents, 39 & seq.; 1 Th. Co. Lit. 459.)

W. C.

## 1<sup>m</sup>. Rent Granted, with Clause of Distress.

Here the grantee of the rent may distrein, by the *terms of the grant*, although he could not do so at common law, of *common right*. (1 Th. Co. Lit. 448; Gilb. Rents, 17.)

## 2<sup>m</sup>. Rent Granted, without Clause of Distress.

In general, rent granted without a clause of distress, is *rent-seck*, as has been said; but there are a few special cases, where a power of distress is allowed by law without express words, apparently because a valuable recompense *in lands* has been afforded for the grant of the rent;

W. C.

## 1<sup>n</sup>. Rent Granted for *Owerty* (Fr. *égalité*, equality) of Partition.

Where, in dividing land between two or more co-heirs, or joint-tenants, or tenants in common, it becomes necessary to equalize the partition, by a rent

granted by him who receives more of the land, and issuing out of his share, to him who has less, such rent is distreinable for, by construction of law, *without any stipulation* to that effect, and so is *rent-charge*. (Gilb. Rents, 19; 1 Th. Co. Lit. 705-'6.)

2<sup>n</sup>. Rent Granted in Lieu of Dower.

Where a precise allotment of a widow's dower in the lands themselves is not practicable, or not convenient, and there is assigned to the widow a rent *in lieu of her dower*, or of part of it, issuing out of the lands whereof she is dowable, she takes this as a *rent-charge*, by implication of law, and may distrein for arrears, without any stipulation to that effect. (Gilb. Rents, 20; 1 Th. Co. Lit. 705-'6, -'7; Bac. Abr. Rents, (A.) 2.)

3<sup>n</sup>. Rent Granted in Lieu of Land, upon an *Exchange*.  
See Gilb. Rents, 20.)

3. Rent-Seck.

We will observe, (1), The definition of a *rent-seck*; and (2), The modes of creating it.

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1<sup>k</sup>. The Definition of *Rent-Seck*.

A rent-seck is a right to a *certain* profit, issuing *periodically*, out of lands and tenements corporeal, for which the land is *not charged with a distress*, either of *common right*, or by *express stipulation*. (2 Bl. Com. 42; 1 Th. Co. Lit. 448; Id. 442, n. (D.); Gilb. Rents, 15, 38; Bac. Abr. Rents, (A.) 3.)

It is so called (*reditus siccus*), because it is *not distreinable for*, and if in arrear, can be charged on the lands only by a *writ of assize*, and hence is styled a *dry* or *barren rent*. (Gilb. Rents, 15, 100, 106.)

In Virginia, as has been seen, every kind of rent may be recovered by distress. (V. C. 1873, ch. 134, § 7; V. C. 1887, ch. 127, § 2787.)

2<sup>k</sup>. The Modes of Creating a *Rent-Seck*.

Rent-seck, like rent-charge, may consist of either rent *reserved*, or rent *granted*;

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1<sup>l</sup>. Rent *Reserved*; w. c.

1<sup>m</sup>. Rent Reserved upon a Grant of One's *whole Estate without Clause of Distress*.

Thus, upon a conveyance in *fee-simple*, subsequent to the statute of *quia emptores*, reserving a rent *without a clause of distress*, the rent is a *rent-seck*. (*Ante*, p. 44 '5 1<sup>l</sup>; Gilb. Rents, 14 to 16; 1 Th. Co. Lit. 477; Id. n. (Q, L); Bac. Abr. Rents, (A.) 3). And so also if a tenant for life or years convey his whole estate or interest, reserving a rent without a clause of distress, it is a *rent-seck*.

2<sup>m</sup>. Rent Reserved, and afterwards *Separated from the Reversion*.

It matters not how the separation takes place, if the rent and the reversion are in different hands, at common law the *rent is seck*. It may be by assigning the rent and reserving the reversion, or *vice versa*, by assigning the reversion and reserving the rent; but at common law, the result is the same, the rent becomes *seck*. (1 Th. Co. Lit. 477, &c.; Id. n. (Q, I).)

2<sup>l</sup>. Rent *Granted without a Clause of Distress*.

Rent *granted* without a clause of distress is an *improper rent*, and at common law cannot be distreined for, there being no clause of distress, and so it is *rent-seck*, except only in the cases recently mentioned (*Ante*, p. 45-6) of rent granted for *owelty* of partition, in lieu of dower, or to equalize an exchange of lands. (1 Th. Co. Lit. 448; Gilb. Rents, 38.)

4<sup>e</sup>. Out of *what Things* Rent may Issue; and on *what Conveyances* it may be reserved; w. c.

1<sup>h</sup>. Out of what Things Rent may Issue; w. c.

1<sup>l</sup>. The General Doctrine.

Rent must issue out of *things corporeal*, to which recourse may be had to distrein, and which may be put *in view*, to the recognitors of *assize*. (2 Bl. Com. 41; Gilb. Rents, 21.)

2<sup>l</sup>. Sundry Instances of Reservation of Rent; w. c.

1<sup>k</sup>. Reservation of Rent Issuing out of an *Incorporeal Hereditament*; w. c.

1<sup>l</sup>. The Reasons which *Forbid such Reservation*.

See Gilb. Rents, 21 to 23; 1 Th. Co. Lit. 442; Id. 441, & n. (B.); *Ante*, p. 46.

2<sup>l</sup>. Effect of Reservation of Rent *out of an Incorporeal Thing*.

Although not good *as a rent*, it may be enforced *as a contract*. (1 Th. Co. Lit. 441, n. (B.); Gilb. Rents, 24.)

2<sup>k</sup>. Reservation of Rent in Retribution *for Lands*, and also for some *other Subject* at the same Time, *e. g.*, *Chattels* or *Incorporeal Property*.

The rent is said to issue out of *both subjects* in point of *render*, but out of the *lands only* in point of *remedy*, the recourse being to them alone to *distrein*. Hence, if the chattel, or the incorporeal right, be lost or destroyed during the term, without the tenant's default, the rent is *abated* (that is, diminished) accordingly. (Dean, &c. of Windsor v. Gover, 2 Saund. 303-4; Newton v. Wilson, 3 H. & Munf. 470; 1 Tuck. Com. 20, 21, B. II.)

3<sup>k</sup>. Reservation of Rent, in Retribution for a *Remainder* or *Reversion Granted*.



Such reservation is good *as a rent*, because when the remainder or reversion takes effect in possession, the arrears of rent may be *distreined* for, and so there is a remedy for the same; and the remainder and reversion, unlike incorporeal hereditaments proper, were originally intended as subjects of property, and of traffic. (Bac. Abr. Rent, (B.); Gilb. Rents, 23.)

## 2<sup>h</sup>. On what Conveyances Rent may be Reserved.

On any conveyance that *passes or enlarges* an estate in land to the tenant; for if no land passes, there ought to be no retribution or return, and conversely, if the transaction is sufficient to convey the land, it ought to be sufficient to vest the retribution. (Gilb. Rents, 26-'7.)

## 5<sup>c</sup>. The Terms in which Rent should be *Reserved*;

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### 1<sup>h</sup>. The Proper Technical Terms.

The proper technical terms are *reservando*, *reddendo*, *solvendo*, etc., implying a return of something which was not *in the grantor before*, in lieu of the land which passes. (Bac. Abr. Rent, (D.); Gilb. Rents, 30; 1 Tuck. Com. 21, B. II.)

### 2<sup>h</sup>. Effect of a *Departure* from the Proper Terms.

Not material, if the terms used fairly import a *retribution for the land that passes*. (1 Tuck. Com. 2, B. II.; Gilb. Rents, 32 & seq.)

### 3<sup>h</sup>. Effect of *Entire* Reservation upon a Grant of Several *Distinct Premises*.

The landlord may distrein *on either* for the rent *of both*, or in a proper case, may *re-enter upon either*. But if the reservation were in the first instance *several*, and *not entire*, it would be otherwise. Thus, a grant of three houses, reserving \$500 rent, viz., for one house \$300, for another \$150, and for another \$50, is an instance of an *entire reservation*, enabling the grantor to distrein, etc., in *any one* for the whole rent; but a grant of three houses, reserving \$300 for one, \$150 for another, and \$50 for the third, is a case of *several reservation*, wherein the grantor can distrein or re-enter, for the respective rents, upon the premises severally, and not upon either of the premises for all. (Gilb. Rents, 34 & seq.)

### 4<sup>h</sup>. Effect of Reservation of Rent upon a Grant by Persons having *Several Titles*.

Although the reservation is by *joint words*, yet from the nature of the titles of the grantors, it is to be understood as a *several reservation* upon which they must distrein severally. Thus, if two *tenants in common* make a lease for life, reserving rent, the reservation, though made by *joint words*, shall follow the nature of the reversion in the lessors, which is *several*. In the case of *joint-tenants* it would be

otherwise. (Gillb. Rents, 37; Bac. Abr. Rents, (E.); 1 Tuck. Com. 22, B. II.)

## 6\*. The Time for the Payment of Rent; w. c.

### 1<sup>h</sup>. The Time of Payment in the *Absence of Contract*.

Rent being a *retribution* for the land, is payable, in the absence of contract, *at the end* of the year, or month, or other period assigned. (Bac. Abr. Rents, (F.); 1 Tuck. Com. 22, B. II.)

### 2<sup>h</sup>. The Time of Payment, *when there is a Contract*.

The rent is payable according to the stipulations of the contract, which, when the language is ambiguous, will always be interpreted by reference to the leading fact that the rent is a *retribution for the land*. Hence, in a lease for years, a reservation of rent payable at Michaelmas and Lady-day, in even portions, is construed to mean *annually* on those days. So, also, if it be payable at the four feasts, without saying *annually*, yet it is construed to be *yearly* during the term.\* And if it be payable *annually*, without saying *during the term*, yet it is to be so construed. However, the law will not control by its *general* intendments the express and clear appointments of the parties. If their meaning and intention can be ascertained, full effect will be given to them. (Bac. Abr. Rents, (F.))

## 7\*. The Person to whom Rent should be *Reserved Payable*; w. c.

### 1<sup>h</sup>. The Original Reservation.

Must be to the *lessor or his heirs*, and not to a stranger, because else it would not be a *return* for the land; and also in order to avoid the danger of *maintenance*. (Bac. Abr. Rents, (G.); Gillb. Rents, 54.)

### 2<sup>h</sup>. Assignment to a Stranger.

After being reserved to the lessor or his heirs, rent may, at common law, be *assigned to a stranger*; that is, it will pass as *incident to the reversion*, supposing that to be assigned; and such stranger-assignee of the reversion may recover the rent at common law, *by distress* or by action *of debt*; but he cannot have the benefit of any *condition or clause of re-entry*, nor maintain an action of *covenant*, etc. These latter privileges were conferred on the assignee of the reversion in England by Stat. 32 Hen. VIII., c. 34, whose counterpart we have in Virginia. That statute, which was occasioned by the dissolution of the monasteries, and the embarrassments in which the grantees of their lands, as well as their tenants, found themselves involved, gave *mutual* redress in all cases of landlord and tenant, where the landlord grants his reversion, not only as to *rent*, by distress and the action of debt, but also as to *conditions and covenants*,

\*The *four feasts* contemplated are, Lady-Day, 25th March; John Baptist, 24th June; St. Michael, or Michaelmas, 29th September; Christmas, 25th December.

on both sides, by re-entry, by the action of covenant, etc., for the breach of *any stipulation* whatsoever touching the land. (2 Th. Co. Lit. 84; 1d. 88, & n. (M. 2).) So the statute in Virginia provides that the assignee of the reversion, and his personal representative or assigns, shall enjoy against the lessee, his heirs, personal representatives or assigns, the like advantage by *action or entry* for any forfeiture, or by *action* upon any covenant or promise in the lease, which the lessor or his heirs might have enjoyed; and *reciprocally*, the lessee, his personal representative or assigns may have against the assignee of the reversion, or any part thereof, his heirs or assigns, the like benefit of any condition, covenant or promise in the lease, as he would have had against the *lessor himself*, and his heirs and assigns, except the benefit of any warranty, in deed or law. And so, also, in conveyances or devises of rents *in fee*, with powers of distress and re-entry, or either of them, such powers shall pass to the grantee or devisee, without express words. (V. C. 1873, ch. 134, §§ 1 to 3; V. C. 1887, ch. 127, §§ 2781 to 2783.)

3<sup>h</sup>. The Mode of Reserving Rent in Case of a Lease *under a Power* to make a Lease for a Period exceeding Lessor's own Estate.

The rent in such case, and indeed in all cases, had best be reserved, payable yearly, etc., *during the term*, and leave *the law* to make the distribution without an express reservation *to any person*. The law will distribute it to every one to whom *the reversion shall appertain*, during the term. (Whitlock's Case, 8 Co. 71 a; 1 Tuck. Com. 23-4, B. II.)

8<sup>g</sup>. To whom *Rent is Payable*; w. c.

1<sup>h</sup>. General Rules for Limitation of Rent; w. c.

1<sup>i</sup>. The most Comprehensive and best Rule, of Reservation.

Reserve it, payable *during the term*, without saying *to whom*. The law will distribute it to the persons entitled; that is, to every one to whom *the reversion shall appertain*. (Whitlock's Case, 8 Co. 71 a; Gilb. Rents, 64; 2 Th. Co. Lit. 413, n. (K).)

2<sup>i</sup>. If the Rent be Reserved Generally, without Saying *for how Long* or *to Whom*.

The rent being a retribution for the land, is presumed to be of *equal duration with the demise*, and after the lessor's death, is payable to him who *has the reversion*. (Bac. Abr. Rents, (H.); 1 Tuck. Com. 24, B. II.)

3<sup>i</sup>. If the Rent be Reserved to the *Lessor*, not naming *Heirs* or *Executors*, etc.

Where the rent is expressly limited *to the lessor*, and to no one else, upon the principle, "*expressio unius exclusio est alterius*," it goes, at *common law*, neither to the heir nor executor of the lessor, but *ceases at his death*. (Gilb.

Rents, 64-5; 2 Th. Co. Lit. 413; Bac. Abr. Rents, (H.). It may perhaps be doubted if this principle would hold in Virginia, under the influence of the *equity* of the statute, which provides that where any real estate is conveyed without words of limitation, the fee-simple, or other the whole estate or interest of the grantor, etc., shall pass, unless a contrary intention shall appear by the conveyance, etc. (V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420.)

- 4<sup>l</sup>. If Rent be Reserved to Executors, etc., when the Heir has the Reversion, and *Vice Versa*.

The law uses all industry imaginable to conform the reservation to the estate, but this disposition may be thwarted by the terms in which the parties express themselves. Thus, if it appears that the rent is to be paid *during the term*, it will follow the reversion, and be payable to him who has it, although it be reserved to some one else. But when it does not clearly appear that it was designed to continue through the *whole term*, and it is expressly reserved to an improper person—as to the executor instead of the heir, or *vice versa*,—the rent will cease upon the lessor's death. Thus, if the words “*during the term*,” or their equivalent, be used, the law distributes the rent to the *proper person*, that is, to him who succeeds to the reversion; but if no such words be used, the common law rule is that the rent *shall cease with the lessor's death*. (Gilb. Rents, 65 & seq.; Bac. Abr. Rents, (H.); 2 Th. Co. Lit. 413, n. (K).)

- 5<sup>l</sup>. If the Rent be Reserved to One of Two *Joint-Tenants*.

If the rent be reserved *by parol* (that is, not under seal), it accrues to *both*, following the *reversion*; but if the lease is by *deed indented*, the parties are *estopped from* claiming the rent save according to the deed, and it goes to the tenant to whom it is reserved. (Gilb. Rents, 63.)

- 2<sup>h</sup>. To whom Rent is Payable, as between Heir and Personal Representative, *after Lessor's Death*; w. c.

- 1<sup>i</sup>. Doctrine as to the Person to whom Rent *in Arrear at the Lessor's Death* is Payable; w. c.

- 1<sup>k</sup>. Doctrine as to the *Time* when Rent is Regarded as *Due*; w. c.

- 1<sup>l</sup>. On *what Day* Rent is Due.

If a *precise day* for its payment is named, then on that day. If payable on a day named, or *within a given number of days* (c. g., 20) *thereafter*, it is due on the *last of the days* designated. (Bac. Abr. Rents, (H.); Gilb. Rents, 48-9, 52; Clun's Case, 10 Co. 117.)

- 2<sup>l</sup>. At what *Hour of the Day* Rent is Due.

It must be *demanded, tendered, or paid* at or *before* sunset, or at least when there is enough of the light of day remaining to *see to count it* on the day when it is payable;



but for other purposes (*e. g.*, distress, etc.) it is *not due* until *midnight* of that day. Hence, if the lessor seised in fee-simple dies *between sunset and midnight*, the rent goes to his *heir*, and not to his *executor*. (Bac. Abr. Rents, (H.); Gilb. Rents, 52; Clun's Case, 10 Co. 127; *Ex parte* Smyth, 1 Swanst. 343, *note*.)

- 2<sup>b</sup>. Effect of Lessor (himself a bare *Tenant for Life*) Dying before the Rent *Becomes Due*, or the estate of the Lessor otherwise coming to an End; *w. c.*

- 1<sup>a</sup>. When Lessor Dies, or his Estate comes to an End on the *very Day the Rent is Due*.

The rent is to be paid in full to the lessor's executor or administrator, although, strictly speaking, not due, as has been seen, until midnight. But the *heir* has no pretence to claim it, the lessor being only tenant for his life; so it must go to his personal representative, or *be lost*; and, therefore, somewhat of the usual rigor is relaxed in order to prevent that result. (Rockingham v. Penrice & al. 1 P. Wms. 180; Strafford v. Wentworth, *Id.*; Bac. Abr. Rents, (H).)

- 2<sup>a</sup>. When Lessor Dies, or his Estate comes to an End *before the Day* when the Rent *becomes Due*; *w. c.*

- 1<sup>m</sup>. Doctrine at Common Law.

*No rent is to be paid* since the last rent-day, there being no remedy as to any apportionment in *point of time*, of periodical payments, either in law or equity, according to the maxim *annua nec debitum jūdex non separat*. (1 Th. Co. Lit. 476, and n. (P. 1); Bac. Abr. Rent, (H); Clun's Case, 10 Co. 128 a; Jenner v. Morgan, 1 P. Wms. 392; *Ex parte* Smyth, 1 Swanst. 339-40, *note*.) The principle of this maxim is that the contract for such periodical payments is *entire*, and that nothing is due by virtue of it unless the service, or consideration, or time be fully completed, it being, indeed, no more than an instance of the general doctrine that *entire contracts cannot be apportioned*. (*Ex parte* Smyth, 1 Swanst. 338, n. (a).)

A similar principle is applied to *all periodical payments*; *e. g.*, annuities, hires, etc., but not to *interest*, which, although *payable* at intervals, is *due* from day to day, *de die in diem*. (Edwards v. Warwick, 2 Ves. 672; *Ex parte* Smyth, 1 Swanst. 349.)

- 2<sup>m</sup>. Doctrine in Virginia, by Statute.

Rent (as also all other periodical payments under like circumstances) is apportioned *in point of time*. The statute provides that "on the determination, by death or otherwise, of the estate or other thing, from or in respect of which any rent, hire, or money coming due at fixed periods, issues or is derived, or on the

death of any person interested in such rent, hire, or money, the person, or the personal representative or assignee of the person who would have been entitled, but for such death or determination, to the rent, hire, or money, coming due at any such period, unless it be expressly provided that no apportionment shall take place, shall have a proportion thereof, according to the time which shall have elapsed of the time of which the said rent, hire or other money was growing due, including the day of such death or determination, deducting a proportional part of the charges." (V. C. 1873, ch. 136, §§ 1, 3; V. C. 1887, ch. 129, §§ 2810 to 2812.)

But this statute does not obviate the doctrine that the rent follows the reversion, and upon the death of the lessor seised in fee before the rent becomes due, the rent will be payable to his heir. (Norris v. Harrison, 1 Madd. (Am. ed.) 486; Duppa v. Mayo, 1 Saund. 288 c, n's (17) & (2).) The statute indeed (which was taken from 11 Geo. II. c. 19) is held to apply to those cases only where the *lease comes to an end* by the occurrence of the event which raises the question, and *is not binding* on the reversioner or remainderman; for if the lease binds the reversioner or remainderman, the *mischief* which the statute was aimed at cannot arise. The person entitled in reversion or remainder will thus always succeed to the *whole rent*. (Strafford v. Wentworth, Proc. in Chan. 556 '7; Clun's Case, 10 Co. 128 a., n. (F.); Opin. of Ld. Kenyon, *Ex parte Smyth*. 1 Swanst. 351.)

3<sup>k</sup>. The Person to whom Rent *in Arrear at Lessor's Death* is Payable.

It is payable always to the lessor's personal representative, or assignee. (1 Lom. Ex'ors, 488; V. C. 1873, ch. 134, § 8; V. C. 1887, ch. 127, § 2788.)

2<sup>i</sup>. Doctrine as to the Person to whom Rent *not Due and in Arrear at the Lessor's Death* is Payable.

It is payable to him who *has the reversion*. Hence, if the lessor were seised *in fee-simple*, as upon his death the reversion would pass to his heir or devisee, so the rent is payable to the heir or devisee; and if the lessor were himself possessed only of a *term for years*, as upon his death the reversion would devolve on his personal representative, so the rent is payable to such representative. (Gill. Rents, 66-'7; Bac. Abr. Rent, (H).)

9<sup>g</sup>. The Estate which may be had in a Rent, and the Incidents Thereof; w. c.

1<sup>h</sup>. The Estate in a *Rent-Service*.

In Virginia the estate in a rent-service can be nothing

more than an estate *for life*, for it cannot be greater than the estate *in the land* for which the rent is a return; and no estate with us, larger than a life-estate, is capable of *having a reversion incident to it*, which it will be remembered must exist, in order to constitute a *rent-service*.

In England the largest estate possible in a rent-service is an *estate-tail*; at least since the statute *quia emptores* (18 Edw. I., c. 1). Before that statute, upon grants (or rather sub-infeudations) in fee-simple, reserving a rent, there was a *tenure* of the grantor, and therefore such rent, though in fee-simple, was yet a *rent-service*; but since 18 Edw. I. the tenure is not *of the grantor* in such case, but of the *chief lord* of the fee, and therefore there can be no *fee-simple rent-service* there, any more than in Virginia; not in England, because upon a grant in fee-simple the tenure is *not of the grantor*; not in Virginia, because in the like case the *tenure is of nobody*.

2<sup>d</sup>. The Estate in a *Rent-Charge* or *Rent-Seck*.

The estate in a rent-charge or rent-seck may be either in fee-simple, for life, or for years.

10<sup>g</sup>. The Apportionment of Rents.

The distinction most needful to be noted in connection with the *apportionment of rents*, is that between *rents reserved*, or proper rents, and *rents granted*, or improper rents. Rents reserved implied a *new tenant* introduced into the barony, perhaps into the State, thereby increasing the military strength of one or both of them. It was, therefore, viewed with great favor, as being in accordance with *common right*, *i. e.*, the common good; and if any change afterwards occurred in the relation of the parties, to make it unreasonable and unjust to exact the payment of the *whole rent*, a new arrangement, adapted to the new state of things, was easily *implied*, whereby the rent was either *abated* or *divided* (*apportioned* was the technical designation), as the circumstances suggested, and justice required.

Rent *granted* on the other hand, so far from implying *any addition* to the military resources of the barony, plainly tended to weaken them. However able a tenant might be to perform the stipulated military service incident to the tenure of his lands, he was *prima facie* certainly *less able* when he had granted a rent, common, or any other easement, to be enjoyed in or issuing out of those very lands, than he was before. Such grants were therefore regarded *with disapproval*, although not actually prohibited; and, hence, when, by the *act of the parties*, such a change in their relation had taken place as to make it unjust to enforce the grant *in its integrity*, the law declined to enforce it *at all*, unless in pursuance of new and express stipulations, having the effect of a new contract. The rent, common, etc.,

was in such case *extinct*. If, however, the change of relation occurred by the act, *not of the parties, but of the law*, or of God, a modification of the grant was *implied*, adapted to the new state of things.

Thus if, in case of rent *reserved*, the landlord afterwards takes back half of the land, the rent would be *apportioned*—*i. e.*, abated *one-half*—without any new agreement. But if, in case of rent *granted*, the grantee of the rent *purchases* part of the land out of which it issues, the rent is, at common law, *extinct*. If, however, in the latter case, part of the land *descends* to the grantee of the rent (which is an *act of the law*), the rent will be *apportioned* according to the quantity remaining still in the hands of the grantor thereof. (1 Th. Co. Lit. 466, 463-4, 474; Gilb. Rents, 151 & seq.; Bac. Abr. Rents, (M.).)\*

In pursuing the subject of the apportionment of rents, let us observe, (1), When the whole rent becomes *extinct*; (2), When the rent is *apportioned*; (3), When the rent is not apportioned, but the *whole must be paid*; and (4), The manner of making apportionment;

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1<sup>h</sup>. When the whole Rent is *Extinct*; W. C.

1<sup>i</sup>. In Case of *Rent Granted*.

When the grantee of the rent acquires, *by his own act*, part or all of the land out of which the rent issues, the rent, *at common law*, is *extinct*, for the reason of feudal policy above stated; and not only is it extinct *as a rent*

\*APPORTIONMENT OF RENTS.

I. Where Recipient of rent acquires part of the land out of which the rent issues.	<i>Rent Reserved.</i> <i>Rent Apportioned.</i>	<i>Rent Granted.</i> <i>Rent Extinct at Common Law.</i>
1 By Purchase. (V. C. 1887, ch. 129, § 2813.)		<i>Aliter</i> in Virginia by Statute. (V. C. 1887, ch. 129, § 2813.)
2. By Descent. . . . .	<i>Rent Apportioned.</i>	<i>Rent Apportioned.</i>
II. Where payer of rent is evicted from <i>part or all</i> of the land, by a stranger claiming <i>by title paramount</i>	<i>Rent Apportioned</i> or <i>Extinct</i> , as the case may be.	<i>Rent not Apportioned.</i> <i>Whole to be paid.</i>
III. Where the <i>Buildings</i> on the land are <i>entirely or partly destroyed</i> , or possession taken by public enemy.	<i>Rent not Apportioned.</i> <i>Whole to be paid.</i> <i>Aliter</i> by Code of 1887. (V. C. 1887, ch. 108, § 2455.)	<i>Rent not Apportioned.</i> <i>Whole to be paid.</i>
IV. Where the <i>Land itself</i> is <i>entirely or partially destroyed</i> , as by earthquake, submergence, etc.	<i>Rent Apportioned</i> or <i>Extinct</i> , as the case may be.	<i>Rent not Apportioned.</i> <i>Whole to be paid.</i>
V. Recipient of Rent assigns Part of it to <i>Another</i> .	<i>Rent Apportioned, i. e., divided</i> between Assignor and Assignee.	<i>Rent Apportioned, i. e., divided</i> between Assignor and Assignee.
VI. Land out of which Rent issues divided by <i>Transfer</i> of Part of it to <i>Another</i> .	<i>Rent Apportioned, i. e., to be paid</i> by the holders of the land proportionately.	<i>Rent Apportioned, i. e., to be paid</i> by the holders of the land proportionately.



but also *as an annuity*, although previously to thus dealing with it, it might, at the grantee's election, have been treated either *as a rent*, or *as an annuity*. (1 Th. Co. Lit. 463-4; Id. 465; Bac. Abr. Rents, (M.); Gilb. Rents, 152 & seq.)

In Virginia, it is provided by statute, that where the holder of a rent *shall purchase* part of the land out of which the same issues, the rent *shall be apportioned*, in like manner as if the same had *come to him by descent*; and where the holder of land, being part of the land out of which a rent shall be issuing, shall *purchase such rent*, or part thereof, the rent shall also *be apportioned*. (V. C. 1873, ch. 136, § 4; V. C. 1887, ch. 129, § 2813.)

2<sup>d</sup>. In Case of *Rent Reserved*; w. c.

1<sup>k</sup>. Eviction of Grantee of Land, by a Stranger, *from all of it*, by Title Paramount.

The rent being *in retribution* for the land, and all of it being now lost by title paramount, the rent is of course *extinct*. (1 Th. Co. Lit. 468; Gilb. Rents, 148-9; Chun's Case, 10 Co. 128.)

2<sup>k</sup>. Purchase by Lessor, of Part of the Land, where the Rent is *Entire* (*e. g.*, a horse), and *not Pro Bono Publico*.

Since one party or the other must suffer loss, it is laid on him who is supposed to be the most able to bear it, namely: *the lessor*, and whose immediate act *as purchaser* brought about the result. The rent is not apportioned, but *is extinct*. (1 Th. Co. Lit. 471; Gilb. Rents, 165.)

If the rent were entire, but *pro bono publico* (*e. g.*, keeping a fortress), it is otherwise, as will be seen, and the *whole rent* must be paid. (Gilb. Rents, 166.)

3<sup>k</sup>. Eviction of Lessee by Lessor, from Part or All of the Land.

The whole rent is *suspended* (however small a part of the premises may have been resumed), until the *possession is restored*. (1 Th. Co. Lit. 470, and n. (H. 1); Gilb. Rents, 178; Briggs v. Hall, 4 Leigh, 484.)

2<sup>h</sup>. When the Rent is *Apportioned*; w. c.

1<sup>i</sup>. In Case of *Rent Granted*; w. c.

1<sup>k</sup>. Release of a Part of the Rent to the Grantor of it.

The rent in this case is apportioned. See 1 Th. Co. Lit. 465.

2<sup>k</sup>. Loss of Part of the Land to the Grantee of the Rent, by Breach of *Condition in Law*.

Thus, in case of a grant of Black-acre by A to Z for his life; and afterwards a grant by Z to A for life, *of a rent* issuing (in equal parts) out of Black-acre and White-acre; Z conveys Black-acre, by *feoffment with livery*, in fee simple to X, thereby, at common law, forfeiting it to A, by breach of the *condition in law*, and A enters on Black-acre for the forfeiture, the rent is *abated in proportion*,

because it would be unjust *not to abate the rent* in proportion to the land out of which it issued, that has come to the possession of the grantee of the rent, who *claims the land under*, and *not paramount* to the grantor; and if, on the other hand, we held it to be *extinct*, the grantor of the rent would have had *advantage from his own wrong*. (1 Th. Co. Lit. 469; Gilb. Rents, 162.)

The foregoing case exhibits an instance of the singular proposition of law, that when a grantor enters for the breach of a *condition in law*, he holds *under*, and not *paramount to the grantee*.

Another illustration of the same anomalous doctrine is found in the fact that when the grantor has thus entered for the condition broken, he does not thereby avoid precedent charges of the grantee (2 Th. Co. Lit. 117); although in case of a condition *in deed*, the grantor by his entry is seised as he was before the grant, and therefore does avoid *all mesne charges and incumbrances* created by the grantee. (Bac. Abr. Conditions, (O.) 4; 2 Th. Co. Lit. 99, n. (W. 2).)

- 3<sup>k</sup>. Acquisition of Part of the Land by the *Grantee of the Rent*, or of a *Part of the Rent*, by the Grantor thereof *by Act of the Law*.

See 1 Th. Co. Lit. 474 & seq.

W. C.

- 1<sup>l</sup>. Descent of a Part of the Land, out of which the Rent Issues, to the *Grantee of the Rent*.

The rent shall be *Apportioned* according to the *value* of the land, lest the grantee should be discouraged to take upon him the burden of the feud, by the loss of the entire rent; and the rather as he *did not concur* in the act. (Gilb. Rents, 156; 1 Th. Co. Lit. 474-5.)

- 2<sup>l</sup>. Descent of *Part of the Rent* to the Grantor thereof.

Here, also, the rent shall be apportioned, for else the inheritance descending, which is the act of the law, and meant beneficently, might prove a detriment to the third person, who is entitled to the residue of the rent. (Gilb. Rents, 157; 1 Th. Co. Lit. 475.)

- 4<sup>k</sup>. Assignment to a Third Person of Part of the Rent by the Grantee Thereof.

There is an apportionment or division here of course, according to the terms of the assignment.

See 1 Th. Co. Lit. 465 & n. (Z.).

- 5<sup>k</sup>. Partition of Rent Amongst *Several Co-parceners*, to whom it *has Descended*.

Here, also, there is an apportionment of the rent amongst the co-parceners.

See 1 Th. Co. Lit. 465 & n. (Z.); Id. 474-5.

- 6<sup>k</sup>. Partition of the Land out of which the Rent Issues Amongst Several Co-owners Thereof.

In this case each several tenant to whom the land is divided shall pay a proportional part of the rent.

2<sup>i</sup>. In Case of *Rent Reserved*; w. c.

1<sup>k</sup>. Eviction of Lessee from *Part of the Land* by Title *Paramount*.

Since the rent is a compensation for the land, of course, if part of the land be lost by title paramount, the rent ought to be, and is, *proportionably reduced*. (1 Th. Co. Lit. 468.)

2<sup>k</sup>. Release or Assignment of *Part of the Rent* by Lessor.

Here an apportionment of the rent takes place.

See 1 Th. Co. Lit. 467, n. (E. 1).

3<sup>k</sup>. Partition of Rent Amongst *Co-parceners*, &c.

Here also there is an apportionment or division of the rent amongst the co-owners.

See 1 Th. Co. Lit. 467, n. (E. 1).

4<sup>k</sup>. *Purchase* of Part of the Land by *Lessor*.

The *return* or *compensation* must be diminished in proportion as the lessor *buys or takes back the land*. (1 Th. Co. Lit. 466; Gilb. Rents, 179.)

5<sup>k</sup>. *Resumption* of Part of the Land by *Lessor*; w. c.

1<sup>i</sup>. Resumption of Part of the Land by Lessor by *Surrender*.

The rent is reduced in proportion as the quantity of land in the lessee's hands is diminished by the lessor's act, because the rent is a return for the land. (1 Th. Co. Lit. 466-'7.)

2<sup>i</sup>. Resumption of Part of the Land by Lessor by *Forfeiture for Waste*, &c.

Here, also, for the same reason, the rent is apportioned, although it is by the lessee's own default that he loses part of the land, because the rent is a compensation for the land. (1 Th. Co. Lit. 467.)

6<sup>k</sup>. Grant by Lessor of *Part of the Reversion*; i. e., of the Reversion in *Part of the Land*.

Here the apportionment of the rent takes place in proportion to the portion of the reversion assigned.

See 1 Th. Co. Lit. 467; Gilb. Rents, 173.

7<sup>k</sup>. Entire Destruction of *Part of the Premises*.

Where there is an *entire destruction* of part of the premises, in contradistinction to a *partial injury* thereto, the *rent is apportioned*, upon the ground that the rent is a *compensation*, and ought to be reduced when, without the fault of the lessee, he is deprived wholly of any enjoyment of part of the subject. Thus, if part of the land is swallowed by an earthquake, or permanently submerged by the sea, a proportional abatement of the rent is to be made; but not so if it be swept by wild-fire, or if the *buildings only* are destroyed. (1 Th. Co. Lit. 469, n. (G. 1); Gilb. Rents, 187.)

The student will not fail to observe the incongruity between the common law doctrine where there is an *entire* destruction of part or all of the *land*, and a destruction of the *buildings only*, an abatement of the rent being allowed in the former case, and not in the latter. It would seem that, *upon principle*, it should be allowed in neither (*infra* 2<sup>i</sup>, 1<sup>k</sup>); and that the allowance of the abatement in the first case is an illogical concession to the hardship of the tenant's situation.

The student will observe, however, that this latter doctrine as to the non-abatement of the rent where there has been a destruction, without the tenant's default, of part or all the buildings upon the premises, is changed by the Code of 1887, which provides that upon such destruction of the buildings in whole or in part, without any default on the part of the tenant, the rent shall be abated in proportion, until the buildings are restored to their former condition. (V. C. 1887, ch. 108, § 2455.)

8<sup>k</sup>. Eviction from the Land (by Title Paramount) or Determination of the Lessor's Estate in the Land *Before Rent-day*.

The rent is *apportioned* in Virginia, but at common law it was not, upon the maxim before cited, of *annua nec debitum judex non separat*, depending on the entirety of the lessor's contract that lessee should enjoy the premises during the whole period from rent-day to rent-day. (1 Th. Co. Lit. 476 & n. (P. 1); V. C. 1873, ch. 136, § 1; V. C. 1887, ch. 129, § 2810.)

3<sup>b</sup>. When the Rent is *not Apportioned* or *Abated*, but the *Whole must be Paid*; w. c.

1<sup>i</sup>. In Case of *Rent granted*; w. c.

1<sup>k</sup>. Eviction by Title Paramount of the *Grantor of the Rent*, from Part or all of the Land out of which it Issues.

There is no abatement of the rent, because, as the land was not the consideration *for the grant*, the loss of the land out of which it issues is no reason for reducing its amount. (1 Th. Co. Lit. 467.)

2<sup>k</sup>. Loss of *Part of the Land*, to the *Grantee of the Rent*, by *Breach of Condition in deed*.

Thus, A grants *Black-acre* to Z in fee-simple, on *condition in deed*, and Z afterwards grants to A an annual rent issuing out of *Black-acre and White-acre*. Then, the condition not being observed, A enters on *Black-acre* for *condition broken*. The *whole rent* must be paid *without* abatement; for, although the grantee of the rent has *possessed himself* of part of the land out of which the rent issues, yet he claims it *not under* the grantor of the rent, but by title *paramount to his*; and if the rent were abated, the grantor thereof would *profit by his own wrong*. (1 Th. Co. Lit. 468.)



2<sup>i</sup>. In Case of *Rent Reserved*; w. c.

1<sup>k</sup>. Partial or Total Destruction of the Premises; *i. e., of the Houses, or other Erections, by Fire, or other Casualty.*

There is at common law no *abatement* of the rent in this case. The tenant is regarded as the *purchaser* of the property for the term, taking upon himself the risk of all contingencies (at least, in general), which imply no default on the part of the lessor; partly because that is a reasonable view of the relations of the parties, but partly also because such liability is requisite to stimulate him to the proper care of the premises, and to guard against frauds which the lessor is often not in a condition to establish, even when they are very gross. If the lessee means to decline such responsibility, he must have a stipulation in the lease to that effect. (1 Th. Co. Lit. 469, n. (G. 1); *Ross v. Overton*, 3 Call, 309; *Newton v. Wilson*, 3 H. & Munf. 470; *Thompson v. Pendell*, 12 Leigh, 591; *Scott v. Scott*, 18 Grat. 168 & seq.)

But by the code of 1887, it is declared that the rent shall be apportioned until the buildings be restored to their former value, at least as far as the tenant's purposes shall require. (V. C. 1887, ch. 108, § 2455.) The same provision is also extended to the case where the tenant is deprived of possession of the premises by a *public enemy*. In that case the rent is to be abated until the possession is restored. (Ibid.)

2<sup>k</sup>. Purchase by *Lessor* of Part of the Land, the Rent being *entire*, and *Pro Bono Publico, e. g., Keeping a Fortress, etc.*

The entire rent is to be discharged without abatement, considerations of *public policy* controlling those of regard to the comparative weakness of the lessee. (1 Th. Co. Lit. 472; *Gilb. Rents*, 166.)

The *entire rent* is also to be paid when the service is indivisible (*e. g., a horse*), when part of the tenancy comes to the lessor *by descent*, or other act of the law. (*Gilb. Rents*, 167; 1 Th. Co. Lit. 471.)

4<sup>h</sup>. The Manner of Apportionment of Rent.

This is properly the business of a *jury*, who, upon the evidence offered, are to judge of the proportion of rent to be reduced, or of the ratio of distribution amongst several. (*Gilb. Rents*, 189; 1 Th. Co. Lit. 470, n. (I. 1); V. C. 1873, ch. 136, § 2; V. C. 1887, ch. 129, § 2811.)

11<sup>g</sup>. The Assignment of Rents.

Provision is made by statute, in Virginia, for the recovery of rents by the assignee thereof, who may not only bring an action, but may *distrein*, whether he has the reversion or not. (V. C. 1873, ch. 134, § 8; V. C. 1887, ch. 127, § 2788.)

12<sup>g</sup>. At what Place Rents are Demandable and Payable :

w. c.

1<sup>h</sup>. When the Place of Payment, etc., is *Designated*.

At that place. (Gilb. Rents, 88 to 90.)

2<sup>h</sup>. When the Place of Payment is *not Designated*.On the *premises*, at the front door, etc. (Gilb. Rents, 87-'8.)13<sup>g</sup>. Remedies for Rent ; w. c.1<sup>h</sup>. Summary Remedies ; w. c.1<sup>i</sup>. Distress.

The mode of recovering rent by distress will be treated of in connection with remedies, in the fourth book. See 3 Bl. Com. 6 & seq. ; Bac. Abr. Distress ; V. C. 1873, ch. 134, §§ 7 to 15 ; V. C. 1887, ch. 127, §§ 2787 & seq. ; 4 Min. Insts. 99 & seq. ; Geiger v. Harman, 3 Grat. 125 ; Prestons v. McCall, 7 Grat. 121.

2<sup>i</sup>. Attachment.

Attachment is a statutory remedy for rent, *supplemental* to distress, when the tenant has removed (within thirty days), is removing, or is about to remove his property from the leased premises, before the rent *becomes due*, so as to defeat the remedy by distress. The mode of proceeding will be stated, along with the other remedies for rent, in the fourth book. See V. C. 1873, ch. 148, §§ 4, 6 to 10, 12-14, 16 to 19, 21 to 26, 30 to 32 ; V. C. 1887, ch. 141, §§ 2962, 2965 to 2973, 2975 to 2987, 2989, 2990. Daniel on Attachment, 62 & seq. ; 4 Min. Insts. 124 & seq., 476 & seq.

3<sup>i</sup>. Re-entry.

This also is reserved for the fourth book. See V. C. 1873, ch. 134, §§ 16 to 25 ; V. C. 1887, ch. 127, §§ 2796 to 2805 ; 4 Min. Insts. 127, 484 ; 1 Lom. Dig. 710, &c.

4<sup>i</sup>. *Nomine Penæ*.

This is no *remedy*, but a mere *penalty*, in case the rent is not promptly paid. (4 Min. Insts. 127 '8, 485 ; 1 Lom. Dig. 713, &c.)

2<sup>h</sup>. Remedies for Rent, *by Suit* ; w. c.1<sup>i</sup>. Remedies by *Action at Law*.

For these, which will be exhibited more at large hereafter, it will suffice at present to refer to 3 Bl. Com. 231 & seq. ; Gilb. Rents, 93 & seq. ; V. C. 1873, ch. 134, §§ 7, 8 ; V. C. 1887, ch. 127, §§ 2787, 2788 ; 4 Min. Insts. 128 & seq., 485 & seq.

2<sup>i</sup>. Remedy by *Bill in Equity*.

A bill in equity lies to recover rent whenever there is *no adequate remedy at law*. (1 Stor. Eq. §§ 508 & seq. ; Id. §§ 684 & seq. ; Adams' Eq. 237 '8 ; 4 Min. Insts. 134, 490 ; Graham v. Woodson, 2 Call, 249 ; Mulliday v. Machir, 4 Grat. 8.)

## CHAPTER IV.

## OF THE FEUDAL SYSTEM.

3<sup>a</sup>. The Tenures whereby Things Real are Holden.

The third topic in connection with the subject of real property, namely: *the tenures whereby things real are holden*, leads to the exposition of, (1), The feudal system; (2), The *ancient tenures* whereby things real are holden in England; (3), The modern tenures whereby things real are holden in England; and (4), The doctrine touching the tenure of things real in Virginia;

W. C.

1<sup>b</sup>. The Feudal System.

We are to observe under this head, (1), The origin of feuds; and (2), The nature of feuds;

W. C.

1<sup>c</sup>. The Origin of Feuds.

The constitution of feuds had its origin from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who brought it from their own original countries, and continued it in their respective colonies as the most likely means to secure their own acquisitions. To that end large districts were allotted by the conquering general to the superior officers of the army, and by them dealt out in smaller parcels or allotments to the inferior officers and most deserving soldiers. Those allotments were called *feoda*, feuds, fiefs, or *fees*; which last appellation, in the northern languages, signifies a *conditional stipend or reward*, the condition annexed being that the possessor should do service faithfully to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty; and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.

Allotments thus acquired naturally engaged such as accepted them to defend them; and as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all *givers*, as well as *receivers*, were mutually bound to defend each others' possessions. But as that could not be done effectually in a tumultuous, irregular way, government, and to that purpose, subordination, was necessary. Thus, the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's several property, but also in defence of the whole, and of every part of their newly acquired domain; the pro-

duce of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests. (2 Bl. Com. 45 & seq. See also Robertson's Charles V., Intro.; Montesq. Sp. L., B. xxx. & xxxi.; Hall Mid. Ages, c. II.; 1 Spence's Eq. Jurisd. 28 to 103.)

W. C.

#### 1<sup>d</sup>. The Introduction of Feuds into Europe and their Progress.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valor, alarmed all the princes of Europe, that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary, upon the principle of self-protection, to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial* (that is, wholly independent, and held of no superior at all), now they parcelled out their royal territories, or persuaded their subjects to surrender up and re-take their own landed property, under the like feudal obligations of military duty. And thus, in the compass of a very few years, the feudal constitution, or the doctrine of *tenure*, extended itself over all the western world; which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws, in respect to lands, soon drove out the Roman, which had hitherto so universally obtained, and now became for several centuries measurably lost and forgotten. (2 Bl. Com. 47; Hall. Mid. Ages, c. II.; 1 Spence Eq. Jur. 28 & seq.)

#### 2<sup>d</sup>. The Introduction of Feuds into England.

The feudal policy, which had been by degrees established over all the continent of Europe, seems not to have been received in England, at least not universally, and as a part of the national constitution, till the reign of William the Norman. Not that traces are wanting of something similar amongst the Saxons, but not so extensively, nor attended with the rigor that was afterwards imported by the Normans, perhaps because the Saxons were settled in England fully two centuries before feuds arrived at their full vigor and maturity on the continent.

The introduction of the feudal tenures into England by King William does not seem to have been effected *immediately* after the Conquest, nor by the mere *arbitrary power* of the conqueror, so much as by his address, and by adroitly availing himself of the peculiar situation of his Saxon subjects, so as to procure the assent of the common



council of the realm to the innovation. After the fatal battle of Hastings (A. D. 1066), he had of course rewarded his Norman followers with as large donations of land as were at his disposal, which, considering the immense slaughter of English nobility in the battle, must have been great. The fruitless insurrections which followed, and the numerous forfeitures occurring therefrom, still further increased his ability to attach the Norman chiefs to his victorious standard. It is probable, therefore, that within a very few years after his accession to the crown of England, no inconsiderable portion of the landed estates of the kingdom were in the possession of Norman proprietors, who, of course, by their own choice, and as the result of a very natural policy on the part of the king, held, according to that system of feudal military subordination to which both they and he had been accustomed in Normandy.

The consequence was, that the same instinct of *self-preservation* which led to the adoption of the feudal policy on the part of the several states of continental Europe, operated to constrain the great body of the Saxon thanes to *consent* ultimately to exchange their comparatively free, if not *allodial*, land-holdings for the military tenures of the Normans. A feudal lord and his vassals, connected by the mutual obligation of protection and service, acted in vigorous concert, and so far as the feudal *circle* was concerned, made amends for the feeble administration of the public magistrate. By the united force of this martial combination, injuries offered to any of its members were pretty sure to be avenged, and retorted with interest. The *allodial* proprietors, on the other hand, were in some measure aliens and outlaws in the midst of society; and being thus exposed without any adequate legal protection, were fain to take shelter within the feudal association, and rendering their lands to the king, were content to receive them back upon the terms of fealty and homage, preferring the security of vassals to the unprotected dignity of freemen.

Thus it was that William found it no very difficult task to prevail upon an assemblage of his nobility, probably about A. D. 1086, to consent formally to introduce the feudal tenures by law, in consequence of which it became a necessary principle (though in reality a mere fiction) of English tenures, "that the king is the universal lord, and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, and to be held upon feudal services." By this step, indeed, our English ancestors probably designed nothing more than a system of military defence: but the Norman interpreters, skilled in all the niceties of the feudal

constitution, gave a very different construction to the proceeding; introducing upon it not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and incidents, such hardships and services, as were never known to other nations; as if the English had in fact, as well as theory, owed everything to the bounty of their sovereign lord. (2 Bl. Com. 48 & seq.; 1 Th. Co. Lit. 244, n. (3); Mr. Hargrave's note, continued and enlarged upon by Mr. Butler, Id. 913, App'x; Sulliv. Lects. 254, Lect. 27; 1 Reeves' Hist. Eng. Law, 9; 1 Hume's England, App'x I. and II.; Hal. Mid. Ages, c. VIII.; Anglo-Sax. Chron. A. D. 1086.)

## 2<sup>c</sup>. The Nature of Feuds.

The system of feuds was originally not only an ordinance of property, but also, and in its peculiar features, *chiefly*, a political constitution. By degrees, however, as society assumed a more regular form; as the military exigency which had tended to foster the feudal relation became less urgent; and as the progress of trade and industry called into being new wants and new wishes, feuds acquired more and more the character of property, and in the same proportion lost their political importance. Hence, they are to be regarded under the two-fold aspect of *proper* and *improper*;

W. C.

### 1<sup>d</sup>. Proper Feuds.

The grand and fundamental maxim of all feudal tenure is this: that all lands were originally granted out by the sovereign, and are, therefore, holden, either mediately or immediately of the crown. The grantor was called the *lord*, and he retained the ultimate property of the feud or fee; and the grantee, who had only the possession, according to the terms of the grant, was called the feudatory or *vassal*, which was only another name for the *tenant*, or holder of the lands. (2 Bl. Com. 53, &c.; Id. 48 & seq.)

W. C.

### 1<sup>e</sup>. Relation of *Lord and Vassal*.

It implies *fealty* on one side, and *protection* on the other. (2 Bl. Com. 46, 54.)

### 2<sup>e</sup>. Terms of the Feudal Grant.

They were words of gratuitous donation, "*dedi et concessi*," and the grant was perfected by *corporal investiture*, that is, the *open and notorious delivery* of possession in the presence of other vassals; which in the absence of the art of writing, was relied on as affording the best evidence of title. (2 Bl. Com. 53.)

### 3<sup>e</sup>. Incidents of the Feudal Grant.

See 2 Bl. Com. 53; 1 Th. Co. Lit. 252 '3, n. (C.).

W. C.

### 1<sup>f</sup>. Fealty.

This is a solemn *recognition* by the tenant, *of the tenure*, whatever the duration of the estate, and a declaration on oath, of his *fidelity and attachment to the lord*. It is, indeed, the parent of the *oath of allegiance*. (2 Bl. Com. 45, n. (3); Id. 53-4; 1 Th. Co. Lit. 253, n. (C.); Id. 265.)

## 2<sup>d</sup>. Homage.

This was a very humble service of reverence, done to the lord, by the tenant of an *estate of inheritance*, and was merely an *acknowledgment of tenure*,—unless it was *homagium ligum*, which was rendered only to the *sovereign*, and included fealty or allegiance. It is called *homage*, because the tenant's profession to his lord was that "he did become *his man*, from that day forth, of life and limb and earthly honor;" the form of words being *devenio vester homo*. (2 Bl. Com. 45, n. (3); Id. 54: 1 Th. Co. Lit. 252-3, n. (C).)

## 3<sup>d</sup>. Service to be Rendered by the Tenant,—besides *Homage and Fealty*.

See 2 Bl. Com. 54; 1 Th. Co. Lit. 244, &c.;

W. C.

## 1<sup>g</sup>. Suit of Court.

That is, to attend the *lord's court*, to assist as one of the *pares curiæ*, in the trial of causes. (2 Bl. Com. 54.)

## 2<sup>g</sup>. Military Services.

That is, to follow the lord in war, with such followers, and for so many days as were stipulated in the donation. (2 Bl. Com. 54.)

## 3<sup>g</sup>. Agricultural Services.

See 2 Bl. Com. 61, &c.; 1 Th. Co. Lit. 331 to 334.

## 4<sup>g</sup>. The Duration of the Feudatory's Estate.

See 2 Bl. Com. 55.

W. C.

## 1<sup>f</sup>. Estates at the *Will of the Lord*.

At the *first introduction* of feuds, as they were gratuitous, so also they were precarious, and held at the will of the lord, who was the sole judge whether his vassal performed his services faithfully, or not.

## 2<sup>f</sup>. Estates for *One or Two Years*.

This was the *second stage* of the feudal donations, which, when the Teutonic hordes ceased to be migratory, and began to covet fixed habitations, soon tended towards something more permanent. (2 Bl. Com. 55.)

## 3<sup>f</sup>. Estates *for Life*.

As soon as this idea of a more permanent property was introduced, feuds began to be granted *for life*. (2 Bl. Com. 55.)

## 4<sup>f</sup>. Estates by Way of Inheritance; w. c.

### 1<sup>g</sup>. Estates of *Inheritance Qualified*.

That is, the feud was considered to *pass to the heir*, provided the *lord consented* that it should do so; the lord at first making it purely a *matter of favor*, and preferring any of the tenant's children that he thought fit, the child preferred generally acknowledging the lord's good will, in horses, money, arms, and the like, which was called a *relief*, because it *raised up* and re-established the inheritance. (2 Bl. Com. 55-56.)

2<sup>g</sup>. Estates of *Inheritance Unqualified*.

In process of time, feuds came by degrees to be *universally* extended to the vassal's *sons*, or to such of them as the *lord named*; and in this case the form of the donation was *strictly observed*. If limited to the vassal's *heirs*, the feud passed to the *male* descendants *in infinitum*, provided they were of the *blood or lineage* of the first feudatory, but *to no others*. And originally, the descent extended to *all the sons* alike, without distinction of primogeniture; but this proving inconvenient, especially by *dividing the services*, the feud began to descend to the *eldest son*, in *exclusion of all the rest*. (2 Bl. Com. 56.)

5<sup>e</sup>. Qualities of Feuds.

See 2 Bl. Com. 57;

W. C.

1<sup>f</sup>. Lands were *Inalienable by Tenant*, without the *Lord's Consent*.

As the reason for conferring the feud was the *personal abilities* of the feudatory to serve in war, it was not fit that he should be at liberty to transfer the gift, without consulting the lord's wishes. (2 Bl. Com. 57.)

2<sup>f</sup>. Seigniorship *Inalienable by Lord*, without *Tenant's Consent*.

The lord, for obvious reasons, could no more transfer his seigniorship or protection, without the vassal's consent, than the vassal could assign the land without the lord's. (2 Bl. Com. 57.)

2<sup>d</sup>. Improper Feuds.

Improper feuds are such as were bartered or sold to the feudatory for a price; such as were held by a base service, or at least by a service less honorable than the military; such as were held by a money-rent, etc. But when a feud was once created, if no difference were expressed in the creation, it was treated as an *original and proper feud*. (2 Bl. Com. 58.)



## CHAPTER V.

## OF THE ANCIENT ENGLISH TENURES.

2<sup>d</sup>. The Ancient Tenures whereby Things Real were Holden in England.

In reference to the doctrine touching the ancient tenures of England, we are to have regard to, (1), The legal idea, at common law, of the words "tenure," "tenement," "tenant," etc.; (2), The several species of ancient English tenures; (3), The nature and incidents of tenure in *chivalry*, or by *knight service*; and (4), the abolition of military tenures, and of their oppressive incidents;

W. C.

1<sup>st</sup>. The Legal Idea, at Common Law, of the Words "Tenure," "Tenement," "Tenant," &c.

Almost all the real property in England being, by the policy of the law supposed to be granted by, and holden of, some superior lord, in consideration of certain services to be rendered to him by the possessor of the property, the thing *holden* is therefore styled a *tenement*, the possessor thereof a *tenant*, and the manner of their possession a *tenure*.

Such tenants as held *immediately* under the king were called tenants *in capite*, whilst the king was styled *lord paramount* (Fr. *paramont*, above, from *per* or *par*, interior, and *amount* above); and if they let out their lands to subordinate tenants, as they continued still tenants, to the king whilst they were lords to the under-tenants, they received the appellation of *mesne lords* or *mesnes*, and the under-tenants were known as tenants *paravail*, being (according to Lord Coke and Blackstone) they who were supposed to make *avail* or profit of the land. (2 Bl. Com. 59; 2 Com. Insts. 296.) The true etymology, however, which makes it the counterpart of *paramount*, is from Norman French *paraval*, below, (*par* intensive, and *aval*, down lowest), meaning the lowest tenant in the feudal series. (Worc. Webst. in *verbs*; Burr. Law Dict.)

In Virginia, as will be seen, all feudal tenures were abolished by act of Assembly of 1779 (lands having been granted by the crown, and down to that time held in *free and common socage*); and it was declared that all lands claimed in fee-simple should be "held in *absolute and unconditional property*," that is *allodially*. (10 Hen. Stats. 64.) But these feudal terms are still retained to express the same general ideas as in England, only premitting the notion of a feudal superior. Thus, *tenement* in Virginia means a thing which at common law was such; *tenant*, the possessor of a *tenement*; and *tenure*, the manner of a *tenant's* possession.

The words *feudal* and *allodial*, as applicable to the tenure

of lands, being so frequently contrasted, it will be worth while to advert to their *imputed* etymology respectively, *Feodal* is said to be composed of *fee* (meaning, in the Teutonic tongue, a *conditional reward* or *stipend*), and *odh* (meaning, in the same language, *property*), with the adjective termination *al*,\* and *allodial*, of *all* (total) and *odh* (*proprietas*), with the like termination. (2 Bl. Com. 45, n. f; Broekhaus' Convers. Lexic. *Feudalwesen*.) Thus, *feodal* means belonging to *stipendiary* property, and *allodial* belonging to property held *unconditionally*, in absolute ownership.

## 2° The Several Species of Ancient English Tenures.

The ancient land-tenures of England are prominently distinguished into those where the services are, (1), *Free*, or such as do not mis-become a freeman; and (2), Those where the services are *base*, or such as a serf or villein alone would be willing to render. And whether the services be free or base, they are *in amount* either *certain* or *uncertain*. Accordingly, the classification of the ancient tenures, and, indeed, to a large extent, of the modern ones also, is regulated by these distinctions;

W. C.

### 1<sup>d</sup>. Tenures by *Services Free*.

That is, where the service was such as became a *freeman* to render, as to serve in the wars, to pay money, &c. They were generally *military*, but they might be agricultural or other. (2 Bl. Com. 69, &c.);

W. C.

### 1<sup>e</sup>. Tenures by Free Services, *Certain in Amount*.

The tenure where the services were at once in character *free*, and in amount *certain and determinate*, was called *free socage*. Thus, to hold by fealty and twenty shillings rent, or fealty and three days' ploughing, was a *socage-tenure*. (2 Bl. Com. 60, &c., 79, &c.; 1 Steph. Com. 193; Burr. Law Dict. *Socage*.)

### 2<sup>e</sup>. Tenures by Free Services, *Uncertain in Amount*.

The most conspicuous instance of this manner of tenure was *chivalry* or *knight-service*, wherein the tenant, for every *knight's fee* held by him, was bound, if called upon, to attend his lord in the wars for such term as he should require, *not exceeding forty days*, however, in any one year. (2 Bl. Com. 61 & seq.; 1 Steph. Com. 176-7.)

\* NOTE.—This etymology is not free from objection. It is said that there is no Teutonic dialect in which the word *fee* signifies a *stipendiary reward*. The Anglo-Saxon *feoh* has that meaning only secondarily, its primary signification being *cattle*, and it came to mean *reward* or *fee* not until several centuries after the origin of fiefs. However, that argument is by no means conclusive, since it appears that the word *fiodam* was not introduced until after the eleventh century, the word previously used being *beneficium*. (Gilb. Ten's, 1, n. II.)

The rival etymology (which is sustained by names as respectable as that given in the text), derives *feodal* from the Latin *fide*, because the relation of lord and vassal was one of peculiar and mutual *faith and confidence*.

To this head may also be referred tenure in *frankalmoign* or *free alms*, which is a *spiritual tenure*, in case of lands held by ancient religious corporations, whereby they are bound to pray for the repose of the *soul of the donor*, and of his heirs. (2 Bl. Com. 101.)

2<sup>d</sup>. Tenure by *Services Base*.

That is, where the service was only such as was fit for persons of *servile rank*, and did not become a *freeman* or a *soldier* to perform; *e. g.*, to carry out the lord's manure, etc. (2 Bl. Com. 61.)

W. C.

1<sup>o</sup>. Tenure by Base Services, *Certain in Amount*.

This sort of tenure was known as *villein-socage*, or as *privileged villenage*, the word *villain* indicating the character of the service to be such as only *villeins* or *serfs* would undertake, and *socage* (from Ang.-Sax. *Soc* privilege) importing the *certainty* or fixedness of the *amount*. (2 Bl. Com. 62, 98-9.)

2<sup>o</sup>. Tenure by Base Services, *Uncertain in Amount*.

This tenure is *pure villenage*, and was the least advantageous of all, the tenant, who was in fact a mere bondsman under the designation of *villain*, being obliged to do *whatever was commanded him*, however servile the function, and *without limitation as to amount*. (2 Bl. Com. 61-2.)

The several ancient tenures, therefore, according to the foregoing classification, are as follows :

1. Tenures by *services free*, including—

- 1, Tenures where the amount of the service was ascertained, or tenure in *socage* ;
- 2, Tenures where the amount of the service is not ascertained ; w. c.
- 1, Tenure in *chivalry* ; and
- 2, Tenure in *frankalmoign* ;

2, Tenures by *services base*, including—

- 1, Tenures where the amount of the service, *although base*, is ascertained, or *villein-socage* ; and
- 2, Tenures where the amount of the service is *not* ascertained, or *pure villenage*.

The tenures in *socage* and in *frankalmoign* are modern as well as ancient, and will be fully described in the next chapter, amongst the modern tenures. Of *villain-socage* also, under its modern designation of tenure in *ancient demesne*, and of *pure villenage*, under the denomination of *copy-hold*, something will be said in the same chapter. There remains, therefore, to be discussed just here only the tenure in *chivalry*, or by *knight-service*.

3<sup>o</sup>. The Nature and Incidents of Tenure in *Chivalry*, or by *Knight-Service*.

Tenure in chivalry consists of, (1), Knight-service proper; (2), Grand sergeanty; and (3), Escuage or scutage;

W. C.

1<sup>d</sup>. Tenure in *Chivalry*, or by *Knight-Service* Proper.

This was the first, most universal, and most honorable species of tenure. It was called in Latin *servitium militare*, and in law-French *chivalry*, or *service de chevalier*, and differed in very few points from a pure and perfect feud, being entirely military, and the general effect of the feudal establishment in England. (2 Bl. Com. 62);

W. C.

1<sup>e</sup>. Mode of Granting Lands to be held by *Knight-Service*;

W. C.

1<sup>f</sup>. Words of Grant.

These were words of *pure donation*, "*dedi et concessi*," as in a strict and regular feud. (2 Bl. Com. 63.)

2<sup>f</sup>. Corporeal Possession of the Lands.

Actual delivery of possession, usually called *livery of seisin*, was necessary to the transfer. (2 Bl. Com. 63.)

3<sup>f</sup>. Homage and Fealty.

The grant was perfected by the rendition by the grantee of *homage and fealty*, *fealty* being a solemn oath of *fidelity* to the lord, and *homage* merely an acknowledgment of *tenure*. (2 Bl. Com. 63, 45, n. (3).)

4<sup>f</sup>. Other Military Services.

That is, to serve in the wars when called on by the lord, so that it *did not exceed forty days in the year*, for *each knight's fee* held by the tenant, a knight's fee being estimated at twelve *plough-lands*, and valued (though it varied with the times), *temp.* Edward I. and II., at £20 *per annum*. (2 Bl. Com. 62.)

2<sup>e</sup>. Fruits and Consequences of Tenure by *Knight-Service*.

These were not foreseen by the English people when they admitted the Norman military tenures. They appear to have supposed that, by consenting to admit those tenures, they did nothing more than agree that they held their lands mediately or immediately of the king; that they would be faithful and true to him and his successors; and that they would attend him in his wars for any period of time not exceeding forty days yearly. The other consequences, which proved so oppressive, were fastened upon them by the superior craft of the Norman lawyers. (2 Bl. Com. 63.)

These fruits and consequences are the following, (1), Aids; (2), Relief; (3), Primer-seisin; (4), Wardship; (5), Marriage; (6), Fines for alienation; and (7), Escheat for lack of heirs;

W. C.

1<sup>f</sup>. Aids.



Originally aids were mere benevolences, granted *voluntarily* by the tenant to his lord, in times of difficulty and distress; but in process of time exacted *as a right*. (2 Bl. Com. 63; Gilb. Tenures, Introd. xix., xx.)

w. c.

1<sup>st</sup>. Aids to Ransom the Lord's Person *from Captivity*.

Which was claimed to be the necessary consequence of the proper feudal attachment and fidelity on the part of the vassal.

2<sup>nd</sup>. Aids to make the Lord's Eldest Son a *Knight*.

The ceremony of *knighting* was attended with much pomp and expense, and did not take place until the heir was fifteen years old, and capable of bearing arms. It was, therefore, an occasion when substantial testimonials of attachment on the part of the vassals were peculiarly acceptable.

3<sup>rd</sup>. Aids to provide a *Marriage-Portion* for the Lord's *Eldest Daughter*.

2<sup>d</sup>. Relief.

Relief is a sort of fine or composition with the lord (if the heir was of *full age*, *i. e.*, twenty-one years, at the death of the ancestor), for *taking up* the estate (*relever*), the same being lapsed or fallen by the death of the last tenant. It was £5 for a *knight's fee*, of about £20 *per annum*. (2 Bl. Com. 65.)

3<sup>d</sup>. Primer-Seisin.

Primer-seisin is a sort of additional *relief*, applicable only in case of the king's tenants *in capite*, and when the heir was of *full age*. It was *one year's profits*, or for a reversion, *a half-year's profits*. (2 Bl. Com. 66.)

4<sup>th</sup>. Wardship; w. c.

1<sup>st</sup>. Extent of Lord's Authority, as *Guardian in Chivalry*.

The lord, as guardian in chivalry, had full control of the ward's *person*, and of *all the lands* within the lord's seignior; or if the king were the guardian, of all his lands *every where*. (1 Th. Co. Lit. 152, n. (1).) The design was that the lord should see that the wards "be, in their young years, taught the deeds of chivalry, and *other virtuous and worthy sciences*." (1 Th. Co. Lit. 288; 2 Bl. Com. 67, &c.)

2<sup>nd</sup>. Ouster le Main.

Ouster le main was the delivery of the inheritance out of the guardian's hands, for which *half a year's profits* of the lands were exacted. (2 Bl. Com. 68.)

3<sup>rd</sup>. Knighthood in Case of Tenants *in capite*, or perhaps also in Case of Tenants of Private Persons.

The land held by the tenant must have been at least a *knight's fee*, in order to compel him to receive the

order of knighthood ; but if then he refused, he was subjected to a fine. (2 Bl. Com. 69, and n. (8).)

#### 5<sup>t</sup>. Marriage.

*Maritagium* or *jus maritagii*, is the right of the lord to dispose of his infant ward in marriage, and if the ward refused, (the match being a suitable one, without *disparagement* or inequality), to demand the *value of the marriage* ; that is, as much as any one would *bona fide* give to the lord for such an alliance, the forfeiture *being doubled* if the ward contracted a marriage without the lord's consent. Originally this was confined to the case of *female* heirs, for which there was this much show of reason, that it intimately concerned the lord's interest and safety that his female vassal should marry one *friendly*, and not *hostile* to him. (2 Bl. Com. 70.)

#### 6<sup>t</sup>. Fines for Alienation.

As it was not reasonable nor allowed to a vassal to dispose of the lord's gift to another, and thus substitute a new tenant in his stead, without the lord's consent, the lord, in process of time, made merchandise of his consent, and would give it only when paid therefor. The sum thus paid was called a *fine for alienation*. It was exacted (after the statute *quia emptores*, etc., 18 Edw. I.) of the king's tenants *in capite* alone, and was finally fixed at *one third* of one year's value. (2 Bl. Com. 72.)

#### 7<sup>t</sup>. Escheat for *Lack of Heirs*.

See 2 Bl. Com. 72-3.

W. C.

#### 1<sup>st</sup>. Failure of Heirs, by Reason of *Conviction of Treason or of Felony*.

By conviction of treason or of felony the blood is, at *common law*, attainted and corrupted, so far as to be incapable of transmitting inheritance. (2 Bl. Com. 72-3.)

#### 2<sup>nd</sup>. Failure of Heirs, for *Want of Blood-Relations*, Capable of Inheriting.

See 2 Bl. Com. 73.

#### 2<sup>d</sup>. Tenure by Grand Sergeanty (*Servitium Majus*).

Tenure by *grand sergeanty* was a species of knight-service, so called because, like knight-service proper, the service or render was of a *free and honorable* nature, and *uncertain in amount*, and was attended, for the most part, with similar fruits and consequences as knight-service. The service, indeed, if it savored of war at all, as it did not always do, was not strictly *military*, the tenant's obligation being, not to serve the king *generally* in his wars, but to do some special *honorary service* to him in person : as to carry his banner, his sword, or the like ; or to be his butler, champion, or other officer at his coronation. Tenure by *cornage*, namely, to *wind a horn* when enemies entered the

land, in order to warn the king's subjects, was a species of grand sergeanty. (2 Bl. Com. 73-4.)

3<sup>d</sup>. Tenure by Escuage, or Scutage (*Servitium Scuti*).

This was a tenure where the personal military service stipulated for in the tenure by *chivalry* was, by arrangement between the lord and vassal, commuted for a pecuniary satisfaction, levied by assessments, at so much for every knight's fee. It was called, in Latin, *scutagium*, or *servitium scuti*, from *scutum*, a well-known denomination for money; and in like manner in Norman-French, *escuage*; or, as Littleton, Coke, and Bracton say, because it was the service of the shield, *i. e.*, of arms, being a compensation for actual service. (2 Bl. Com. 74, and n. (15).)

4<sup>th</sup>. The Abolition of *Military Tenures*, and of their *Oppressive Incidents*.

By Stat. 12 Car. II., c. 24 (A. D. 1660), fines for alienation, tenures by homage, knight-service, and escuage, aids for marrying a daughter, or knighting a son, and all tenures of the king *in capite*, were abolished, and all sorts of tenures converted into *free and common socage*, save *frankalmoign*, or free-alm, (a *spiritual* and not a *lay* tenure, the services being *purely religious*, *i. e.*, to *pray for the soul of the grantor after death*), copy-hold, and the *honorary services* of grand-sergeanty. (2 Bl. Com. 77.)

## CHAPTER VI.

### OF THE MODERN TENURES IN ENGLAND AND IN VIRGINIA.

3<sup>b</sup>. The Modern Tenures, whereby Things Real are Holden.

Let us note, (1), The Modern Tenures in England, and (2), The Modern Tenures in Virginia;

w. c.

1<sup>o</sup>. The Modern Land Tenures in England.

The modern land tenures in England include, (1), The socage tenures; (2), Copyhold tenure; (3), Tenure in ancient demesne; and (4), Tenure in frankalmoign. (2 Bl. Com. 78 & seq.)

w. c.

1<sup>d</sup>. The Socage Tenures; w. c.

1<sup>o</sup>. The Characteristic of Socage Tenure.

The characteristic of socage tenure is to have the services or rents *ascertained, and determined in amount*. It is probably derived, not from *soc*, a plough, as Littleton and others suppose (implying originally, only *agricultural* services, therefore), but from Ang. Sax. *Soc*, liberty or privilege. (2 Bl. Com. 80; 1 Steph. Com. 193, and n. (h).)

2<sup>o</sup>. The Several Species of Socage Tenure.

The several species of socage tenure are, (1), Free and common socage; (2), Petit sergeanty (*Servitium parvum*); (3), Burgage tenure; and (4), Gavelkind tenure;

W. C.

1<sup>f</sup>. Free and Common Socage.

Free and common socage is the tenure whereby most of the lands in England are held, since 12 Car. II., c. 24, being characterized by the ascertainment of the rents or services. (2 Bl. Com. 79 & seq.)

2<sup>f</sup>. Petit Sergeanty (*Servitium Parvum*).

Petit sergeanty is a tenure *in capite* (i. e., of the crown), by the service of rendering *annually* some small implement of war, *e. g.*, a bow, sword, lance, &c. (2 Bl. Com. 81; 1 Th. Co. Lit. 388.)

3<sup>f</sup>. Burgage Tenure.

Burgage tenure occurs in ancient *boroughs* (whence its name), and is indeed a *town socage*, a remnant of Saxon liberty. (2 Bl. Com. 82, &c.; 1 Th. Co. Lit. 392.)

“For the greater part,” as Littleton observes, “such boroughs have divers customs and usages which be not had in other towns,” and those customs constitute the distinguishing feature of the tenure. The most usual and noted of these special customs are, (1), The custom of *Borough-English*; (2), The custom of *free-bench*; and (3), The custom *to devise lands* independently of the statute of wills. (1 Th. Co. Lit. 393 & seq.)

W. C.

1<sup>g</sup>. The Custom of *Borough-English*.

This is the most prominent of a number of special customs which affect lands held by *burgage tenure*. It appears to be called *borough-English*, as if in contradistinction to the *Norman* customs. The most remarkable trait connected with *borough-English* is that, on the father's death, the *youngest son*, and not the *eldest*, succeeds to the burgage tenements; for which Littleton gives this reason: because the younger son, by reason of his tender age, is not so capable as the rest to help himself. (2 Bl. Com. 83; 1 Th. Co. Lit. 393, 437.)

2<sup>g</sup>. The Custom (called *Free-Bench*) of *Endowing Widows of all the Husband's Lands*, instead of *One Third*.

See 2 Bl. Com. 84; 1 Th. Co. Lit. 394.

3<sup>g</sup>. The Custom to *Devise Lands* Independently of the Statute of Wills.

After the Conquest and prior to the reign of Henry VIII., disposition of lands by will was not in general permitted, although allowed in Saxon times; a pregnant proof, as Blackstone observes, that the liberties of socage tenure were remnants of Saxon freedom. The general power to devise lands was conferred by Stat. 32 Hen. VIII., c. 5; and prior thereto the only power to devise



lands in England was by virtue of this custom of burgage tenure, or of gavelkind tenure. (1 Th. Co. Lit. 394; Wright. Ten. 172; 2 Bl. Com. 84.)

4<sup>f</sup>. Gavelkind Tenure; w. c.

1<sup>g</sup>. Where *Gavelkind Tenure* Principally Prevails, &c.

In the county of Kent, where the Saxon resistance to the Normans was most obstinate. Hence, it is inferred to have been a Saxon tenure before the Conquest. (2 Bl. Com. 84; but see Id. n. 6; 1 Th. Co. Lit. 435, & n. (H).)

2<sup>g</sup>. The Distinguishing Properties of *Gavelkind Tenure*; w. c.

1<sup>h</sup>. Tenant of Gavelkind Lands may alien *at Fifteen*.

2<sup>h</sup>. The Land is not *Subject to Escheat* for Felony.

The maxim was, "the father to the bough, the son to the plough."

3<sup>h</sup>. *Devisable by Will*, prior to the Statute of Wills, 32 and 34 Hen. VIII.

4<sup>h</sup>. Descends to *all the Sons Together*.

3<sup>f</sup>. The Incidents and Consequences of *Socage Tenure*.

See 2 Bl. Com. 86;

w. c.

1<sup>f</sup>. Marks of the Feudal Origin of *Socage Tenure*.

See 2 Bl. Com. 86;

w. c.

1<sup>g</sup>. Held of a *Superior*.

2<sup>g</sup>. Held by some *Rent or Service*.

2<sup>f</sup>. The Incidents of Socage Tenure.

See 2 Bl. Com. 86-7;

w. c.

1<sup>g</sup>. Aids; w. c.

1<sup>h</sup>. Aids to Knight the Lord's *Eldest Son*.

2<sup>h</sup>. Aids to Marry the Lord's *Eldest Daughter*.

All aids were abolished by Stat. 12 Car. II., c. 24.

(*Ante*, p. 74, 4<sup>e</sup>.)

2<sup>g</sup>. Relief.

Same in character as in knight-service (*Ante*, p. 72, 2<sup>f</sup>), but instead of *one-fourth*, it was *the whole* of one year's rent. (2 Bl. Com. 87.)

3<sup>g</sup>. Primer-Seisin.

Same in character and amount as in knight-service. (*Ante*, p. 72, 2<sup>f</sup>; 2 Bl. Com. 87.)

Primer-seisin was abolished by Stat. 12 Car. II., c. 24.

4<sup>g</sup>. Wardship.

Not for the benefit of the *lord*, nor belonging to him, but for the benefit of the *ward*, and devolving on the next of kin of the infant, who *cannot by possibility inherit* the land. (2 Bl. Com. 87-8.)

5<sup>g</sup>. Marriage.

But for the *exclusive benefit of the infant*. (1 Bl. Com. 88.)

6<sup>g</sup>. Fines for Alienation.

Just as in knight-service. (*Ante*, p. 73, 6<sup>l</sup>; 2 Bl. Com. 89.)

Fines for alienation were abolished by Stat. 12 Car. II., c. 24.

7<sup>g</sup>. Escheat.

Just as in knight-service, except in *gavelkind* lands. (*Ante*, p. 73, 7<sup>l</sup>; 2 Bl. Com. 89.)

2<sup>d</sup>. Copyhold Tenure.

See 2. Bl. Com. 90 & seq.;

W. C.

1<sup>o</sup>. Origin of Copyhold Tenure; w. c.1<sup>l</sup>. Pure Villenage.

From this ignoble origin sprang *copyhold tenure*. (*Ante*, p. 69, 2<sup>o</sup>; 2 Bl. Com. 90; Bac. Abr. Copyhold.)

2<sup>l</sup>. Nature and Origin of *Manors*.

A manor, *manerium* (*a manendo*), because the usual residence of the owner, seems to have been a district of ground held by lords or great personages (whence it is also styled a *barony*, or *lordship*), who were accustomed to keep in their own hands so much land as was necessary for the immediate use and comfort of their families, and to let the rest to tenants. (2 Bl. Com. 90; Bac. Abr. Copyhold);

W. C.

1<sup>g</sup>. Demesne Lands (*Dominicales Terra*).

Being those which are occupied and cultivated by the lord himself. (2 Bl. Com. 90.)

2<sup>g</sup>. Tenemental Lands.

Being those let to the lord's tenants. (2 Bl. Com. 90.)

W. C.

1<sup>h</sup>. Boc-Land.

Land held *by deed*, at certain rent, and not differing essentially from *free socage* land. (2 Bl. Com. 90.)

2<sup>h</sup>. Fole-Land.

Land held *by no assurance in writing*, by persons in the condition of *villains*, and resumable originally at the lord's pleasure. (2 Bl. Com. 90.)

W. C.

1<sup>i</sup>. Villeins *Regardant*.

Villeins annexed to and passing with the soil. (2 Bl. Com. 93.)

2<sup>i</sup>. Villeins in *Gross*.

Annexed to the *lord's person only*. (2 Bl. Com. 93.)

These *fole-land* tenants came ultimately to the sure and stable tenure by *copy of court roll*—that is, at the *will of the lord*, but his will to be determined only according to the *custom of the manor*, as evidenced by the *copy of the rolls*, or records, of the *manorial court*.

The original tenure was neither feudal, Saxon, nor Norman strictly, but mixed of them all, and probably somewhat Danish in its constitution. (2 Bl. Com. 92.)

3. The Court-Baron, or Manorial Court.

A court-baron was incident to every complete manor. Every lord or baron was empowered to hold such a domestic court for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or *hommage* (that is, two *freehold* tenants at least), the manor itself (that is, the manorial privileges attached to the estate) are, for the most part, lost. (2 Bl. Com. 90, 91, & n. (14).)

2<sup>e</sup>. The Essential Principles of *Copyhold Tenure*.

See 2 Bl. Com. 97;

W. C.

1<sup>l</sup>. Lands must be *Parcel of a Manor*.

2<sup>l</sup>. Lands must have been Demised *Immemorially* by *Copy of Court Roll*.

3<sup>l</sup>. Mode of Admittance to a Copyhold Estate.

See 2 Bl. Com. 97, n. (22), &c.

3<sup>e</sup>. The Quantity of Interest which may be Held by a *Copyhold Tenant*.

In those manors where the custom has been to permit the heir to succeed the ancestor in his tenure, the estate is styled a *copyhold of inheritance*. In others, where the lords have been more vigilant to maintain their rights, they remain copyholds *for life only*. (2 Bl. Com. 97.)

4<sup>e</sup>. The Fruits and Appendages of Copyhold Tenure;

W. C.

1<sup>l</sup>. Fealty.

Belongs to copyhold, as to all *feudal tenures*, except estates *at will*. (1 Th. Co. Lit. 675; 2 Bl. Com. 97.)

2<sup>l</sup>. Services.

Including *rents*, belong to copyhold as to other tenures. (2 Bl. Com. 97.)

3<sup>l</sup>. Relief.

Belongs to copyholds of *inheritance*. (2 Bl. Com. 97; Bouv. Law Dict. *Relief*.)

4<sup>l</sup>. Wardship.

Devolves on the lord, but for the *ward's benefit*. (2 Bl. Com. 98.)

5<sup>l</sup>. Fines for Alienation.

Must be *reasonable*, if the amount is not fixed by the custom of the manor. (2 Bl. Com. 98, & n. (25).)

6<sup>l</sup>. Escheat.

Belongs to copyholds of *inheritance*. (2 Bl. Com. 97.)

7<sup>t</sup>. Heriots.

A right arising out of a *Danish custom*, whereby the lord, on the tenant's death, was entitled to take his *best beast*, or other chattel. (2 Bl. Com. 97, 422, & seq.)

3<sup>d</sup>. Tenure in *Ancient Demesne*.

Originally, *villein-socage*. (2 Bl. Com. 98; *Ante*, p. 70, 1<sup>e</sup>.)

W. C.

1<sup>e</sup>. Origin of Tenure in *Ancient Demesne*.

Tenants hold (or did originally hold) of the *Crown*, by *fixed and determinate services*, but of an humble and menial character. (2 Bl. Com. 99.)

2<sup>e</sup>. The *Interest of Tenants* in *Ancient Demesne*.

They have an interest equivalent to a *freehold*. (2 Bl. Com. 100.)

3<sup>e</sup>. Incidents of Tenure in *Ancient Demesne*.

See 2 Bl. Com. 100.

W. C.

1<sup>t</sup>. Right of Tenants to *Try their Titles* in a court of their own, called a "*Court of Ancient Demesne*."

2<sup>t</sup>. Tenants are exempt (as being *Tenants of the Crown*) from Tolls, Taxes, Serving on Juries, &c.

3<sup>t</sup>. Tenants pay *Determinate Rents*.

4<sup>t</sup>. The Tenure is a Species of Copyhold, and Lands are conveyed, as in that, *by Surrender*.

4<sup>d</sup>. Tenure in *Frankalmoign*, or *Free Alms*.

A *spiritual tenure*, in case of ancient religious corporations, to pray for the repose of the *soul of the donor*, and his heirs! (2 Bl. Com. 102.)

4<sup>e</sup>. The Tenure of Lands in *Virginia*; W. C.1<sup>d</sup>. Tenure of Lands in Virginia prior to May, 1779.

They were universally held (by the terms of the royal grants) in "*free and common socage, as of the king's manor of East Greenwich*."

2<sup>d</sup>. Tenure of Lands in Virginia since May, 1779.

The tenure has been *allodial*, and discharged of all *quit-rents*, etc., which may have been reserved by the crown grants. (10 Hen. Stats. 64.)

4<sup>a</sup>. Estates in Things Real.

Estate (*status*) signifies the *condition, relation, or circumstance* in which the owner stands with regard to his property. And to ascertain this with precision, estates may be considered, *first*, with regard to the *quantity of interest* the tenant has in the tenement; *secondly*, with regard to the *qualifications of interest* which may exist in reference thereto, *by condition* or otherwise; *thirdly*, with regard to the *time of enjoyment*, whether in *presenti* or in *futuro*; and *fourthly*, with regard to the *number and connection* of the tenants. (2 Bl. Com. 103.)

W. C.



1<sup>b</sup>. The *Quantity of Interest* which may be had in Things Real.

The quantity of interest which may be had in things real, consists of, (1), Estates of freehold: and (2), Estates less than freehold:

W. C.

1<sup>c</sup>. Estates of Freehold.

An estate of *freehold* (*liberum tenementum*), or frank-tenement, is an estate of *indeterminate duration*, other than an estate at will, or by sufferance; *e. g.* an estate in fee-simple, an estate for life, an estate until W returns from Europe, an estate *durante viduitate*, an estate during coverture, etc. (Bract. Fol. 27; 1 Th. Co. Lit. 621, and n. (C.))

It derives its name from the fact that it was esteemed the only estate worthy of a *freeman's* and a *soldier's* acceptance.

Freeholds at common law could be created, or conveyed, only by actual corporal *delivery of the possession* by the grantor to the grantee, which solemnity was known as "*Livery of Seisin.*" Hence, lands, as to the immediate freehold thereof, were said to *lie in livery*;

Estates of freehold are either, (1), Of inheritance, or (2), Not of inheritance:

W. C.

## CHAPTER VII.

### OF FREEHOLD ESTATES OF INHERITANCE.

1<sup>d</sup>. Freehold Estates of Inheritance.

These are such freehold estates as, upon the death of the tenant, will or may go to his nearest kindred, whom the law appoints to be *his heirs*.

They are of four kinds, namely: (1), Estates in fee-simple absolute; (2), Estates in fee-qualified; (3), Estates in fee-conditional; and (4), Estates in fee-tail;

W. C.

1<sup>e</sup>. Estates in *Fee-simple Absolute*.

The discussion of estates in fee-simple absolute leads us to observe, (1), The extent of interest possessed by the owner of such estates; (2), The technical words needful to create an estate in fee-simple; and (3), The incidents belonging to such an estate;

W. C.

I. Extent of Interest *Possessed by the Owner* of the Fee-simple Absolute.

An estate in fee-simple is the entire and absolute pro-

perty of the subject-matter, and, therefore, when one grants such an estate, he can make no further disposition of the property (save by way of *substitution*), for he has already granted the whole and entire interest that it is possible for him to have, and consequently nothing remains in him. The substitution of another estate for a fee-simple is at *common law* practicable only where the fee-simple is a *future and contingent* estate, and happens *never to have vested*; in which case another estate, a fee-simple for example, may be substituted in its room. This is known as the doctrine of *concurrent fees*, or of *remainders limited upon a contingency in a double aspect*, or of *remainders upon a double contingency*. Thus, if a conveyance be made to A for life, remainder, if A should die in B's life-time, to B and his heirs, and in case B should die in A's life-time, to A and his heirs, B and A would each have fee-simple estates, but contingent ones by way of remainder, so that A's fee-simple is to take effect only in case B's *fails to vest*. (Lodgington v. Kime, 1 Ld. Raym. 203; Doe v. Burnsell, 6 T. R. 30; Hawk. Abr. 36, n. (76).) By conveyances operating under the Statutes of Wills (V. C. 1873, ch. 118, § 2; V. C. 1887, ch. 112, § 2512), or of Uses or of Grants (V. C. 1873, ch. 112, §§ 14, 4; V. C. 1887, ch. 107, §§ 2426, 2417), such substitutions of one fee-simple for another may be made even after the first is vested. It may be divested upon a subsequent contingency, and the property be transferred to another person in fee-simple, the *rationale* of which will be explained in a subsequent connexion. (2 Th. Co. Lit. 87, n. (L.) 27, 768; Butler's note, II.; Fearn's Rem. 399 & seq. & n (d); Post, Chaps. X., XI.)

But a fee-simple may be variable as to place, and also as to person: of which Sir Edward Coke gives three instances, namely: (1), Where a meadow of eighty acres has been used time out of mind, to be divided between certain persons, so as yearly to assign and lot out to each their respective portions, sometimes in one part of the meadow, and sometimes in another; (2), Where a partition is made between two co-parceners (or joint heirs) of one and the self-same land, that the one shall have the land from Easter until Lammas to her and to her heirs, and the other shall have it from Lammas\* till Easter to her and her heirs; or the one shall have it the first year and the other the second year, *alternis vicibus*, etc.; and (3), Where two co-parceners have two several manors by descent, and they make partition, that the one shall have the one manor for a year, and the other, the other manor for the same year, and after that year, then she that had the one manor shall have the other, *et sic*

\* NOTE.—*Half-mas*, 1st August: *loaf-mas*, feast of first fruits.

*alternis vicibus*, forever. (1 Th. Co. Lit. 505, &c., & n. (X).) And Mr. Preston reconciles this seeming incongruity by observing that the estate is permanent, as to the duration of the interest, though it shifts as to the possession. Each party in each of the instances has an *estate*, which has continuance at all times. His right to the *possession* is indeed constantly fluctuating, but his *estate* is always the same; and he has, at all times, a present fixed right of present or future enjoyment. (1 Prest. Est. 257-'8.)

W. C.

- 1<sup>st</sup>. Legal Import of the Words "*in Fee*," and "*Seised in his Demesne, as of Fee*."

The words "*in fee*," according to their *original* signification, are the same as *in fide*, or *in feudo*, and import an estate held *feudally of some superior*, in whom, according to the fundamental idea of feuds, resides the ultimate property of the land, the *dominium directum*, the tenant having only the usufruct, or *dominium utile*. Hence the strongest and highest estate in lands, which at common law any subject could have was expressed by the words, "he is seised thereof *in his demesne, as of fee*." It is his demesne, *dominium*, or property, since it belongs to him and to his heirs forever; yet this *dominium*, property or demesne, is strictly not absolute or allodial, but qualified or feudal; it is his demesne, but *as of fee*. (2 Bl. Com. 105.)

But whilst the primary use of the word *fee* was in contradistinction to *allodium*, or absolute property, the English lawyers for more than a century have not employed it generally in this sense, having nothing to do with *allodium*, and, therefore, no occasion to contrast the two modes of ownership; but they use it particularly to express the *continuance or quantity* of estate. A *fee*, therefore, in general, signifies an *estate of inheritance*: being the highest and most extensive interest that a man can have in a feud; and when the term occurs simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a fee, or fee-simple), it is used in contradistinction to a *fee-conditional*, or *fee-tail*, etc., importing an absolute inheritance, clear of any condition, limitation or restriction to particular heirs, but descendible to the *heirs general*. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man. (2 Bl. Com 106.)

In Virginia the same nomenclature prevails for the opposite reason. Our lawyers have no occasion to employ the word *fee* in its primary sense of contrast with *allodium*, since our lands are all allodial, and we have nothing to do with feudality; and so we use it as in modern times it is used in England, merely to express, when standing alone,

or with the adjunct *simple*, an absolute and unqualified *estate of inheritance*, the largest which it is possible for any one to have. (1 Th. Co. Lit. 488, 491; 1 Lom. Dig. 14, &c.)

In this sense, unless otherwise expressed, the word *fee* will be hereafter used; but it should be observed that it is not usual to say of an *incorporeal subject*, that the owner is seised of it *in his demesne as of fee*, but only that he is seised *as of fee*, for the owner hath no *dominium*, demesne, or property in the *thing itself*, but only a *right* derived out of it. (2 Bl. Com. 106.)

## 2<sup>g</sup>. The Fee, or *Inheritance*, being in *Abeysance*.

That is (as the word signifies) in *expectation*, remembrance, and contemplation in law; there being no person *in esse* in whom it can vest; though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus in a grant to John for life, and afterwards *to the heirs* of Richard, the *inheritance* is plainly granted neither to John, nor to Richard, nor can it vest *in the heirs* of Richard till his death, *nun nemo est hæres viventis*; it remains therefore, according to Littleton and earlier writers, including Blackstone, in waiting or *abeyance*, during the life of Richard. (2 Bl. Com. 107; 3 Th. Co. Lit. 102-3.)

Mr. Fearn, however, considers that the inheritance can in no case be properly said to be *in abeyance*, but that it remains *in the grantor*, or in the case of a will, in the *devisor's heirs*, until the contingency occurs on which it is to vest. (2 Bl. Com. 107, n. (8); Fearn's Rem. 351, 360, 363; *Post*, —, Ch. XI.)

## 3<sup>g</sup>. The *Freehold* being in *Abeysance*.

This, at common law, is *never admitted*, at least by the *act of the party*, for two reasons: 1st, That if it were allowed, there would be none to render the military services; 2dly, That there would be none to sue or to be sued for the title during such abeyance. (2 Bl. Com. 107, n. (7); 3 Th. Co. Lit. 102-3, n. (G).) But by the statutes of uses, wills and grants, which dispense with actual livery of seisin, a conveyance of the freehold to take effect *in futuro*, does not put the freehold in abeyance, but leaves it still in the grantor, and is therefore freely allowed.

## 2<sup>d</sup>. The Technical Words necessary to Create an Estate in Fee-simple; w. c.

### 1<sup>g</sup>. The Technical Words necessary, *at Common Law*, to Create a Fee-simple; w. c.

#### 1<sup>h</sup>. The Technical Words necessary in Conveyances *Inter Viros*; w. c.

#### 1<sup>i</sup>. Conveyances to *Natural Persons*.

The words proper to convey a fee-simple, are "*to the*



*grantee and his heirs.*" The word "*heirs*" is indispensable, at common law, in order to create *any estate of inheritance*, a principle which is a relic of that feudal strictness which required that the form of the donation should be punctually pursued, lest the lord be construed to give more than he designed. (2 Bl. Com. 107-'8; 1 Th. Co. Lit. 493.) And the word does not only extend to the immediate heirs, but, unless qualified by the context, it takes in the most remote, born and to be born, *in infinitum*. In that particular, therefore, the word is strongly contrasted with *children* or *sons*, which for the most part, apply to and embrace descendants only, and descendants in the *first degree*. The word *heirs* extending thus to an indefinite succession of persons, is denominated a word of *limitation*, having the effect to vest nothing in the heirs, but to mark out the *limits* of the ancestor's estate as an estate of inheritance. The words *children* or *sons*, on the other hand, do not in general enlarge nor affect the ancestor's estate, but are said to be words of *purchase*, vesting a new estate in those persons. (*Post*, p. 351; 2 Th. Co. Lit. 145, n. (P.); Lewis Bowles' Case, 11 Co. 80 a; Fearn's Rem. 149 & seq., 153; Loddington v. Kime, 1 Ld. Raym. 203; S. C. 1 Salk. 224; Backhouse v. Wells, 1 Eq. Abr. 184, pl. 27; Moon v. Stone, 19 Grat. 328-'9.)

But as the word *heirs* may be so qualified by the context as to show that an unlimited succession was not designed (as when the conveyance or devise is to A and his *heirs now living*, *Post*, p. 351), and so become for the nonce a word of *purchase*, so the words *child*, *children*, *sons* or *daughters*, which are generally words of purchase, may, *in a will* (but not in a *deed*), appear by the context, or by the attendant circumstances, to be designed to embrace the whole succession of descendants indefinitely, and will then become, for that occasion, words of *limitation* and not of purchase. Thus a devise to A *and his children and their heirs*, if A has children *at the time* of the devise, is a *joint estate in fee-simple in A and those children*; but if A have no children *at the time of the devise*, the obvious intent of the testator can only be effected by supposing that he used the word *children* in the sense of *issue*, and so, in order to accomplish the intent, A would take *by implication*, such as is allowed in wills, an *estate-tail*. In *deeds*, however, such an implication is not admissible, so that were it a feoffment, or other conveyance *inter vivos*, instead of a *devise*, to A and his children and their heirs, the whole property, in the case last supposed (when A has no children at the time of the conveyance), would vest in

A in fee-simple. For the conveyance, being intended to operate *in presenti*, can pass nothing to a non-existent person, and it cannot create a remainder in the children, because that is not consistent with the intent. (1 Th. Co. Lit. 496; 2 Redf. Wills. 14 & seq.; Wild's Case, 6 Co. 17 a & b; Stevens v. Lawton, 1 Cro. (Eliz.) 121; Frederick v. Frederick, Id. 334; Crone v. Odell, 1 Ball. & Beat. 459; Oates v. Jackson, 2 Str. 1172; Thomason v. Anderson, 4 Leigh, 122; Moon v. Stone, 19 Grat. 328.)

What is meant by the *time of the devise* is not quite settled. It seems, however, to be the better doctrine that we are to understand by it, not the *date* of the devise, but the period when it is *to take effect*, whether that be the death of the testator, or a time subsequent to that. (2 Lom. Ex. 29, 30, 23, 24; Buffar v. Bradford, 2 Atk. 220; 2 Jarm. Wills, 75, 307, 312; Gilmore v. Severn, 1 Bro. C. C. 582; Prescott v. Long, 2 Ves. Jr. 690; Barrington v. Tristram, 6 Ves. 345; Crone v. Odell, 1 Ball. & Beat. 459; Hamlett v. Hamlett, 12 Leigh, 350, 357, 369; Brent v. Washington, 18 Grat. 528-9.)

It may be proper to add that a devise or grant to A *and his children*, supposing that there are children living then, or at testator's death, creates a *joint-tenancy* in A and those children; a construction which is said to have prevailed ever since Wild's Case, 6 Co. 17 a & b. (Cook v. Cook, 2 Vern. 545; Buffar v. Bradford, 2 Atk. 221; Read v. Willis, 1 Collier (28 Eng. Ch.), 87; Morton v. Tewart, 2 Yo. & Coll. Ch. (21 Eng. Ch.) 81 '2; Wilson v. Maddison, Id. 375; Pyne v. Franklin, 5 Sim. (9 Eng. Ch.) 458; De Witte v. De Witte, 11 Sim. (34 Eng. Ch.) 41; Paine v. Wagner, 12 Sim. (35 Eng. Ch.) 188.)

## 2<sup>d</sup>. Conveyances to Corporations.

If the corporation be *sole*, the word *successors* is *proper*, and perhaps *required*; whilst if aggregate, that word is frequently less important; for although without it the conveyance is *only for life*, yet corporations are, or may be, of *perpetual duration*. (2 Bl. Com. 109.)

## 2<sup>h</sup>. Technical Words Necessary in Conveyance of Fee-simple by Devise.

No *technical* words are required. The *intent* only is regarded. The testator being generally *improvisus consilii* in making his will, it was necessary to choose in this, as in many other particulars, between frustrating most devises for want of the proper technical words, and dispensing with technical expressions and the *certainty* thereby endangered. The law chose the latter alternative, whether wisely or not, as a general rule, in view of the uncertainty and litigation which has ensued in the interpretation of

wills, may admit of question. (2 Bl. Com. 108, & n. (11).)

2<sup>g</sup>. Technical Words required *in Virginia* to Create a Fee-simple.

Words of inheritance were first dispensed with in Virginia by act of 1785, taking effect 1st January, 1787, the phraseology being in substance the same with the existing statute, viz.: "Where any real estate is conveyed, devised or granted to any person, without any words of limitation, such devise, conveyance or grant shall be construed to *pass the fee-simple* or other the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance or grant." (V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420.)

3<sup>g</sup>. The Incidents Belonging to *Estates in Fee-Simple*.

The incidents which belong to an estate in fee-simple, at common law, may be enumerated thus: (1), Unlimited power of alienation; (2), Descendible to the *heirs general*; (3), Subject to dower and curtesy respectively; (4), Liable to the debts of the deceased owner; and (5), Forfeiture for treason or felony. (1 Th. Co. Lit. 506, and n. (Y).)

W. C.

1<sup>g</sup>. Unlimited Power of *Alienation*.

Yet not so as to forbid *reasonable* restriction in point of *time* or *persons*, and complete restriction in case of *corporations*, at least in general, because they are created for specific purposes, and such restrictions tend to confine them within the limits prescribed. (2 Th. Co. Lit. 25-27; 1 Com. Dig. 334 '5; 4 Kent's Com. (12th ed.) 131, & n. 1; *Stuyvesant v. Mayor of N. York*, 11 Pai. 414; *Southard v. Central R. R. Co.* 2 Dutch (N. J.) 13; *Grissom v. Hill*, 17 Ark. 483; *Atto. Gen'l v. Merrimac, &c., Co.* 14 Gray (Mass.) 556; *Warner v. Bennett*, 31 Conn. 468; *French v. Quincy*, 3 Allen (Mass.) 9; *Penn. R. R'd Co. v. Parke*, 42 Penn. 31; *Post*, p. — & seq., Chap. VIII.)

2<sup>g</sup>. Descendible to the *Heirs General*.

3<sup>g</sup>. Subject to Dower and Curtesy.

But both curtesy and dower may be *prevented*, or having accrued, may be *barred* by sundry devices, which will be treated of in connection with those subjects. (*Post* pp. — 167 & seq.; 2 Bl. Com. 137, n. (30); 2 Th. Co. Lit. 292, n. (1); 1 Bright's H. & Wife, 516 & seq.)

4<sup>g</sup>. Liable to the Debts of the *Deceased Owner*.

At common law, lands of a decedent are liable only to debts of *record* and of *specialty* (*i. e.*, *under seal*), binding the heirs *expressly*; in Virginia they are liable to *all debts*. (V. C. 1873, ch. 127, §§ 3 to 7; V. C. 1887, ch. 120, §§ 2665 to 2670; 2 Bl. Com. 465, n. (36); Bac. Abr. Heir, &c. (F).)

5<sup>th</sup>. Liable to Forfeiture, at Common Law, for Treason or Felony.

For *treason*, forfeiture is for ever: for *felony* other than treason, for the life of the felon, and a year and a day afterwards. (2 Bl. Com. 267 '8; 4 Do. 381, 385 '6.)

In Virginia there is no forfeiture of estate for crime. (V. C. 1873, ch. 195, § 5; V. C. 1887, ch. 190, § 3883.)

By the constitution of the United States no attainder of treason shall work corruption of blood, or forfeiture of estate except during the life of the person attainted. (U. S. Const. Art. III., § iii., 2.) And previous to 1860, it was provided by law, that no conviction or judgment for treason, murder, piracy, etc., should work corruption of blood, or any forfeiture of estate. (1 Bright. Dig. 221.) But of late, forfeitures for crime have been multiplied vastly, chiefly in connection with rebellion. Thus, all property, real and personal, employed for *insurrectionary purposes*, or abandoned by the owner, etc., is liable to forfeiture. (2 Bright's Dig. 199 & seq.; Rev. Stats. U. S. § 5308; Alexander's Cotton, 2 Wal. 403; Union Ins. Co. v. U. States, 6 Wal. 765; Armstrong's Foundry, 6 Wal. 769; Morris' Cotton, 8 Wal. 511; Confiscation Cases, 7 Wal. 454; U. States v. Anderson, 59 Wal. 56, 66-7, 69 to 71; The Confiscation Cases, 20 Wal. 92.)

## 2<sup>o</sup>. Estates in *Fee-qualified*.

This estate is often called a *base fee*. It may, by its limitation, *continue for ever*, but it has a qualification annexed, in pursuance of which it may be determined *at any moment*. The examples usually given are, "grant to A and his heirs, tenants of the manor of Dale;" "to A and his heirs, citizens of Virginia;" "to A and his heirs, as long as Z has heirs of his body;" "to a town, as long as the judicial proceedings of the town shall be held on the premises," etc. Of this sort was the remarkable instance mentioned by Lord Hale, of the grant by Henry III., of the manor of Penrith and Sourby "to Alexander, king of Scotland, and his heirs, *kings of Scotland*;" Alexander, having daughters, one of whom was married to the Earl of Hunt, died, leaving no heir who was king of Scotland; whereupon it was adjudged that the estate was determined, and that the manor reverted to the heir of Henry III., who was Edward I., and he recovered it accordingly. (2 Bl. Com. 109; 1 Th. Co. Lit. 507, and n. (36); 1 Prest. Est. 431; Bolling v. Mayor of Petersburg, 8 Leigh, 224.)

Mr. Preston mentions many instances of estates of this character, calling them, however, *determinable fees*, whilst he would assign the designation of *qualified fees* to such interests as are given to a man and *certain of his heirs*, and not extended to all of them generally, nor confined to the issue



of his body; *i. g.*, a limitation to a man, and his *heirs on the part of his father*. (1 Prest. Est. 432, 449; 1 Washb. Real Prop. 63, &c.) The preferable designation, however, is believed to be *qualified fees*.

In this class of estates the owner in possession has, as long as the estate continues, the same right in respect to it which he would have if he were a tenant in fee-simple absolute. (1 Washb. Real Prop. 63.)

### 3°. Estates in *Fee-conditional*.

See 2 Bl. Com. 110; 1 Prest. Est. 477, &c.

Let us note, (1), The terms whereby estates in fee-conditional are created; (2), The effect of birth of issue in case of fee-conditional; and (3), The objections on the part of the nobility to fees-conditional;

W. C.

#### 1°. Terms whereby Estates in Fee-conditional are Created.

The terms proper to convey a fee-conditional at common law, or a fee-tail in pursuance of the statute, 13 Edw. I., c. 1, presently to be mentioned, are "*to the grantee and the heirs of his body*." The reader must observe, therefore, that it is not *every condition* that constitutes a *fee-conditional*, which must not be confounded with the more comprehensive phrase of *an estate on condition*. For a *fee-conditional* there is but one condition, namely: that the grantee shall have issue, or *heirs of his body*. It is created, as we have seen, by a conveyance to the "grantee and the *heirs of his body*," or to the "grantee and the *heirs male of his body*," etc. (2 Bl. Com. 110; 1 Prest. Est. 477.)

#### 2°. Effect of *Birth of Issue*, in Case of *Fee-conditional*.

The birth of issue being the *fulfilment of the condition*, the estate ought, upon general principles, to become absolute immediately, for *all purposes whatsoever*. But the doctrine of the law is, that it thereby becomes absolute for only *three purposes*, namely: to aliene in *fee-simple*, to *charge with rents*, commons, and other incumbrances, and to *forfeit for treason*. If, however, none of these things happen *before the issue dies*, the estate loses its absolute character, and becomes again purely conditional, as before; and if the grantee finally dies without issue, the land reverts to the grantor, whilst if he dies leaving issue, it descends to such issue as a *fee-conditional*. (1 Th. Co. Lit. 508-9; 2 Bl. Com. 111, and n. (17).)

Under this state of the law, the grantee of a fee-conditional would of course, as soon as he had fulfilled the condition by having issue, hasten to convey the land in fee-simple to a friend, and take back from him immediately a like estate, thus frustrating the family objects of the limitation, and defeating the possibility of *reverter* in the donor. (2 Bl. Com. 111; 1 Lom. Dig. 25-26.)

3<sup>d</sup> Objections on the Part of the Nobility to Fees-conditional.

The nobility objected to this power of alienation on the part of the donee, upon his having issue. It did indeed affect their order injuriously, in two ways. The nobles were, for the most part, the *donors* of these estates, and by according to the donees the power to aliene, the possibility of *reverter* was rendered so remote as to be valueless. And when an improvident noble was a donee, it put it in his power to aliene the family estates, if he were so minded, to the detriment of the power and aggregate influence of the order. The nobility, therefore, under the plausible pretext of giving effect to the *will of the donor*, proposed and carried (they themselves then constituting the whole legislature) the famous statute, Westm. II., 13 Ed. I., c. 1, known as the statute *de donis conditionalibus*, which, in the case of *lands and tenements*, converted *fees-conditional* into estates *in fee-tail*. (2 Bl. Com. 111-'12.)

4<sup>e</sup>. Estates in *Fee-Tail* ; w. c.1<sup>st</sup>. Estates in Fee-tail in England.

See 2 Bl. Com. 112 & seq. ; 1 Th. Co. Lit. 512 & seq. ; 1 Lom. Dig. 24 & seq. ;

w. c.

1<sup>st</sup>. Original of *Estates-Tail*.

They originated, as has been just said, in the Stat. Westm. II., 13 Edw. I., c. 1 (A. D. 1285), known as the statute *de donis conditionalibus*, which provided that the *will of the donor*, according to the form in the deed of gift, plainly expressed, *should be observed*, so that they to whom any *tenement* was given on such condition should have no power to aliene the same, but that it should *remain to their issue* after their death, or if there were no issue, should *revert* to the donor or his heirs. (1 Lom. Dig. 26 ; 2 Bl. Com. 112 ; 1 Th. Co. Lit. 512 & seq.)

The name, *fee-tail*, or *feodum talliatum*, was borrowed from the feudists, amongst whom it signified any *mutilated* or *truncated* inheritance, from which the heirs general were cut off ; or, as some say, because ownership of the subject was *cut into two parts*, one going to the donee and the heirs of his body, and the other remaining as a reversion in the donor. (2 Bl. Com. 112, n. (m) ; 1 Th. Co. Lit. 512, 525-'26.)

2<sup>d</sup>. Things which may be Entailed.

The word employed in the statute of entails, is *tenement* which means any *corporate* inheritance which *may be holden* of a superior, and also includes all inheritances issuing out of, concerning, annexed to, or exercisable within the same, *c. q.*, not only lands, but likewise rents of all kinds, commons, offices, dignities, uses and other profits granted out of lands, or

which concern certain places; all of which may be entailed under the statute. But mere *personal chattels* are not entailable, nor is an *annuity*, nor a *corody*; but these latter, if limited to the *heirs of the body*, remain still *fee-conditional*. (2 Bl. Com. 113, and n. (18); 1 Th. Co. Lit. 514-’15; Id. 219, 213; 3 Th. Co. Lit. 105-’6, and n. (10).)

### 3<sup>g</sup>. The Several Species of Estates-Tail.

The will of the donor was made so supreme by this statute, that not only might he limit the inheritance to the special heirs of the *donee's body*, but he was permitted to prescribe *both parents*, and even *the sex also* of the heirs; an allowance which was peremptorily denied in the case of a fee-simple estate, a limitation to the *heirs male* of the grantee being simply without effect as to the word *male*, and amounting to nothing but an ordinary fee-simple, descendible to the heirs general. (2 Bl. Com. 113 to 115; 1 Th. Co. Lit. 547.) Estates-tail, therefore, are either, (1), Estates-tail *general*; or (2), Estates-tail *special*;

W. C.

#### 1<sup>h</sup>. Estates-Tail General.

Estates-tail are called *general*, when only *one parent* by whom the heirs are to be procreated is named. (1 Bl. Com. 113-’14.)

W. C.

##### 1<sup>i</sup>. Where the *Sex of the Heirs* who are to Inherit is not Designated.

*e. g.* Where lands are given to A and the *heirs of his body*. (2 Bl. Com. 113-’14.)

##### 2<sup>i</sup>. Where the *Sex of the Heirs* who are to Inherit is Designated; W. C.

#### 1<sup>k</sup>. Estates in Tail-Male General.

*e. g.* Where lands are given to A and the *heirs male of his body*. (1 Th. Co. Lit. 530; 2 Bl. Com. 114.)

#### 2<sup>k</sup>. Estates in Tail-Female General.

*e. g.* Where lands are given to A and the *heirs female of his body*. (1 Th. Co. Lit. 551; 2 Bl. Com. 114.)

#### 2<sup>h</sup>. Estates-Tail Special.

Estates-tail are called *special*, when *both parents* are named by whom the heirs who are to inherit shall be procreated. (2 Bl. Com. 113-’14.)

W. C.

##### 1<sup>i</sup>. Where the *Sex of the Heirs* who are to Inherit is not Designated.

*e. g.*, Where lands are given to A and the *heirs of his body, on Mary his now wife to be begotten*. (2 Bl. Com. 114; 1 Th. Co. Lit. 541.)

##### 2<sup>i</sup>. Where the *Sex of the Heirs* who are to Inherit is Designated; W. C.

1<sup>k</sup>. Estates in Tail-*Male* Special.

*e. g.*, Where lands are given to A and the *heirs male of his body, on Mary his now wife to be begotten.* (2 Bl. Com. 114.)

2<sup>k</sup>. Estates in Tail-*Female* Special.

*e. g.*, Where lands are given to A and the *heirs female of his body, on Mary his now wife to be begotten.* (2 Bl. Com. 114.)

4<sup>s</sup>. The Technical Words Necessary to Create an Estate-Tail; *w. c.*1<sup>b</sup>. Technical Words Required for a Fee-Tail, in Conveyances *Inter Vivos*, Generally.

The word "*heirs*" is in general necessary in order to create this estate as well as any other estate of *inheritance*, but no particular or special words of *procreation* are requisite; that is, words showing of *whose body* the issue is to be begotten. It is enough if it appears with reasonable certainty from whom the issue to inherit the estate is to spring. (2 Bl. Com. 114-'15; 1 Th. Co. Lit. 520-'21.)

2<sup>b</sup>. Technical Words Required for a Fee-Tail *in Wills*.

Any words in a will, manifesting the *testator's intent* are sufficient for *inheritance*, as well as for *procreation*. Thus, a grant *by deed* to a man and his *issue of his body*, or to his issue, or to *his seed*, or *offspring*, will pass only an estate *for life*, for lack of the proper words of inheritance; but in a *will* the same words will create an *estate-tail*. (2 Bl. Com. 114-'15; Doe v. Collis, 4 T. R. 299; Knight v. Ellis, 2 Bro. C. C. 578.)

3<sup>b</sup>. Technical Words Required upon a Gift in *Frank-Marriage*.

A gift *in frank-marriage* is where tenements are given by one man to another, together with a wife who is a near kinswoman of the grantor, to hold in *frank-marriage*. The word *frank-marriage* alone, *ex vi termini*, supplies not only words of *descent*, but of *procreation* also, and expresses that the donees shall have the tenements to them and the heirs of their two bodies begotten; that is, they are tenants in *special tail*. Such donees are liable to no service but *fealty* until the *fourth degree* of consanguinity between the issues of the donor and donee be past. (2 Bl. Com. 115; 1 Th. Co. Lit. 521 & seq.)

5<sup>s</sup>. The Mischiefs of Estates-Tail and Efforts to Defeat Them.

The statute *de donis*, in creating estates-tail, and tying them up in families (a *family law* it was well called), proceeded upon the insidious suggestion that a man ought to be permitted to do what he will *with his own property*; whereas the idea of property being deduced from the general welfare of the whole, it is a perversion and abuse to



allow it to be used in such a way as to *injure* the community. It is certainly remarkable that so astute a prince as Edward I., who has not improperly been styled the *English Justinian*, did not anticipate the mischiefs likely to ensue, as well to the Crown as to the body of society, and refuse to sanction an enactment conceived exclusively in the interests of the nobility: and it may be conjectured that some motives not traceable in history influenced him to consent to what he could hardly have approved. (1 Th. Co. Lit. 510-11, 512-13; 1 Lom. Dig. 27.)

W. C.

1<sup>h</sup>. The Mischiefs of Estates-Tail; w. c.

1<sup>i</sup>. Children were Rendered Insubordinate.

Because they knew they could not be set aside as heirs. (2 Bl. Com. 116.)

2<sup>i</sup>. Farmers (*i. e.*, Lessees) were Ousted of their Leases.

The lands going, at the tenant's death, *to the issue, per formam doni*. (2 Bl. Com. 116.)

3<sup>i</sup>. Creditors were Defrauded of their Debts.

The lands being limited by the statute *to the issue*, to have allowed them to be *charged with debts* would have frustrated the intent of the legislature. (2 Bl. Com. 116.)

4<sup>i</sup>. Treasons were Encouraged.

Estates-tail being not liable to forfeiture longer than *for the tenant's life*. (2 Bl. Com. 116.)

5<sup>i</sup>. Public Prosperity was Checked by the *Inalienability* of Lands so Limited.

Experience has demonstrated that the prosperity of a community depends much upon the freedom with which property may be transferred from hand to hand. Any obstructions to such transfer are therefore hindrances to the general well-being. Hence, to make any considerable proportion of the property of a country by law inalienable, whether under the pretext of conforming to the will of him who granted it, or of securing a support for families, will be found to exert a demoralizing influence upon society, to paralyze its energies, and to destroy its thrift.

2<sup>h</sup>. The Efforts made in England to Defeat Estates-Tail.

The mischiefs above stated were early acknowledged, but it was difficult to devise an available remedy. The legislative power, at the time of the enactment of the statute *de donis*, was wholly in the hands of the Barons, the right of the Commons, or representatives of the people, to participate even in the granting and *levying of aids* being recognized and finally established only in 23 Ed. I. (A. D. 1295); and their admission to a share in the business of *general legislation* not being distinctly ac-

knowledge until 15 Ed. II. (A. D. 1322). The influence of the Commons' house of parliament, however, was far inferior to that of the Lords for more than two centuries afterwards—indeed, until after the accession of the Stuart family (A. D. 1603). Hence, as the Lords would not willingly consent to the repeal or material modification of a law which ensured so much to the grandeur and power of the nobility, no expectation could be cherished of relief from entails by the interposition of the legislature. (1 Spence's Eq. Jurisd. 268 ; 2 Bl. Com. 116.)

The statute, too, had been drawn with such consummate skill and foresight (the draftsmen being fairly entitled to the eulogy of one of the old judges, in the Year Books, "they were sage men who made this statute"), that despite the wishes of the judges and of the people, no opening was found whereby to impair its efficiency for nearly two hundred years, until 12 Edw. IV. (A. D. 1473). (2 Bl. Com. 116-117.)

W. C.

#### 1<sup>i</sup>. Taltarum's Case (A. D. 1473).

In Taltarum's case it was decided by the judges that the claim of the issue, as well as of the donor, to an estate-tail, might be *barred* by means of a *common recovery*. It had, indeed, been repeatedly intimated from the bench, even so early as the reign of Edward III., about one hundred years before, that a bar might be effected upon the same principle, but it was never carried into execution ; and perhaps would not have been in Taltarum's case had not the reigning monarch (Edward IV.) countenanced it, with a view to arrest the frequent treasons which were continually occurring during the disputes between the houses of York and Lancaster, he having observed how little effect attainders had on families whose estates were protected by the sanctuary of entails. (2 Bl. Com. 117.)

What common recoveries are, and why they should operate as a *bar* to an entailed estate—that is, effectually to convey the same, discharged of the claims of the issue, etc., under the statute *de donis*—cannot be made entirely intelligible just now. Let it suffice at present to say that a common recovery is a collusive suit instituted by the intended grantee against the proposed grantor, ostensibly to recover the lands by a prior title, in which, by collusion, a *recovery* is had upon a pretended previous claim of the grantee to the ownership of the property. Its force and effect are due, in part, to the fact that it *purports* to be the judgment of a competent court, ascertaining the title to be in the grantee ; but it also owes a part, and a great part, of its effect to another

doctrine—that of *reverter to warranty*—the explanation of which must be postponed. (*Post* p. 1005; 2 Bl. Com. 117; *Id.* 357 & seq.; Wms. Real Prop. 43-4.)

2. Statute 26 Hen. VIII., c. 14 (A. D. 1535).

The armor of these "*coarcted inheritances*," as an old writer quaintly styles them, having been thus pierced by Taltarum's case, attacks were soon made upon them in other particulars. That rapacious tyrant, Henry VIII., finding them to obstruct the forfeitures for treason, which he was desirous to exact from his subjects, "had the *abilities*," says Blackstone (that is, by his wonted arts of bullying and threats), to procure a statute (26 Hen. VIII., c. 13), whereby *all estates of inheritance* (under which general words estates-tail were covertly included), are declared forfeitable for high treason. (2 Bl. Com. 118.)

3. Statute 32 Hen. VIII., chaps. 28 and 36 (A. D. 1541).

By the first of these statutes certain leases made by tenant in tail, not tending to the prejudice of the issue, were allowed to bind the issue; and by the second, a *fine*, duly levied by the tenant in tail, was declared to be a *complete bar to the estate-tail*, as to all persons claiming under it, which was directly contrary to the express provisions of the statute *de donis*. (2 Bl. Com. 118.)

A *fine* is another device in the nature of a *collusive suit*, used in England as a kind of peculiarly solemn method of assurance of lands. It differs from a common recovery in being *ostensibly a compromise* of the suit, and a *judgment* entered accordingly, instead of a *recovery* of the subject. (*Post*, pp. 1004 & seq.; 2 Bl. Com. 348 & seq.; Wms. Real Prop. 46-7.)

4. Statute of Charitable Uses, 43 Eliz. c. 4 (A. D. 1601).

An appointment by tenant in tail to a *charitable use*, conveys the entailed estate without fine or recovery. (2 Bl. Com. 119.)

5. Statutes of Bankruptcy, 21 Jac. I., c. 19, &c. (A. D. 1624).

6. Statute 3 & 4 Wm. IV., c. 74 (A. D. 1833).

Abolishing fines and recoveries, and allowing an estate-tail to be conveyed by simple deed enrolled in the court of chancery. (Wms. Real Prop. 46; 2 Bl. Com. 115-16; 1 Th. Co. Lit. 349, n. (P.); 1 Lom. Dig. 30.)

- 6<sup>g</sup>. Incidents to Fee-tail.

See 2 Bl. Com. 115-16; 1 Th. Co. Lit. 549, n. (P.); 1 Lom. Dig. 30.

W. C.

- 1<sup>h</sup>. Tenant in Tail is *Sine Impetitione Vastii*.

That is, is not chargeable for *waste*, or permanent in-

jury to the inheritance, as by pulling down houses, cutting down forests, etc. (1 Lom. Dig. 30; 2 Bl. Com. 115-'16.)

2<sup>h</sup>. Estate-Tail is Subject to Dower and Curtesy.

See 2 Bl. Com. 116.

3<sup>h</sup>. Estate-Tail is *Barrable*.

Estates-tail, which might formerly have been barred (*i. e.*, conveyed in fee-simple, so as to *bar the issue*, etc.), by fine, by common recovery, and by lineal warranty, with assets, may, since 3 and 4 Wm. IV. (A. D. 1833) be conveyed by a *simple deed*, enrolled in the court of chancery. (2 Bl. Com. 116; Wms. on Real Prop. 44.)

4<sup>h</sup>. Estate-Tail is not Subject to *Merger*.

That is, if the estate-tail falls into the same hands with the fee-simple, it is not *merged* or sunk in the fee-simple, but remains still a distinct estate. This is for the *benefit of the issue*, and, therefore, the proposition is not applicable to an *estate tail after possibility of issue extinct*.

5<sup>h</sup>. Estate-Tail is Forfeitable for Treason.

By 26 Henry VIII., c. 13. (2 Bl. Com. 118.)

6<sup>h</sup>. Subject to the Bankrupt Laws.

By Stat. 21 Jac. c. 19. (1 Bl. Com. 119.)

7<sup>g</sup>. Existing State of Entails in England.

Estates-tail are made much more easily and cheaply alienable than formerly, namely, by *simple deed* executed by the tenant in tail, and enrolled in chancery, but *not by will*. Guards, however, are provided to protect the rights of certain parties whose interests might suffer by so facile a mode of alienation. (Williams' Real Prop. 49 & seq.)

2<sup>f</sup>. Estates in Fee-Tail in Virginia; *w. c.*

1<sup>g</sup>. Doctrine of Estates-Tail in Virginia, *prior to 1705*.

Estates-tail subsisted in Virginia until 1705, just as in England, and with the *same incidents*, but with much more favorable regard than they enjoyed in the mother country. (1 Lom. Dig. 30.)

2<sup>g</sup>. Doctrine of Estates-Tail in Virginia, *Between 1705 (3 Anne), and 1734*.

By act of assembly of 1705, it was declared that estates-tail should be no longer subject to be barred by fine or by common recovery, but by *special act of assembly alone*, in each case. (3 Hen. Stats. 320.) And so enamored of entails were our fathers, that by act of 1727, *slaves* were allowed to be entailed with lands. (4 Hen. Stats. 225.)

3<sup>g</sup>. Doctrine of Estates-Tail in Virginia, *Between 1734 and 7th October, 1776*.

By act of assembly of 1734, the stringency of the law of



1705 was somewhat relaxed, it being enacted that lands entailed, which were ascertained by an inquisition by a jury, upon a writ in the nature of a writ of *ad quod damnum*, to be of less value than £200 sterling, and not adjacent to other entailed lands of the same owner, might be aliened by the proprietor, by deed of bargain and sale, reciting the inquisition, etc. (4 Hen. Stats. 400.)

48. Doctrine Touching Estates-Tail in Virginia, *since 7th October 1776.*

By act of assembly of that date, reciting that the perpetuation of property in certain families by means of estates-tail, "is contrary to good policy, tends to deceive fair traders, who give credit on the visible possession of such estates, discourages the holder thereof from taking care of and improving the same, and sometimes does injury to the morals of youth, by rendering them independent of and disobedient to their parents," and that the former method of docking such estates-tail by special acts of assembly in each case, employed very much of the time of the legislature, and the same, as well as the method of defeating such estates, when of small value, was burdensome to the public, as also to individuals, it was provided that all estates-tail in lands or slaves then existing, or thereafter made, whether in possession, or in reversion or remainder *after the determination* of any estate *for life*, or any *lesser estate*, should be deemed estates *in fee-simple*. (9 Hen. Stats. 226; V. C. 1873, ch. 112, §.9; V. C. 1887, ch. 107, § 2421; 1 Lom. Dig. 31 & seq.)

Very soon a case was presented where an estate-tail had been limited by way of remainder, *after a fee-tail*, and not after an *estate for life*, or a *lesser estate*, and the court found itself obliged to pronounce the statute not applicable thereto, and that the remainder (the preceding estate-tail having failed to take effect), was, notwithstanding the statute, *still an estate-tail*. (Roy v. Garnett, 2 Wash. 9.\*) In 1785, therefore, an amended act was passed (to take effect 1st January, 1787), declaring, in terms substantially the *same as the present statute*, that "every estate in lands so limited, that *as the law was on the 7th day of October, in the year 1776*, such estate would have been an estate-tail,

\*The limitation in Roy v. Garnett, which was contained in the will of the testator, who died prior to 1776, was essentially to J for life, remainder to M in fee, in trust for J's surviving sons in tail male equally to be divided, remainder to J in tail male, remainder ultimately to M in fee. J died in 1780, *never having had a son*, but leaving a daughter, whose children and heirs claimed the land in question, insisting that J's estate-tail male in remainder was, by the act of 1776, converted into an estate in fee-simple, and, therefore, passed to his daughter and heir at his death. It was determined, however, that the statute above cited, abolishing estates-tail, applied only to estates-tail *in possession*, and those in *reversion or remainder*, after an estate *for life*, or a *lesser estate*; and as J's estate in tail male was a remainder after the *estates-tail in his sons*, it was not within the statute.

shall be deemed an estate in fee-simple." (V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107, § 2421; 12 Hen. Stats. 156-157.)

This statute converts into *fee-simple* nothing but what the statute *de donis* had previously converted into *fee-tail*; and as the latter statute is applicable only to *tenements*, whatever is not a tenement is not affected by *either of the statutes*, but remains as at common law it was. Hence, the limitation of an *annuity*, or of a *corody*, to the grantee and the heirs of his body, is not a *fee-tail* under the statute *de donis*, nor, consequently, a *fee-simple* under our statute, but it is a *fee-conditional*, as at common law. (1 Tuck. Com. 13 (B. II.); 1 Th. Co. Lit. 514 & seq.; 2 Bl. Com. 113. But see 1 Lom. Dig. 32.)

Further explanation upon the subject of the statutes abolishing entails, and upon kindred topics, will be given in connection with Chapter XI., upon the time of the enjoyment of estates. See 1 Lom. Dig. 34 & seq.; 1 Tuck. Com. 155 & seq.; B. II.; *Post* pp. 450 & seq.

## CHAPTER VIII.

### OF FREEHOLDS NOT OF INHERITANCE.

#### 2<sup>d</sup>. Freehold-Estates, *not of Inheritance*.

The several freehold-estates, not of inheritance, embrace, (1), Estates for life, etc., *created by act of the parties*; (2), Estates-tail, *after possibility of issue extinct*; (3), Estates by the curtesy; and (4), Estates in dower;

W. C.

#### 1<sup>e</sup>. Estates for Life, etc., *created by Act of the Parties*.

It must be remembered that a *freehold* is an estate of *indeterminate duration*, and that there is a great multiplicity of *conventional* estates of freehold, *not of inheritance*, which are included under this head, which are not, *in terms*, estates for life. Yet, because the time for which they will endure being uncertain, they may, by possibility, last for life, they are, rather vaguely and inaccurately, denominated *life-estates*. (2 Bl. Com. 120.)

As the class of estates now under consideration arises *by act of the parties*, so the three remaining classes of freeholds, not of inheritance, arise *by act of the law*.

These estates for life, like inheritances, are of feudal nature, and are conferred by the same feudal solemnities, the same livery of seisin being requisite (whence *all freeholds of lands* are said to *lie in livery*), the same fealty demandable, and such rents and services as the lessor and lessee may have mutually agreed on. (2 Bl. Com. 120.)

Let us notice, (1), The modes of creating conventional life-estates, etc.; (2), The duration of such estates; and (3), The incidents belonging to life-estates generally;

W. C.

1<sup>f</sup>. The Modes of Creating Conventional Life-Estates, etc.

Conventional life-estates may be created *in express terms*; or they may arise by *construction of law*;

W. C.

1<sup>g</sup>. Conventional Life-Estates Created *in Express Terms*.

Conventional life-estates created in express terms are either, (1), Estates for the tenant's own life; or (2), Estates for the life of another, that is, *pur auter vie*;

W. C.

1<sup>h</sup>. Estates for *Tenant's own Life*.

*e. g.* A conveyance to A *for life*,—grants being always construed most favorably to the grantee, and an estate for the grantee's *own life* being, *as to him*, more beneficial than for any one else's life. That principle, however, may be neutralized by another, namely, that a construction is to be avoided which will *work a wrong*. Hence, if the grantor had only an estate for *his own life*, a conveyance to A *for life* would be construed to mean for the *life of the grantor*; for if interpreted to be *for his life*, as in the former case, it would be more than the grantor has to bestow, which would be against law. (1 Th. Co. Lit. 620; 2 Bl. Com. 120.)

Estates for life being always estates of *freehold*, cannot at *common law* be created without *livery of seisin*. By statute it is otherwise, both in England and in Virginia, as by the statutes of Uses, of Wills, and of Grants. (2 Bl. Com. 120; Wms. Real Prop. 164; V. C. 1873, ch. 112, §§ 14, 4; Id. ch. 118, §§ 2, 3, 4; V. C. 1887, ch. 107, §§ 2426, 2417; Id. ch. 112, §§ 2512, &c.)

2<sup>h</sup>. Estates *pur Auter Vie*.

That is, *for another's life*;

W. C.

1<sup>i</sup>. Nature of Estate *pur Auter Vie*.

The parties to such an estate are the *tenant* and the *cestui que vie*. Thus, if a conveyance be made to A for the life of Z, the estate vested in A is *pur auter vie*; A is the *tenant*, and Z the *cestui que vie*. (2 Bl. Com. 120.)

2<sup>i</sup>. Doctrine of Occupancy at Common Law; w. c.

1<sup>k</sup>. Common or General Occupancy.

Where the tenant for life dies, living *cestui que vie*, there is a portion of the estate still remaining, namely; for the residue of the term of *cestui que vie's* life, which at common law cannot pass to the tenant's *heirs*, because it is not an *estate of inheritance*, nor to the *personal representatives*, because it is a *freehold*, and per-

sonal representatives do not succeed to freeholds. The land thus not passing to either the real or personal representatives of the deceased tenant, and no other owner being by the law appointed to take it, it is, at common law, open to the *common or general occupancy* of any one who shall *first possess himself* of it. (2 Bl. Com. 259; 1 Th. Co. Lit. 625-'6, and n. (H.)

## 2<sup>k</sup>. Special Occupancy.

The doctrine of *common or general occupancy* is so hostile to the peace and good order of society, that, in default of legislative interposition, the courts adopt a construction where there is an express limitation of an estate *pur auter vie*, to the grantee *and his heirs*, that the heirs shall take, not indeed *as heirs*, but as *special occupants*, thus obviating the mischiefs of common occupancy whenever the parties were prudent enough to insert such a limitation. (2 Bl. Com. 259; 1 Th. Co. Lit. 326, and n. (I).)

By *parity of reason* (leaving authority out of view), it would seem that an estate limited to A *and his heirs*, until Z should return from abroad, was of like character with that just described, and that both might be properly denominated *descendible freeholds*; the estate, in the case last stated, passing to the *heirs of A*, if he dies before Z returns, and upon Z's death without returning, *ceasing altogether*.\* So, in like manner, a limitation to A *and his heirs*, as long as a tree shall stand, would seem to be not properly an estate of inheritance, not even a *base fee* (since it cannot by possibility *continue for ever*), but only a *descendible freehold*, enuring after A's death to his heirs, by the effect of the *special* limitation, until the tree falls, and then coming to its appointed end. The adverse authorities, however, are too numerous and strong to admit of this construction, and both the cases supposed are to be deemed estates of inheritance; that is, according to the ordinary nomenclature, *base or qualified fees*, and according to the more rigorous analysis of Plowden and Preston, *determinable fees*. (Walsingham's Case, 2 Plowd. 557; 1 Prest. Est. 432, 441.)

## 3<sup>l</sup>. Doctrine of Occupancy in Virginia by Statute.

Any estate for the life of another shall go to the *personal representative* of the party entitled to the estate, and be assets in his hands, and be applied and distributed *as the personal estate* of such party. (V. C. 1873, ch. 126, § 18; V. C. 1887, ch. 119, § 2653; Wms. Real Prop. 52.)

\*See Lord Coke's clear statement of the nature of a *descendible freehold* in Seymour's Case, 10 Co. 98 a.



2<sup>g</sup>. Conventional Life-Estates, by *Construction of Law*.

Thus, a conveyance "during coverture," "*durante viduitate*," until Z returns from abroad, etc., is of this character. So also is a conveyance at *common law* to a grantee, without a limitation *to his heirs*. (2 Bl. Com. 121.)

It is otherwise in Virginia by statute, in the case last stated. The statute provides that where any real estate is conveyed, devised, or granted to any person without any words of limitation, such conveyance, etc., shall be construed to *pass the fee-simple*, or other the *whole estate* or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the conveyance. (V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420.)

2<sup>f</sup>. The Duration of Conventional Life-Estates; w. c.

1<sup>g</sup>. Conventional Life-Estates Granted for the Life of a Named Person.

They endure as long as *the life* for which they are granted: the life being liable at common law to be determined by a *civil*, as well as a *natural* death. Hence, grants are often made "for the term of a man's *natural* life." In Virginia no such distinction exists. There is with us no *civil* death. (2 Bl. Com. 121; *Ante*, B. I., p. 68, 1<sup>g</sup>; 367; *Post*, 652.)

2<sup>g</sup>. Conventional Life-Estates, Determinable upon a Contingency, *during the Life for which they are Granted*.

*e. g.* Conveyances "*durante viduitate*," "during coverture," "until Z returns from abroad," etc. In all these cases, the estate, while it subsists, is reckoned an *estate for life*, because it may by possibility last so long, although it is liable to be determined sooner, upon the contingency indicated. (2 Bl. Com. 121.)

3<sup>f</sup>. The Incidents belonging to Life-Estates.

The incidents to be named belong as well to estates created *by law* (namely, estates-tail after possibility of issue extinct, estates by the curtesy, and estates in dower), as to those now under consideration, arising by *act of the parties*. (2 Bl. Com. 122.)

We are to suppose, first, that there are special covenants in the grant or lease; and secondly, that there are no such special covenants.

w. c.

1<sup>g</sup>. Where there are Covenants in the Grant or Lease.

The incidents will be controlled by the special covenants, for *modus et conventio vincunt legem*. (2 Bl. Com. 122; 1 Th. Co. Lit. 624.)

2<sup>g</sup>. Where there are no Special Covenants in the Grant or Lease to the Contrary.

The incidents belonging to life-estates, where there are

no special covenants to the contrary, are as follows, namely: (1), Estovers; (2), Emblements; (3), Forfeiture of estate for certain defaults of the tenant; (4), Liability of the tenant for waste; and (5), Liability of the under-tenant of tenant for life for rent.

W. C.

### 1<sup>b</sup>. Estovers.

Estovers, as has been seen in connection with *common* of estovers, are supplies of *wood and timber* for various agricultural purposes connected with the use of the premises. The Norman-French designation is *estovers* (Fr. *estoffer*, to furnish,) and the Anglo-Saxon *botes*, (Ang. Sax. *bot*, amends or compensation.) The right to these *estovers*, thus incident to every estate *for life*, (as we shall see they also are to every *estate for years*), unless otherwise stipulated, does not warrant the *selling* of wood or timber by the tenant, nor the commission of any needless destruction in the premises. (2 Bl. Com. 122; 1 Th. Co. Lit. 624; 1 Washb. Real Prop. 99 & seq.)

The student is cautioned against confounding this right to *estovers*, thus belonging in the absence of a contrary stipulation, to every tenant for life or years, (which is an *exclusive right* in such tenant), with the right of *common of estovers*, the owner of which enjoys the *estovers* in common with the proprietor of the land. (2 Bl. Com. 35, n. (27); *Ante*, p. 16.)

W. C.

### 1<sup>i</sup>. House-Bote.

House-bote is wood and timber sufficient to repair the house, and to supply it with *fire wood*—*estoverium edificandi et ardendi*. A supply of fuel alone is styled *fire-bote*. (1 Th. Co. Lit. 624; 2 Bl. Com. 55.)

### 2<sup>i</sup>. Plough-Bote, or Cart-Bote.

Plough-bote, or cart-bote, is a supply of wood for the repair and construction of agricultural implements of all kinds. Lord Coke denominates it *estoverium arandi*. (1 Th. Co. Lit. 624; 2 Bl. Com. 122, 282.)

### 3<sup>i</sup>. Hay-Bote, or Hedge-Bote.

Hay-bote, or hedge-bote, is a supply of wood for the construction and repair of *hedges* and other enclosures. (*estoverium claudendi*), from the rather obsolete English, *hay*, and Ang. Sax. *hæge* or *hoge*, a hedge. (1 Th. Co. Lit. 624; 2 Bl. Com. 122, 282.)

### 2<sup>b</sup>. Emblements.

The doctrine of emblements includes the topics following, namely: (1), The definition of emblements; (2), The common law doctrine of emblements; and (3), The doctrine of emblements by statute in Virginia.

W. C.

1<sup>i</sup>. The Definition of Emblements.

Emblements are fruits of *annual agricultural industry* (*fructus industriales*), for the production whereof art combines *annually* with nature. Hence, wheat, corn and all *cereals*; beans, peas, tares, and other plants of the *cereals species*; hemp and flax, parsnips, carrots, turnips, and other *annual roots*; sainfoin and other *grasses* which are annually renewed; and lastly hops, which though grown on permanent roots, yet require annual training and culture to *produce at all*, come under the description of emblements. But the designation does not include clover or other grasses that endure more than one year, nor the fruits of trees growing upon the land, though planted by the tenant, because he knows when he plants them that they cannot come to maturity and produce their fruit in a single year, to repay the labor bestowed upon their planting and culture. He plants, not in contemplation of present profit, but merely with a prospect of its being useful to himself in a remoter future, and to succeeding tenants. (2 Bl. Com. 122-'3, n. (3); 1 Washb. R. Prop. 102.)

2<sup>i</sup>. The Common Law Doctrine of Emblements.

When a tenant, who *knows not the end of his estate*, sows or plants the land, and before harvest his estate is determined *without his default*, as by the act of God, of the law, or of a third person, he or his personal representative is entitled to the *emblements* then growing, and to free ingress and regress in order to cultivate, reap and carry them away. But he cannot, by virtue of the doctrine of emblements, retain possession of any part of the premises other than the fields which the emblements occupy. (2 Bl. Com. 122 '3; 1 Washb. Real Prop. 102 & seq.);

W. C.

1<sup>k</sup>. Reasons for the Common Law Doctrine of Emblements; W. C.1<sup>l</sup>. Justice.

There is an obvious propriety that he who sows should reap, in order that he may be compensated for the labor and expense of tilling, manuring, and sowing the land. (2 Bl. Com. 122; 1 Washb. Real Prop. 102; 1 Lom. Dig. 41 '2.)

2<sup>l</sup>. Expediency and Public Policy.

In order to encourage husbandry by assuring the fruits of his labor to the cultivator of the soil, thereby leading him, because he sows in hope, to sow liberally; and because he is sure to reap, to cultivate with diligence and thrift. (2 Bl. Com. 122; 1 Washb. Real Prop. 101 '2.)

2<sup>k</sup>. Cases to which the Doctrine of Emblements is Applied.

The principle is, that it shall be applied to all those cases where crops have been *sown by the tenant*, where the determination of the tenancy is *uncertain*, and where it is actually determined *without default of the tenant*, by the act of God, of the law, or of a third person; and it is applicable to no other cases. But the crop must *actually have been planted*, not merely *prepared for*. (2 Bl. Com. 122-3, n. (3); 1 Washb. 103 & seq.) And it must be particularly noted that the doctrine does not warrant the continued occupancy by the tenant of any part of the premises except so much as may be occupied by the growing emblements themselves, as has been above set forth. (*Supra*, p. 102, 2<sup>l</sup>.)

These cases may be classed as follows: (1), Emblements in *conventional* estates for life; (2), In case of estates for life arising by act of the law; (3), In case of under-lessees or assignees of any of the foregoing tenants for life; and (4), In case of tenants at will;

w. c.

1<sup>l</sup>. Emblements in Case of *Conventional Estates* for Life;

w. c.

1<sup>m</sup>. Estates for Life of Tenant Himself, or *pur Auter Vie*.

In the case of a tenant for *his own life*, the emblements belong to his personal representative; and in case of a tenant *pur auter vie*, they belong to the tenant himself. See 1 Lom. Dig. 42; 2 Bl. Com. 122.

2<sup>m</sup>. Estates for Life, Subject to be *Determined on a Contingency*.

*e. g.*, Estates "during coverture," "during the absence of Z abroad," etc. If Z returns from abroad, whereby the tenant's estate is determined, the latter is to have the emblements; and so, if the coverture is ended *by death*, or even *by divorce*, if the divorce arise not from the default of the tenant, as if it were on account of the prior marriage of the other party, or his or her incurable impotency. (1 Lom. Dig. 42.)

2<sup>l</sup>. Emblements in Case of *Estates Arising by Act of the Law*; w. c.

1<sup>m</sup>. Estate-Tail after Possibility of Issue Extinct.

In the case of an *estate-tail after possibility of issue extinct*, the emblements upon the death of the tenant pass to his personal representative. See 2 Bl. Com. 122; *Post*, p. 114.

2<sup>m</sup>. Estates by the Curtesy.



In the case of an estate by the curtesy, the emblements upon the death of the tenant go to his personal representative. See 2 Bl. Com. 122; *Post*, p. 113.

3<sup>m</sup>. Estates in Dower.

At common law no emblements were allowed to the personal representative of a dowress, because she was *presumed* to have gotten the crops growing on her dower-lands at the husband's death. But by statute of Merton (20 Hen. III., c. 2), and by the corresponding statute in Virginia (V. C. 1873, ch. 106, § 14; V. C. 1887, ch. 102, § 2280), emblements of dower-lands shall pass and may be disposed of like those on any other lands held for life. (1 Washb. Real Prop. 103.)

3<sup>l</sup>. Emblements in Case of the Under-Lessees or the Assignees of any of the foregoing Tenants for Life.

These plainly answer to the requirements proposed. Their estates are as uncertain as those from which they are derived, and may as well be determined *without default* of the tenant. Nay, such under-lessees and assignees have this added advantage, namely: that although the tenant for life should determine his estate *by his own act*, and so not himself be entitled to emblements, yet that circumstance will not prevent the *under-lessee* or *assignee* from asserting his claim thereto. Thus, if a tenant *durante viduitate* should under-let, and then marry, though he or she would by the marriage defeat his or her own title to emblements, the under-tenant will not lose his right, he being *in no default*. (2 Bl. Com. 124; 1 Lom. Dig. 42; 1 Washb. Real Prop. 104.)

4<sup>l</sup>. Emblements in Case of Tenants at Will, etc.

Emblements are allowed to tenants at will, and to all other tenants who *know not the end of their term*, and whose estates are determined *without their default*, as above described, except only *tenants by sufferance*, who are in no case *entitled to emblements*, having, indeed, no rightful possession, being only *not trespassers*. (2 Bl. Com. 146; 1 Washb. Real Prop. 103; *Post*, p. 197.)

3<sup>k</sup>. Cases to which (although the estate be of uncertain duration, yet) the Doctrine of Emblements *is not Applied*.

The cases wherein (although the estate be of uncertain duration, yet) the doctrine of emblements is not applicable may be classed thus: (1), Where the tenant knows the end of his term, and yet sows; (2), Where the tenant's estate, although of uncertain duration, is determined by his own act or default; (3), Where,

although the tenant's estate is uncertain in duration, and is determined without his default, yet *he* did not sow the emblements; and (4). Where lands mortgaged are planted, and the mortgage is foreclosed before harvest;

W. C.

- 1<sup>st</sup>. Where the Tenant *Knows the End of his Term*, and yet Sows.

This supposes that the term is *not Viable* to be prematurely determined *by a contingency* before its regular period, and such a case is plainly never within the doctrine of *emblements*. (1 Washb. Real Prop. 103; 2 Bl. Com. 122, and n. (3).)

But in England, and in some of the States of this Union (*e. g.*, Pennsylvania, New Jersey, and Delaware), by the *usage of particular localities*, which is allowed to enter into and form a *part of the contract*, a tenant whose lease is for a fixed period, and who sows with a knowledge that his lease will expire before harvest, may, notwithstanding, be entitled to the crops, and to the incidental privilege, of course, of cultivating, reaping, and carrying them away. This is denominated the doctrine of the *away-going crops*. Although it would be more proper to style it the doctrine of the *right of the away-going tenant* to the crops. (1 Washb. Real Prop. 106; Chit. Cont. 367; Wigglesworth v. Dallison, 1 Dougl. 201, 207, n. (8).)

In Virginia such an usage cannot be referred to in order to entitle the tenant to the growing crop, where the lease is *in writing*, and for a determinate period, elapsed before harvest; not on the ground of *custom* (as a *local law*), because there can be none such in Virginia (as shown, *Ante*, B. I. p. 38, 25); nor on the ground of the usage being in contemplation of the parties in forming their contract, and so proper to be referred to in interpreting its terms, because it is not admissible to explain a *written instrument* by parol evidence. If, therefore, the lease were not *in writing*, *perhaps* the usage might be provable, if it were shown that the parties probably contracted with reference to it. (Harris v. Carson, 7 Leigh, 639; Mason v. Moyers, 2 Rob. 613; Gross v. Criss, 3 Grat. 264.)

- 2<sup>nd</sup>. Where the Tenant's Estate, although of Uncertain Duration, is Determined *by his own Act or Default*.  
*e. g.*, Where tenant *at will* himself determines the will; where tenant, "*durante viduitate*" marries; or where tenant, *during coverture*, commits the act which leads to a dissolution of the marriage by divorce. But the *commencement* of proceedings for divorce by

the aggrieved party would not deprive that party of emblements: for it is the *sentence* which dissolves the marriage, and that is an *act of the law*. (2 Bl. Com. 123, 122, n. (3); 1 Washb. Real Prop. 103; 1 Lom. Ex'ors, 422; Oland's Case, 5 Co. 116.)

- 3<sup>l</sup>. Where, although the Tenant's Estate is *Uncertain in Duration*, and is *Determined without his Default*, yet *he did not Sow* the Emblements.

*e. g.*, A seised of land, sows it, and then conveys it to B for life, remainder to C for life, and B dies before harvest. His executor shall not have the emblements, but they shall go, with the land, to C; and if C also had died before harvest, they would have returned, with the land, to A. (Lom. Ex'ors, 422; Grantham v. Hawley, Hob. 135; 1 Lom. Dig. 42.) Upon like principles, if a woman seised in fee, or for life, sow her land and marry, and her husband die before the crop is severed, she, and not his personal representative, shall have the emblements. (1 Washb. R. Prop. 104.)

- 4<sup>l</sup>. Where Lands Mortgaged are Planted, and the Mortgage is Foreclosed *before Harvest*.

The crops pass (supposing them planted *after the mortgage*), with the land, for the benefit of the mortgagee, whether planted by the mortgagor or his tenant. (1 Washb. R. Prop. 106; Crews v. Pendleton, 1 Leigh, 297.)

This doctrine applies, however, only where the lien involves *an estate in the land*. Hence, a purchaser under a *judgment-lien* is postponed to a tenant who leased the land, and planted it before the sale. (1 Washb. R. Prop. 106; Bittinger v. Baker, 29 Penn. 66.)

- 4<sup>x</sup>. Rent for the Premises in which are the Emblements.

Whether the tenant shall at common law pay rent for the premises occupied by the emblements, is made a query by Plowden (Say A. D. 1560), and the doubt is still unresolved. It would seem the better opinion that, unless the estate is determined by the *act of the lessor* (as in case of an estate at will), the tenant or his executors *shall pay rent*. (2 Plowd. Rep. *Queries*, 44 a, *query* 239; 1 Washb. R. Prop. 105; 1 Lom. Ex'ors, 430.) And in Virginia it is now expressly provided by statute, that the tenant shall pay a reasonable rent for so much land as the emblements occupy, in the same proportion as it shall bear in quantity and value, to the entire premises; and such rent shall be apportioned among the reversioners, if there be more than one, according to their respective interests. (V. C. 1887, ch. 128, § 2807.)

### 3<sup>d</sup>. Doctrine of Emblements in Virginia *by Statute*. Prior to the Code of 1887.

The doctrine of emblements, as it existed at common law, is so just and reasonable, and so well adapted to the varying exigencies of life, as to excite a sentiment of surprise that the legislature of Virginia, generally exercising a wise caution in innovation, should have thought fit to change it. Very material alterations, however, have for many years prevailed amongst us, which even as they existed prior to the Code of 1887 (and they then approximated more to the common law than they formerly did), tended much to perplex the desirable uniformity of the doctrine, without seeming to have any compensating advantage of justice or expediency. (V. C. 1873, ch. 135, §§ 2, 3, 1; 1 Lom. Dig. 43 & seq.; 1 Lom. Ex'ors, 426 & seq.)

Let us note, (1), The several cases contemplated and provided for by the statute; and (2), The prominent diversities between the common law and the statutory doctrine of emblements;

W. C.

#### 1<sup>st</sup>. The Several Cases Contemplated and Provided for by the Statute, Prior to the Code of 1887.

The several cases provided for by the statute are as follows: (1), When an estate of uncertain duration is terminated by the death of the *tenant*, occurring after 1st of March, and before 31st of December; (2), Where such an estate is determined by *any other event*, or at *any other time*; (3), When such an estate is in the hands of an *under-tenant* when it is determined; and (4), When such an estate in the hands of an under-tenant expires *before the 1st of August* in any year;

W. C.

#### 1<sup>st</sup>. When an Estate of *Uncertain Duration* is Terminated by the Death of the Tenant Occurring on or after 1st of March, and before 31st of December; or when, in case of a *Fee-simple*, the Owner, being in Possession, shall die between the same Periods.

The statute enacts that "if any persons having been employed in farming or planting land, whether held for life or *any other interest*, shall die on or after the first of March," his personal representative may, at his discretion, continue to cultivate, or may *lease out the whole of the premises* employed in *farming or planting*, until the last day of December following, and all the emblements *severed before that day* (or doubtless *the rent*, if he shall think fit to lease), shall be personal assets in his hands, deducting taxes and expenses of



cultivation; and out of the general assets of the estate he shall pay to those entitled in reversion or remainder a *reasonable rent*, from the decedent's death to the last day of December, which is to be charged, in preference to all other claims against the estate, on the *profits arising from the land*. (V. C. 1873, ch. 135, § 2.)

Thus, in case of a tenant by the curtesy, or a tenant in dower, or any other tenant for *his own life*, or in case of a tenant for 100 years, if the tenant should *so long live*, supposing the premises to be employed in farming or planting, and the tenant to die on or after the 1st of March, and before the 31st of December in any year, this *statutory rule* would apply, instead of the rule of the common law, in respect to the emblements. And so also the statutory rule would apply where the owner in *fee-simple*, being in possession, died within the period designated.

- 2<sup>1</sup>. When an Estate of *Uncertain Duration* is Determined by *any other Event* than the Death of the Tenant, or at *any other Time* than on or after the 1st day of March, and before the 31st of December.

The *common law doctrine* of emblements prevails in this case. (V. C. 1873, ch. 135, § 3.)

- 3<sup>1</sup>. When an Estate of *Uncertain Duration* is leased to an *Under-Tenant* at the Time when it is Determined.

The under-tenant may *hold the land* (of course making all the profit from it he can) *to the end of the current year of the tenancy*, paying rent therefor, which if reserved *in money* is to be *apportioned* between the tenant of the uncertain interest, or his personal representative, and those who *succeed to the land*. If the rent is reserved *in kind*, the whole is to be paid to the tenant of the uncertain interest, or his personal representative; and he is to pay a reasonable proportion *in money* to those who succeed to the land; such rent being a charge in preference to other claims on the rent received in kind, by the tenant of the uncertain interest, or his representative. And, moreover, such under-tenant is entitled *as at common law*, to the emblements growing on the lands at the *expiration of the uncertain interest*, whether severed during the year or not; but if severed afterwards, the under-tenant *is to pay a reasonable rent* to those who succeed to the land, from the end of the tenancy to the time of severance. (V. C. 1873, ch. 135, § 1.)

It will be observed that this statute does not apply to the *assignee* of an estate of uncertain duration, but to an *under-tenant* only.

- 4<sup>l</sup>. When an Estate of Uncertain Duration, *Let to Another*, Expires *before the 1st of August* in any Year.

The lessee is, in that case, to permit the successor to put in the ground any crop he may desire *after that period*; and if the lessee has prepared the ground for a crop *previous to that period*, the successor shall pay a *reasonable compensation* therefor; and also *for any land* of which the lessee may be deprived by reason of the crop thus put in by the successor. (V. C. 1873, ch. 135, § 1.)

- 2<sup>k</sup>. The Prominent Diversities between the Common Law, and the Statutory Doctrine of Emblements in Virginia; W. C.

- 1<sup>l</sup>. In Respect to the Period of the Year when the Estate is Determined.

At *common law* it is immaterial at what period of the year, or by what event the estate is determined. By *the statute*, the time of year, and the mode of determining the estate, ascertain whether the statutory rule stated above (*Ante*, p. 107-'8, 1<sup>l</sup>, 2<sup>l</sup>), or the common law rule is applicable. (V. C. 1873, ch. 135, §§ 2, 3; *Ante*, p. 107-'8, 1<sup>l</sup> & 2<sup>l</sup>.)

- 2<sup>l</sup>. In Respect to the Extent of the Tenant's Occupancy.

At *common law* the tenant is entitled to possession of only *so much of the premises* as contain the emblements, or indeed, merely to *ingress and regress* to cultivate, etc., the same. By *statute* the *whole tract* is put into his possession to make the most of it he can, even to *plant new crops*, and to use and enjoy the buildings, pastures, meadows, and forests, and, in short, the whole premises, just as before the determination of his estate. (V. C. 1873, ch. 135, §§ 2, 1; *Ante*, p. 107-'8, 1<sup>l</sup>, 2<sup>l</sup> & 3<sup>l</sup>.)

- 3<sup>l</sup>. As between the Tenant for Life, etc., and the Under-Tenant.

At *common law*, no difference as to emblements, is in general made between the case of a person, himself a *tenant for life*, and the case of an *under-tenant*. By *the statute*, a material diversity exists between the two. (V. C. 1873, ch. 135, §§ 2, 1; *Ante*, p. 107-'8, 1<sup>l</sup> & 3<sup>l</sup>.)

- 4<sup>l</sup>. As to the Lessee's Paying Rent.

At *common law*, it seems that the lessee taking the emblements must, in general, *pay rent*, but it is yet a *question*. By *statute*, rent is to be paid in all the cases where the statutory rule applies, and inferentially in *all cases*. (V. C. 1873, ch. 135, §§ 2, 1; *Ante*, p. 107-'8, 1<sup>l</sup> & 3<sup>l</sup>.)

- 5<sup>l</sup>. As to Payment for the Lessee's Preparation of the Land.

At *common law*, no provision is made to pay the tenant for *preparation of the land*, when he has *not sowed*. The *statute* makes such provision, at all events, in case of *under-tenants* of lessees for life, etc., where the estate expires before the 1st of August in any year. (V. C. 1873, ch. 135, § 1; *Ante*, p. 108, 3<sup>l</sup>.)

6<sup>l</sup>. As to the Lessee's Yielding Possession to the Successor.

At *common law*, the tenant is not obliged to give way before the emblements are severed, so as to enable the successor to put in a crop. By *statute*, in case of an *under-tenant* at least, he may be required to relinquish the possession for that purpose, as above stated, where the estate expires before the 1st of August in any year, the successor making proper compensation. (V. C. 1873, ch. 135, § 1; *Ante*, p. 109, 4<sup>l</sup>.)

4<sup>l</sup>. Doctrine touching Emblements in Virginia, by *Code of* 1887.

The Code of 1887 has made judicious changes in the law touching emblements, restoring the simplicity of the common law, with modifications of a highly reasonable character.

The effect will be best understood by a literal transcription of the provisions of the statute, which will be found V. C. 1887, ch. 128:

"Sec. 2806. In all cases the right to emblements shall be *as at common law*.

"Sec. 2807. The tenant who is entitled to emblements, or his personal representative, shall pay a reasonable rent for so much land as the emblements shall occupy, in the same proportion as it shall bear in quantity and value to the entire premises; and such rent shall be apportioned among the owners of the reversion, if there be more than one, according to their respective interests.

"Sec. 2808. If any land has been prepared by the tenant previous to the expiration of the lease, for the purpose of putting a crop into the ground, under such circumstances as would have entitled the tenant or his personal representative to emblements, if the crop had been put in, those who succeed to the land shall pay a reasonable compensation for such preparation.

"Sec. 2809. If there be tenant for life or other uncertain interest in land which is *let to another*, upon the determination of such life or other uncertain interest, the lessee may hold the land to the end of the *current year* of the tenancy, paying rent therefor; the rent, if it be reserved *in money*, shall be apportioned between the tenant for life or other uncertain interest, or his personal representative, and those who succeed to the land. If

rent be reserved *in kind*, it shall be paid to the tenant for life or other uncertain interest, or his personal representative, and the said tenant or his personal representative, as the case may be, shall pay to those who succeed to the land a reasonable rent in money, from the expiration of the life estate or other uncertain interest, to the end of the current year of the tenancy: the rent to be paid to those who succeed to the land shall be a charge in preference to other claims on the rent received in kind by such tenant or his personal representative."

3<sup>b</sup>. Forfeiture of Estate, for *Certain Defaults of Tenant*.

The defaults on the part of the tenant for life, etc., which are liable, at common law, to produce a forfeiture of his estate, are the following, namely: (1), Alienation of an estate greater than the tenant is entitled to convey; (2), Disclaimer by the tenant, in a court of record, of his tenure of the lord; and (3), Claiming in a court of record a greater estate than the tenant is entitled to.

W. C.

1<sup>i</sup>. Alienation of an Estate *Greater than the Tenant is Entitled to Convey*.

Thus, if a tenant for *his own life* alienes by *feoffment*, with livery, *fine*, or *common recovery* (which, because they may thus work a wrong, are called *tortious conveyances*), for the *life of another*, or in *fee-simple*, which are estates greater than he can lawfully make, he thereby forfeits his *particular* estate to him in remainder or reversion. For which two reasons are given: 1st, because such alienation amounts at common law to a renunciation of the feudal connection and dependence, whereby the *right of entry* of the person in remainder or reversion is divested, and turned into a *right of action*, and the forfeiture is exacted *as a punishment* for this great wrong; and 2d, because the particular tenant, by granting a larger estate than his own, has, by his own act *put an end* to his own original interest; and on such determination, the remainderman or reversioner is entitled to enter regularly, as in his remainder or reversion. (2 Bl. Com. 274; 1 Lom. Dig. 820-'21.)

This forfeiture does not ensue in England, if the conveyance were under the statute of uses, or were any other than the *tortious conveyances* mentioned above, because the remainder or reversion is not thereby divested and turned to a *right*, nothing passing but what the grantor had a right to convey. Hence, in Virginia, where it is provided by statute that *no conveyance* shall pass a greater estate than the grantor has a right to pass, this cause of forfeiture is believed no longer to exist. (V. C. 1873, ch. 112, § 7; V. C. 1887, ch. 107, § 2419; 2



Th. Co. Lit. 206-7; Elys v. Wynne & als. 22 Grat. 224.)

- 2<sup>i</sup>. Disclaimer *in a Court of Record, of Tenure of the Lord, by Tenant.*

As where a tenant for life, etc., neglects to render the lord the services or rent due, and upon an action brought to recover them, disclaims in a *court of record* to hold of the lord. This induces a forfeiture of his estate, for reasons similar to those stated *supra*, 1<sup>i</sup>; and it is supposed would induce a forfeiture in Virginia also. (2 Bl. Com. 275; 1 Lom. Dig. 821; 2 Th. Co. Lit. 208, n. (D.); Willison v. Watkins, 3 Pet. 47, 48; Walden v. Bodley, 14 Pet. 162; Merryman v. Bourrie, 9 Wal. 601; Emerick v. Tavener, 9 Grat. 226; Jackson v. Wheeler, 6 Johns. (N. Y.) 272; Jackson v. French, 3 Wend. (N. Y.) 339.) See 1 Washb. R. Prop. 91-2, *Contra*.

- 3<sup>i</sup>. Claiming *in a Court of Record* a Greater Estate than Tenant Possesses.

As where tenant *for life*, etc., in an action in a court of record, demands an *estate in fee*, or any estate greater than his own; or so pleads as expressly or by implication to assert such greater estate to be in him, *e. g.*, at common law, *joining the mise* (that is, the general issue) *upon the mere right*, in a writ of right;—these are virtual *disclaimers of tenure*, and for the reasons already stated, are causes of forfeiture in Virginia (as is supposed), as well as at common law. (2 Bl. Com. 276; 1 Lom. Dig. 593, 821; 2 Th. Co. Lit. 208, and n. (E).) See 1 Washb. R. Prop. 91-2; 4 Kent's Com. 427, *Contra*.

- 4<sup>h</sup>. Liability of Tenant for Life for Waste.

Waste is any *permanent injury to the inheritance*, not occasioned directly by an act of God, or of a public enemy. It may arise from *neglect* merely, or from *acts committed* by a stranger (who, in contemplation of law, is presumed to have the acquiescence of the tenant), when it is termed *permissive waste*; or from *acts committed* by the tenant, in which case it is called *voluntary waste*. If a house be unroofed by a tempest, that is not waste, because occasioned directly by an act of God; but to permit any further injury to accrue for want of a roof, temporary or permanent, is waste, and of that description known as *permissive*. (3 Th. Co. Lit. 234 to 236, and n. (F.); 1 Washb. R. Prop. 108 & seq.; *Post*, p. 602 & seq.)

At common law, those persons only were liable for waste who, *not having the inheritance* (the absolute) owner of which was, of course incapable of committing it), had come into possession by *act of the law*, as ten-

ants *by the curtesy*, tenants *in dower*, and *guardians in chivalry*. Tenants who came in *by act of the parties*, were restrained only *by their covenants*. But the statute of Marlebridge, 52 Hen. III., c. 23 (A. D. 1268), made all tenants *for life or years* liable for waste; and in Virginia we have gone further yet, and made *all tenants* answerable therefor, to such persons as may be prejudiced thereby. (3 Th. Co. Lit. 241, n. (M.); 2 Bl. Com. 282 & seq.; 1 Lom. Dig. 66 & seq.; V. C. 1873, ch. 133, § 1; V. C. 1887, ch. 126, § 2775.)

The penalty for waste at common law is merely the *damage done*, as estimated by a jury; but that being found insufficient to prevent it, the statute of Gloucester, 6 Edw. I., c. 5 (A. D. 1278), directed that the tenant should forfeit the thing (*i. e.*, the *place*) wherein the waste was committed, and *treble damages* besides, to the owner of the inheritance. And this, by statute, was the law of Virginia likewise until 1st July, 1850, when the Code of 1849 went into effect, whereby it is provided that the penalty shall be only the *damages suffered*, or if the waste was committed *wantonly*, "judgment shall be for *three times* the amount of damages assessed therefor." (2 Bl. Com. 283-4; 1 Lom. Dig. 67 & seq.; 3 Th. Co. Lit. 241, n. (M.); V. C. 1873, ch. 133, § 4; V. C. 1887, ch. 126, § 2778.)

More will be said of waste in connection with the doctrine of *forfeiture*, *Post*, Ch. XVIII., p. 621.

5<sup>b</sup>. Liability of *Under-Tenant* of Tenant for Life, etc., *for Rent*; w. c.

1<sup>i</sup>. Where the *Under-Lease* is Determined *on the Rent-day*.

Although strictly speaking the rent is not *due* in such case until midnight, and therefore the maxim *annua nec debitum judex non separat* might seem to be applicable, yet rather than the rent should be *wholly lost* since the last rent-day, the under-tenant, having enjoyed the land which was the consideration therefor, is required to pay it *in full* to the personal representative of the tenant for life. (*Ex parte*, Smyth, 1 Swanst. 344, *note*; *Stafford v. Wentworth*, 1 P. Wms. 180; *Southern v. Bellasis*, 1 P. Wms. 179, *note*.)

2<sup>i</sup>. Where the *Under-Lease* is Determined without the *Under-Tenant's Default*, *before the Rent-day*; w. c.

1<sup>k</sup>. Doctrine at *Common Law*.

The rent is not apportioned, but is *extinct*, no periodical payments at common law being apportionable in *point of time*, agreeably to the maxim *annua nec debitum judex non separat*, and pursuant to the principle which attaches to all *entire contracts*, that they cannot be apportioned. (2 Bl. Com. 124; 1 Th. Co.

Lit. 476, and n. (P. I.); *Ex parte*, Smyth, 1 Swanst. 338 '9 *note*.)

2<sup>k</sup>. Doctrine in Virginia by Statute.

The rent would be *apportioned*, in pursuance of the provision that on the determination by death or otherwise, of the estate or other thing in respect of which any periodical payments, including rents, hires, etc., issue or are devised, such payments are apportionable unless otherwise provided, according to the time which shall have elapsed of the time for which the said rent, etc., was growing due, including the day of such death or determination, deducting a proportional part of the charges. But the under-tenant would with us have also the privilege of continuing to *hold the land*, until the end of the current year of the tenancy, paying rent therefor, of course, to the reversioner or remainderman. (V. C. 1873, ch. 136, §§ 1, 3; *Id.* ch. 135, § 1; V. C. 1887, ch. 129, §§ 2810, 2813; *Id.* ch. 128, § 2809; *Ante*, p. 108, 3<sup>l</sup>.)

2°. Estates-Tail after Possibility of Issue Extinct.

This is a class of estates which arise out of estates-tail *special*, as where land is given to A and the heirs of his body of his present wife M begotten, and M dies without issue. There is now a *complete extinction* of all possibility of issue to succeed to the estate, and A's interest is described by the long, but needful *periphrasis* above stated. He is, in truth, no more than a *tenant for life*, but with some of the privileges of a tenant in tail, as he previously was; thus, for example, he is *dispunishable for waste*, out of regard to the *inheritance* of which he was lately seised. (2 Bl. Com. 124-'5, and n. (6).)

Of course, the statutes abolishing estates tail in Virginia render it impossible that there should be here any *estate tail after possibility of issue extinct*.

3°. Estates by the Curtesy; w. c.

The discussion of estates by the curtesy requires us to observe (1), The definition of the estate; (2), The reason for the appellation of *estate by the curtesy*; and (3), The requisites of the estate.

w. c.

1<sup>l</sup>. Definition of Estate by the Curtesy.

When a man takes a wife *seised* during the coverture, of an *estate of inheritance*, legal or equitable, such as that the issue of the marriage may by possibility inherit it, *as heir to the wife*, has issue by her *born alive* during the coverture, and the *wife dies*, the husband surviving has an estate in the land for *his life*, which is called an *estate by the curtesy*. (2 Bl. Com. 126; 1 Th. Co. Lit. 556, 551, 567-'8; Paine's Case, 8 Co. 35 a.)

And if these conditions concur, it is not possible at *common law*, by any provision whatever, to exclude the husband's right to curtesy. But in the case of a married woman's *separate estate*, which is the creature of a court of equity, and to which there is nothing correspondent at law, the right to curtesy may be excluded, either by the terms of the conveyance, or by the alienation of the wife, by deed or will. (Cooper v. Macdonald, L. R. 7 (Ch. Div. 288, 300; 23 Moak's ed. 591); Chapman v. Price, 83 Va. 394-'5.)

And it is held that a separate estate in a married woman, created by gift, conveyance or settlement, by the husband, whether directly or through a trustee, *presumptively* excludes the husband's curtesy. (Dugger v. Dugger, 84 Va. 144.)

## 2<sup>d</sup>. Reason for Calling it *Estate by the Curtesy*.

The full designation is an *estate by the curtesy of England* (in Latin, *per legem Angliæ*) and Littleton says it is so called because it "is used in *no other realm*, but in England only," which seems to be a mistake in fact; for not only is it found in Scotland and Ireland, whither it may have been introduced from England, but it prevails, or did formerly prevail, in other countries also, though not under this name. The laws of the *Alemanni*, or Germans, define the estate almost in the very terms used by the laws of England. Blackstone considers that it takes its name from the husband's attendance upon the *lord's court* or *curtis*, as one of the vassals in right of his wife, whilst Mr. Wooddeson and Mr. Christian are disposed to hold that it originally signified nothing more than an estate *by the courts* of England, as in Latin the tenant is styled *tenens per legem Angliæ*. And this last opinion seems to be the most satisfactory. (1 Th. Co. Lit. 586, and n. (A.); 2 Bl. Com. 126 '7, and n. (8); 1 Washb R. Prop. 128; 1 Lom. Dig. 56-'7.)

## 3<sup>d</sup>. Requisites of Estate by the Curtesy.

The requisites of an estate by the curtesy are, (1), Marriage; (2), Seisin of the wife; (3), Birth of issue alive; and (4), Death of the wife. (2 Bl. Com. 127; 1 Washb. R. Prop. 130 & seq.; 1 Lom. Dig. 77.)

W. C.

## 1<sup>st</sup>. Marriage.

A marriage is required which is neither void *per se*, nor actually avoided *ab initio* by divorce. (1 Lom. Dig. 77; 1 Th. Co. Lit. 557, n. (B).) We are therefore to note, (1), The effect of the marriage being void *per se*; (2), The effect of the marriage being avoided by a decree of divorce *a vinculo matrimonii*; and (3), The effect of a divorce *a mensa*, etc.

W. C.

## 1<sup>h</sup>. Effect of the Marriage being Void *Per Se*; w. c.



1<sup>l</sup>. Effect at *Common Law* of the Marriage being Void *Per Se*.

It will be remembered that marriage is void at common law for the *legal disabilities* existing at the time of the marriage, namely: prior marriage, want of age, want of reason, and (by statute) want of consent of parents or guardians. These disabilities make the union *meretricious*, and not *matrimonial*, and that without any decree of a court; and of course, therefore, *no marital rights whatsoever* can accrue from it. Hence, in such a case, there can be *neither curtesy nor dower*. (1 Bl. Com. 436 & seq.; 1 Lom. Dig. 77; 1 Th. Co. Lit. 557, n. (B.); 1 Min. Insts. 260–262.)

2<sup>l</sup>. Effect in *Virginia* of Marriage being Void *Per Se*; w. c.

1<sup>k</sup>. What Causes Render a Marriage Void *Per Se* in *Virginia*, without Divorce.

Of course, they cannot be *supervenient* causes, but must be such as existed *when the marriage was contracted*:

w. c.

1<sup>l</sup>. Marriage between a *White Person and a Negro*.

See V. C. 1873, ch. 105, § 1; V. C. 1887, ch. 101, § 2252; 1 Min. Insts. 265.

2<sup>l</sup>. Marriage where a *Former Consort is Still Living*.

See V. C. 1873, ch. 105, § 1; V. C. 1887, ch. 101, § 2252; 1 Min. Insts. 265.

3<sup>l</sup>. Marriage *under the Age of Consent*.

When either party is under the age of consent (fourteen in males and twelve in females), if they *separate during non-age*, and *do not cohabit* afterwards.

See V. C. 1873, ch. 105, § 3; V. C. 1887, ch. 101, § 2254; 1 Min. Insts. 265.

2<sup>k</sup>. Effect of Marriage *being Void* for these causes.

No marital right whatsoever can accrue, and so there can be *neither curtesy nor dower*. (1 Lom. Dig. 77; 1 Th. Co. Lit. 557, n. (B.); 1 Min. Insts. 298–9.)

2<sup>h</sup>. The Effect of Marriage being Avoided by a Decree of Divorce *a vinculo matrimonii*.

The marriage may be annulled, (1), For a cause subsisting at the time it was contracted; and (2), For a *supervenient* cause:

w. c.

1<sup>l</sup>. Effect of Marriage being *annulled* for a Cause Subsisting *at the time of the marriage*; w. c.

1<sup>k</sup>. Doctrine at *Common Law*.

A marriage at common law can be annulled for no *supervenient cause* whatsoever, (except by special act of parliament), but only for causes subsisting at the

*date of the marriage.* (1 Bl. Com. 441.) These are the *canonical impediments*, namely, pre-contract (which is no longer such an impediment), consanguinity, affinity, and incurable impotency of body. If the marriage is avoided during the *lifetime of both parties*, for either of these reasons, it is *void ab initio*, and no marital right can accrue under it, and consequently *neither curtesy nor dower*. Although, to be sure, if the man has disposed of the woman's chattels *bona fide*, and for value, she cannot reclaim them. If, however, the marriage is not avoided during the *lifetime of both parties*, it *never can be annulled* afterwards, and therefore the marital rights are unimpaired. (1 Th. Co. Lit. 557. n. (B.); Id. 571-'2; Id. 609; 2 Bl. Com. 127, 130; 1 Min. Insts. 259.)

2<sup>k</sup>. Doctrine in *Virginia*; w. c.

1<sup>l</sup>. The Causes Subsisting at the Time of the Marriage for which it *may be Annulled in Virginia*.

As these causes all are supposed to exist at the *time of the marriage*, it might reasonably be expected that, when the marriage is pronounced void by a competent court, in the life-time of the parties, it would be void *ab initio*, as it is in like cases in England. There are sundry causes, however, in respect to which it is expressly declared that this logical consequence shall not follow, but that in these cases the marriage shall be void only *from the time of the decree*. And these causes are precisely those to which it might have been supposed the *largest effect* would have been given;

W. C.

1<sup>m</sup>. Causes Subsisting at the Time of the Marriage, for which the Marriage may be Annulled in Virginia, but to take Effect only from the Sentence of Divorce.

They are, (1), Consanguinity and affinity (where the marriage is solemnized in Virginia, or out of Virginia if the parties go out for the purpose, and afterwards return to and reside in the State); (2), Insanity; and (3), Incurable impotency of body. (V. C. 1873, ch. 105, § 1; V. C. 1887, ch. 101, § 2252; 1 Min. Insts. 301-'2.)

2<sup>m</sup>. Causes Subsisting at the time of Marriage, for which the Marriage may be Annulled in Virginia, *ab Initio*.

Such causes are, (1), Conviction prior to the marriage, without the knowledge of the consort, of an *infamous offence*; (2), the wife, without the husband's knowledge, being *enceinte* by some person other than the husband; (3), The wife having been

prior to the marriage, without the husband's knowledge, a prostitute. (V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257); and (4), doubtless fraud or force. (1 Min. Insts. (4th ed.) 263-'4.)

- 2<sup>l</sup>. The Effect in Virginia, of the *Annulment* of the Marriage for *Causes Subsisting at its Date*.

When the marriage is determined *ab initio* (as in the four cases mentioned *supra*, 2<sup>m</sup>), no marital right attaches, and consequently *not curtesy nor dower*. But in the three cases mentioned *supra*, 1<sup>m</sup>, where the marriage is void only from the *date of the sentence*, it would seem that, in the absence of any *special provision* in the sentence itself (which it is competent to the court to insert), the marital rights (including curtesy and dower) which have *already attached* to the *existing property* of the parties are not impaired. Rights, however, which have *not attached* (e. g., that to a *distributive share*), are barred, nor can *any claim* arise on the part of either consort, to the *after-acquired* property of the other. (*Ante*, p. 116, 1<sup>k</sup>; V. C. 1873, ch. 105, §§ 1, 4, 12; V. C. 1887, ch. 101 §§ 2252, 2254, 2255.)

It should be observed, however, that the suggestion that in the three cases in question, the consort, notwithstanding the divorce, is entitled to dower or curtesy, as the case may be, unless the decree of the court, in granting the divorce, has directed otherwise, is quite discredited as to *curtesy* by the recent case of *Porter v. Porter*, 27 Grat. 600, and virtually as to *dower*, by *Harris v. Harris*, 31 Grat. 33-'4; and as to both by *Cralle v. Cralle*, 79 Va., 188. See 2 Bish. Marr. & Div. §§ 706, 707; *Wait v. Wait*, 4 Comst. (N. Y.) 101.

These authorities are understood to establish the doctrine, in Virginia at least, that in such a case dower and curtesy must be denied.

- 2<sup>i</sup>. Effect of Marriage being Avoided by Divorce *a Vinculo* for a *Supervenient Cause*; w. c.

- 1<sup>k</sup>. Doctrine at *Common Law*.

At common law there cannot be a divorce avoiding the marriage for a *supervenient cause*, not even for adultery. Application has to be made to parliament for a special act, which determines the whole law applicable to the case to which it relates. Hence, the English authorities, which affirm that, if the marriage *be dissolved* by divorce *a vinculo*, there can be neither curtesy nor dower, are to be understood as referring only to divorces for causes existing *at the time of the marriage* (canonical impediments or civil disabilities), whereby the marriage is annulled *ab initio*, the maxim

being *ubi nullum matrimonium, ibi nulla dos.* (1 Th. Co. Lit. 609; 2 Bl. Com. 130.)

2<sup>k</sup>. Doctrine in Virginia.

The English authorities, for the reasons just stated (*supra*, 1<sup>k</sup>) prove nothing as to the effect of annulling a marriage for a *supervenient cause*: the sentence in such case not avoiding the relation *from the beginning*, but only from the *date of the decree*. The marriage having been for a time a *subsisting and a valid marriage*, it is supposed that, in the absence of any special order to the contrary contained in the sentence, all the marital rights (including curtesy and dower) which have *already attached* to the *existing property* of the parties remain unimpaired; whilst rights which have not attached (*e. g.*, that to a *distributive share*) are barred: and that no claim at all can arise on the part of either consort to the *after-acquired property* of the other. (*Ante*, p. 118, 2<sup>i</sup>; V. C. 1873, ch. 105, § 12; V. C. 1887, ch. 101, § 2263.)

The student will not fail to observe that the foregoing proposition, that curtesy and dower are not with us divested by a divorce *a vinculo*, for a supervenient cause, or for a cause which, although it existed at the date of the marriage, is yet by statute specially declared to dissolve the marriage only from the *time of the sentence*, is in opposition to authorities of much weight, and in Virginia cannot now be relied on as law, since the decision in *Porter v. Porter*, 27 Grat. 600, which seems to have been approved in the subsequent cases of *Harris v. Harris*, 31 Grat. 33-34, and *Cralle v. Cralle*, 79 Va. 188; and it must be acknowledged that the doctrine propounded in *Porter v. Porter*, whilst it does not commend itself to the writer's judgment, is yet sustained by a great mass of judicial decisions in other States. (2 Bish. Marr. & Div. §§ 706-708, 712.)

The reasons for the doctrine are summed up by Mr. Bishop as follows:

(1), That the *common law* recognizes no right to curtesy or dower unless the marriage continues *at the time of the consort's death*; and our courts cannot *create* such a right by construction, "merely because, by legislative enactment, she (or he) is *found in circumstances unknown to the common law*." (2 Bish. Marr. & Div. § 706.)

(2), That a divorce *a vinculo* puts an end to all the marital rights which are *not actually vested*, such as the husband's right to the wife's *chores in action*, and such as the right to curtesy and dower are *assumed to be*. (2 Bish. Marr. & Div. §§ 706, 708.)



(3), That the death of the *consort* is an indispensable ingredient in curtesy and dower, and that in the event of a divorce *a vinculo*, that can never happen; for although the party who was once the consort dies, yet he or she *is not then the consort*. (2 Bish. Marr. & Div. §§ 705, 712; 1 Bish. Marr. Women, §§ 479, 249.)

(4), That in respect to *dower*, it is, in its nature, a provision for the support of the wife upon the husband's death, and it would be a singular anomaly if the divorce should relieve him of the obligation to support her whilst living, and yet leave his lands charged with such obligation after his death. (2 Bish. Marr. & Div. § 706.)

To these considerations the writer submits the following reply, which appears to him to be satisfactory in point of *reason*, however it may be wanting in *authority*:

*First*, It is admitted that the courts can *create* no new doctrine applicable to the subjects of curtesy and dower; but it is not perceived why, in interpreting statutes, they may not, and *must* not, allow such modifications of the common law as legislative enactments impliedly require, in order that the symmetry and harmony of the system may be maintained. In permitting a divorce *a vinculo*, which dissolves the marriage, not *ab initio*, but only from the *date of the sentence*, the legislature must have intended all the consequences which would logically follow from that very marked innovation upon the common law, and why not, amongst others, what seems the natural consequence, that such a divorce does not divest the consort of the rights already vested of curtesy or dower? The maxim which embodies the common law doctrine, *Ubi nullum matrimonium, ibi nulla dos*, is not applicable under the statute law. There is a marriage, and a valid one, until it is dissolved by judicial sentence.

*Second*, It may be admitted that a divorce *a vinculo* terminates all marital rights *not actually vested*, such as the husband's right to his wife's *choses in action*; but is it not an assumption to treat *curtesy* and *dower* as rights *not vested*? They are not in *possession*, indeed, and the future enjoyment of them depends on the contingency that the one consort survives the other. They are, however, *present rights*, and although the enjoyment of them is postponed, yet the consort cannot be deprived of them when once they have attached, without his or her own act or default. They occupy manifestly a very different position from *choses in action*, or from a distributive share. The common law confers

the wife's *chooses in action* upon the husband, only upon condition that, *during the coverture*, he shall reduce them into possession, and the distributive share is, by the *terms of the statute*, given at the *death* of the decedent to the husband and wife respectively; that is, to the person who shall then occupy that relation; and this is enforced by the decedent having it in his power, in his life-time, to dispose of the subject, so as to defeat the distributee's interest.

*Third*, To insist upon the fact that the *death of the consort* is indispensable to curtesy and dower, and that in case of a divorce *a vinculo*, that is an impossible event, seeing that the person, whose death would otherwise consummate the estate, is no longer the *consort*, might seem to savor of a fanciful play upon words, rather than an argument, had it proceeded from a source less distinguished. The death of the consort is, indeed, an indispensable event to the consummation of curtesy and dower, but no reason is perceived why it may not be as well satisfied by the death of the person who *was* the consort when the right accrued, as of one who held that relation when the death occurred.

*Fourth*, The consideration that dower is designed as a support to the wife, professedly applies to *dower* alone, and as curtesy and dower are closely assimilated the one to the other, it is a partial answer that, as it is not true of curtesy, the application to dower is fallacious. But is dower, in its *nature*, *merely* a provision for the wife? Even in its *origin* it was a reward to her for her participation in the labors, the support, and the well-being of the household (*Post* p. 135), being designed for the sustenance of the younger children of the family, as well as of herself; and for several centuries past, as well in the mother-country as amongst ourselves, has been regarded chiefly as a mode of *equalizing* the property-interests of husband and wife between themselves.

The *supervenient causes* for annulling a marriage in Virginia are, (1), Adultery; (2), Sentence to the penitentiary; (3), Indictment for felony, where consort is a fugitive from justice, and has been absent for *two years*; and (4), Wilful desertion continuing for *five years*. (V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257; 1 Min. Insts. 289 & seq.)

3<sup>d</sup>. Effect of a Divorce *a Mensa et Thoro*; w. c.

1<sup>st</sup>. Doctrine at Common Law.

A divorce *a mensa*, etc., had at common law *no effect whatever* upon curtesy or dower, nor indeed in general

upon any of the marital rights of either party *touching property*. (2 Bl. Com. 130; 1 Min. Insts. 298.)

2<sup>d</sup>. *Doctrine in Virginia*: w. c.

1<sup>k</sup>. Effect of Simple Divorce *a Mensa*, etc.

In the absence of any order of court in the sentence of divorce, it has no more effect than at common law. (V. C. 1873, ch. 105, § 12; V. C. 1887, ch. 101, § 2263; 1 Min. Insts. 301.)

2<sup>k</sup>. Effect of Divorce *a Mensa*, etc., with a Decree of *Perpetual Separation* Added.

Such a decree of perpetual separation has no effect upon the marital rights of the parties (nor consequently upon curtesy and dower) as to *existing property*; but upon property *thereafter acquired* it operates like a divorce *a vinculo matrimonii*, thus, as to such property, barring the claim to curtesy or to dower. (V. C. 1873, ch. 105, §§ 13, 12; V. C. 1887, ch. 101, §§ 2264, 2263; 1 Min. Insts. 301.)

4<sup>h</sup>. Effect of Abandonment or Desertion of Wife by Husband.

If a husband wilfully deserts or abandons his wife, and such abandonment or desertion continues until her death, he shall be barred of all interest in her separate or other estate, as tenant by the curtesy, distributee or otherwise. (V. C. 1887, ch. 103, § 2296.)

2<sup>g</sup>. Seisin of the Wife.

Seisin, which means *possession of the freehold*, is of a two-fold nature, viz.: a *seisin in deed*, or *actual seisin* or possession, and a *seisin in law*, which is a *right to the possession*, when there is no adverse possession, such, for example, as that of an heir, in respect to the deceased ancestor's inheritance, before entry thereon by such heir or by some agent or tenant on his behalf. (3 Th. Co. Lit. 273-4; Ibid. 25-6; 1 Do. 558, 574; 1 Lom. Dig. 564; 4 Kent's Com. 386, n. a.)

The exposition of the seisin of the wife, in order that the husband may have curtesy, requires us to have regard to, (1), The kind of seisin which she must have; and (2), The estate whereof the wife must be seised;

w. c.

1<sup>h</sup>. The Kind of Seisin Required in the Wife.

In order properly to set forth the kind of seisin required in a wife, we must take notice of: (1), Seisin *in fact*; (2), Seisin *in law*; (3), Sole seisin; (4), The mere right of entry or of action; and (5), Equitable (in contradistinction to legal) estates;

w. c.

1<sup>i</sup>. Seisin *in Fact*.

This is called by Lord Coke *seisin in deed*, and is often termed *actual seisin*. It means a possession of the free-

hold actually, by the *pedis positio* of one's self, or one's tenant, or by construction of law, as in case of a grant of lands from the commonwealth, by conveyance under the statute of uses, or under the statute of grants, or by devise (supposing *no adverse occupancy* by some else), in contradistinction to the *seisin in law*, which exists in the heir, after the descent of lands upon him, before actual entry by himself or his tenant. (2 Bl. Com. 127; 4 Kent's Com. 29, 30; Tabb v. Baird, 3 Call, 475; Barwicke's Case, 5 Co. 94; 1 Th. Co. Lit. 558, and n. (6); 2 Do. 177, 179-'80; Clay v. White, 1 Munf. 168, 173; Carpenter v. Garrett, 75 Va. 135; Muse v. Friedenwald, 77 Va. 62.)

Hence, when the Virginia statute, as it existed prior to 1850, provided that until her dower should be assigned, it should be lawful for her to remain in the husband's mansion-house and the plantation thereto belonging, free of rent, and the widow had thus remained in possession, it was held that she was *seised* of the premises, and her daughter, one of the heirs of her husband, having married, had issue born alive, and died in her mother's life-time, the husband of the daughter was denied curtesy because of the lack of *actual seisin* on the part of his wife during the coverture between them. (Carpenter v. Garrett, 75 Va. 133 & seq.; Pitzer v. Williams, 2 Rob. 245.)

W. C.

1<sup>k</sup>. The Reason Usually Assigned for Requiring *Seisin in Fact*, in Order for Curtesy.

That otherwise the issue of the marriage *could not inherit*, the common law of descent requiring for that purpose *actual seisin* in the ancestor. (2 Bl. Com. 208; 1 Th. Co. Lit. 577-'8; *Post*, p. 524.)

W. C.

1<sup>l</sup>. Causes why this cannot be the *True Reason*; W. C.

1<sup>m</sup>. Seisin for Descent and for Curtesy are not the Same.

Seisin for curtesy may be *at any time* during the coverture; whilst seisin for descent must be *at the death of the ancestor*. (1 Th. Co. Lit. 557; 2 Bl. Com. 208; 1 Lom. Dig. 78, *note* \*; *Post*, p. 524.)

2<sup>m</sup>. Dower, by like Reason would Require *Actual Seisin*.

But it is a familiar principle, that for dower, *seisin in law* suffices. (1 Lom. Dig. 78, *note* \*; 1 Th. Co. Lit. 574; *Post*, p. 139.)

3<sup>m</sup>. The Principle might Apply even though *Actual Seisin were Impossible*.

Yet where actual seisin is *impossible*, it is dispensed with for curtesy, upon the maxim *impotentia excusat legem*. Thus, if a man seised of a rent in fee



hath issue a daughter, who is married and hath issue, and he dieth seised, the wife, before the rent *becomes due*, dieth, she had but a *seisin in law*, and yet the husband shall be tenant by the curtesy, because he could *by no industry* attain to any other seisin. (1 Th. Co. Lit. 558-9.)

2<sup>d</sup>. Effect in Virginia, if this were the True Reason.

Actual seisin is not required for descent with us, and, therefore, it might be plausibly insisted that it is not *necessary for curtesy*;—*plausibly*, but not *soundly*, because the rules of law are not generally subject to be altered by statutory provisions introduced for a different object. (V. C. 1873, ch. 119, § 1; V. C. 1887, ch. 113, § 2548; 1 Lom. Dig. 78, *note* \*; 1 Bright's H. & Wife, 117, n. (a).) And accordingly it is held that *actual seisin* is necessary. (Carpenter v. Garrett, 75 Va. 133 & seq.)

3<sup>d</sup>. Doctrine in Virginia.

Actual seisin is required, as at common law. (1 Lom. Dig. 78, and *note* \*; Carpenter v. Garrett, 75 Va. 133.)

2<sup>k</sup>. The True Reason for Requiring *Actual Seisin* for Curtesy.

It is supposed to be in order to stimulate the husband to *employ proper diligence* in reducing his wife's title to lands to *actual possession*, so that her interest may not suffer by his neglect. A parallel policy is adopted in respect to a wife's *choses in action*, which do not become absolutely the husband's unless, during the coverture, he reduce them into possession. Lord Coke hints at this reason when, having stated *seisin in law* to be sufficient for dower, he accounts for the diversity in respect to curtesy by observing that "it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land." (1 Th. Co. Lit. 574; 3 Do. 309 '10, and n. (O).)

2<sup>i</sup>. *Seisin in Law*.

*Seisin in law* is where an ancestor dies leaving land to descend to his heir. Before the *heir actually enters* (or in case of an incorporeal hereditament, before he actually enjoys it), by himself or his tenant for years, he is said to be *seised in law*. This sort of *seisin* for curtesy suffices only where *actual seisin is impossible*, e. g., in case of rent, where, after the right to it accrues to the wife, she dies *before any day of payment*. (2 Bl. Com. 127; 1 Th. Co. Lit. 559.)

3<sup>d</sup>. Sole-Seisin.

That is, the wife must not, at common law, be seised as *joint-tenant*; although she may be as *tenant in common*, or as coparcener.

W. C.

1<sup>k</sup>. Doctrine at Common Law.

The husband of a woman seised as a *joint-tenant* is not entitled to curtesy, because of the *right of survivorship* (*jus accrescendi*), whereby, upon the death of one tenant, the whole estate survives to the survivor, or survivors. (1 Th. Co. Lit. 564, 745 '6; *Post*, p. 474.)

2<sup>k</sup>. Doctrine in Virginia.

The *jus accrescendi*, or right of survivorship, is abolished in Virginia, except when the estate is, by the original conveyance, *expressly limited* to the survivor, and except, also, two other cases not germane to this subject. Hence, the husband of a joint-tenant (save in the case excepted) is with us, by the express terms of the statute, entitled to curtesy, as the wife of a joint-tenant is also to dower. (V. C. 1873, ch. 112, §§ 18, 19; V. C. 1887, ch. 107, § 2430; *Post*, p. 475.)

4<sup>i</sup>. Mere *Right of Entry*, or *Right of Action*.

In these there is no curtesy, for want of *actual* seisin, although *by statute* in Virginia, dower may be enjoyed in them. (1 Th. Co. Lit. 559; V. C. 1873, ch. 106, § 2; V. C. 1887, ch. 102, § 2268; *Post*, p. 135.)

5<sup>i</sup>. *Equitable* (in Contradistinction to *Legal*) Estates.

Curtesy may be had in equitable estates, although, at common law, *dower* could not be. (1 Th. Co. Lit. 559, and n. (9); *Id.* 576, and n. (25); 2 Bl. Com. 127, n. (9).)

The diversity is explained thus: Upon the first introduction of equitable estates (in the latter part of the reign of Edward III., *about* A. D. 1370), the law courts held, very unadvisedly, that as curtesy and dower were *legal estates*, neither of them could exist in the newly invented interests called uses, of which those *courts* had as yet declined to take any cognizance. Equitable estates, however, proved so convenient, and made such progress amongst the people, that ere long the courts of law found themselves constrained indirectly to acknowledge their existence, although to this day they are left almost exclusively to the *control* of the courts of equity, where they originated. Thus, by degrees, they were admitted to be subject to the same general rules, and to the same charges, as legal estates, descending like them, and like them subject to debts.

The courts of equity, which hitherto had *followed the law*, now thought it time to retrace their steps, and would doubtless have attached both dower and curtesy to equitable inheritances; but as to dower, a difficulty (insurmountable without the aid of the legislature) inter-

vened. In pursuance of the original determination that dower could not be had in such estates, many persons had bought lands without requiring the relinquishment of dower by the vendors' wives, and if the doctrine were now changed the titles of all such purchasers would be shaken to the extent of such dower. In respect to curtesy no such embarrassment arose, for no purchaser would or could have taken a conveyance from a married woman without her husband's concurrence, whether he were entitled to curtesy or not.

Hence, the courts were under the necessity of adhering to their original determination as to *dower* in equitable estates, whilst, as to curtesy, they adopted the juster view that they should be subject to it. (*Sweetapple v. Bindon*, 2 Vern. 536; *Watts & al. v. Ball*, 1 P. Wms. 108; *Casborne v. Scarfe & al.*, 1 Atk. 603; 2 Bl. Com. 127, n. (9); *Darcy v. Blake*, 2 Sch. & Lefr. 388.)

In Virginia the legislature has come in aid of justice and reason, and put curtesy and dower in this respect upon the same footing. Both may be had in equitable estates. (V. C. 1873, ch. 112, § 17; V. C. 1887, ch. 107, § 2429.)

There would seem to be no reason to doubt that, in the absence of any provision to the contrary, in the instrument creating a *separate estate* in a wife, her husband is entitled to curtesy therein wherever he would be so entitled were the estate *legal* instead of *equitable*; the principle being that the marital rights of the husband are never to be divested to a greater extent than the terms of the settlement clearly require. (1 Min. Insts. 347; 1 Bish. Mar. Wom. § 852; *Moloney v. Kennedy*, 10 Sim. (16 Eng. Ch.) 254; *Mitchell v. Moore*, 16 Grat. 275.) In respect to the wife's separate estate arising out of the "Married Woman's Law," it is expressly enacted that nothing contained in this act shall be construed to deprive the husband of curtesy in his wife's real estate, nor shall he be deprived thereof by her sole act. (V. C. 1887, ch. 103, §§ 2286, &c.; 3 Min. Insts. 72.)

But when the separate estate of the wife is created by the gift of the husband himself, whether directly or through a trustee, it presumptively excludes the husband's curtesy; and so it is, by parity of reason, if the settlement proceeds from any other source, when the estate is limited to the wife, to hold in her own right, free from any claims or demands of her husband, *now or at any time hereafter*. (*Dugger v. Dugger*, 84 Va. 144; *Chapman v. Price*, 83 Va. 394, 396; *Cooper v. MacDonald* (L. R. 7 Chan. Div. 288) 23 Moake's ed. 581.)

2<sup>b</sup>. Estate whereof the Wife must be Seised.

The exposition of the *estate* whereof the wife must be seised in order that the husband may have curtesy, will lead us to contemplate, (1), The general rule as to the wife's estate; (2), Illustrations of the general rule; (3), Effect of eviction by title paramount to that of the wife; and (4), The effect upon curtesy of the determination of the wife's estate;

W. C.

1<sup>i</sup>. General Rule as to the *Wife's Estate*.

The wife must have, at some time during the coverture, (1), The *immediate estate of freehold* in possession; and (2), The *first estate of inheritance*, such as that issue born of the marriage may by possibility inherit it, as *heir to the wife*; (3), Without any intermediate *vested estate of freehold*. (1 Th. Co. Lit. 560, and n's (E.) and (F.); 1 Lom. Dig. 82.)

The same rule is applicable also to dower. Indeed, dower and curtesy are so nearly correlative, that almost every proposition which is true of the one is applicable also to the other.

2<sup>i</sup>. Illustrations of the General Rule; w. c.1<sup>k</sup>. Leases by Wife, *before Marriage*, for a *Term of Years*, Reserving Rent During the Term. She Marries, has Living Issue, and Dies *During the Term*.

The wife has here all the requisites of the *immediate estate of freehold* in possession, and the first estate of inheritance, without any intermediate estate of freehold, and so the husband is entitled to curtesy, not indeed to the prejudice of the tenant for the term, but being possessed for his life of the reversion, he will *have the rent*. (1 Th. Co. Lit. 559-'60, and n. (10); Id. 582.)

2<sup>k</sup>. Lease by Wife, *before Marriage*, for *Term of Life*, Reserving Rent During the Term. She Marries, has Issue Born Alive, and Dies *Before the End of the Term*.

The husband cannot have curtesy; not *of the land*, because the wife had not, during the coverture, the *immediate estate of freehold* in possession; and not *of the rent*, because in that she had *no estate of inheritance*. (1 Th. Co. Lit. 559-'60, and n. (10); Id. 582; Cocks's Ex'r v. Phillips, 12 Leigh, 248.)

So where, upon the death of the wife's ancestor, she, as his heir, enters and assigns dower to the ancestor's widow, and having had issue by her husband born alive, she dies in the life-time of the ancestor's widow, the husband surviving is entitled to curtesy in the remaining two-thirds of the inheritance derived by his wife from her ancestor, but not in the one-third as-



signed to the ancestor's widow for her dower; for as to that third, the wife's seisin was in contemplation of law determined by the assignment of dower, not from the time of the assignment only, but by relation from the *death of the ancestor*, so that in law she was not seised of that third during the coverture. (1 Th. Co. Lit. 574-5.)

This same principle is applicable to dower also, and is then denominated the principle or doctrine of *dos de dote peti non debet*. (*Post*, p. 152; 1 Th. Co. Lit. 574-5, and n. (E.) and (F).)

3<sup>k</sup>. Where there is an *Intermediate Vested Estate of Freehold*.

*e. g.* Conveyance to W *for her life*, remainder if by any means that estate should come to an end in W's lifetime, to Z *for the residue of W's life*, remainder after W's death, to W *and her heirs*. Here W (the wife) has the *immediate estate of freehold* in possession, and, as is supposed, the *first estate of inheritance* (by virtue of the last limitation to W *and her heirs*, notwithstanding the statute proposing to abolish the rule in Shelley's Case, V. C. 1873, ch. 112, § 11; V. C. 1887, ch. 107, § 2423); but the *intermediate estate of freehold* vested in Z prevents curtesy, as in a corresponding case it would prevent dower. (2 Bl. Com. 137, n. (30); 2 Th. Co. Lit. 292, n. (1); 1 Bright's H. & Wife, 519.) Z's remainder is *vested* (although limited upon a most remote and improbable contingency), because it has a *present capacity* to take effect in possession, if the possession should become vacant. (2 Bl. Com. 137, n. (30); 169, n. (10); *Post*, pp. 152, 172.)

4<sup>k</sup>. Where no Issue Born of the Marriage can Inherit the Estate, as *Heir to the Wife*.

*e. g.* Devise to W *and her heirs*, but if she die leaving issue, then to *her children*, and their heirs. Here, although all the other requisites above-named exist, yet the estate is such that no issue born of the marriage can by possibility *inherit* the estate, as *heir to the wife*; such issue, if there be any, taking as *purchasers under the terms of the devise*, and not by inheritance at all. (Barker v. Barker, 2 Sim. 249; Sumner v. Partridge, 2 Atk. 37; 1 Lon. Dig. 81; *Post*, pp. 152 & seq.)

3<sup>l</sup>. The Effect of Eviction by Title *Paramount to that of Wife*; w. c.

1<sup>k</sup>. Eviction *by a Stranger*.

As the recovery by a stranger upon a title paramount demonstrates that the wife never had any *lawful seisin*, it of course frustrates *any claim to curtesy* founded thereupon; as under similar circumstances the wife's

claim to dower is defeated. (1 Th. Co. Lit. 560, and n. (D.); 1 Lom. Dig. 105; 4 Kent's Com. 32-3.)

- 2<sup>k</sup>. Where the *Wife's Seisin is Wrongful*, and the Husband Succeeds as *Heir to the Estate*.

The husband is *remitted to the inheritance*, and cannot claim, even if so disposed, *as by the curtesy*. (3 Bl. Com. 19 & seq.; 1 Lom. Dig. 105; 4 Min. Insts. 165.)

- 3<sup>k</sup>. Where the *Wife's Seisin is Wrongful During the Coverture*, but there Descends from Her on Her Heir a *Rightful Estate*.

The husband is precluded from curtesy, because the seisin which the wife had *during the coverture* is defeated, and the estate in the heir is a different estate, of which, during the coverture, *she was not seised*. Thus a woman, tenant in fee-tail, makes a feoffment in fee, and *takes back* an estate in fee, marries, has issue, and dies, and the issue recovers in a writ of *formedon*, against his father. The father cannot have curtesy of his wife's *estate in fee*, because that is defeated; nor of the *estate-tail*, because by her feoffment before marriage she had discontinued that, and *was not seised of it* during the coverture. (1 Th. Co. Lit. 561, and n. (12).)

- 4<sup>i</sup>. Effect upon Curtesy of the *Determination of the Wife's Estate*; w. c.

- 1<sup>k</sup>. The *General Doctrine*.

If the consort's estate *expires by the regular efflux of the period* originally marked out for its duration, leaving the *previous seisin* of the consort unimpaired, curtesy (and dower) are *prolongations* of the consort's estate, *annexed by law*; and notwithstanding that estate, according to its ostensible terms, has expired, yet (supposing the subject-matter thereof to *remain in existence*), curtesy (and dower) are still to be enjoyed therein. But if the consort's estate is determined in such a manner as not only to *put an end* to the consort's *previous seisin*, but to *defeat and annul* it as from the *beginning*, or if the *subject* of the consort's estate *ceases to exist*, the prolongation cannot take place, and curtesy (and dower) are then denied. (1 Th. Co. Lit. 561, and n's (13) & (G.); Id. 565, and n. (L.); Paine's Case, 8 Co. 34 a; (S. C. 1 And. 184; 1 Leon. 167; Goldsb. 81).)

- 2<sup>k</sup>. *Illustrative Examples*.

The examples which will be adduced are, (1). The case of an estate *in fee-simple*, where there is a total failure of heirs; (2). The estate of a *qualified or base fee*, where the occurrence takes place upon which the

estate is to be determined ; (3), The case of an *estate-tail* which is determined by a failure of issue ; (4), The case of an estate on condition which is determined by the condition broken, and the re-entry of the grantor ; and (5), The case of a *conditional limitation*, where the event happens which is to determine the estate ;

W. C.

1<sup>1</sup>. Estate in *Fee-Simple*, and Total Failure of Heirs.

*e. g.*, A woman having a fee-simple, marries, has issue, and dies without any *blood relations* whatsoever. Her estate at common law is at an end by the limitation attached to it, by the *regular efflux of the period* originally assigned for its duration, whilst her previous seisin is unimpaired. In such a case, therefore, the husband *is entitled to curtesy*, as, in a corresponding case, the wife would be entitled to dower. (1 Bright's H. & Wife, 348 ; 1 Lom. Dig. 97.)

In Virginia, the husband in the case supposed would be the *wife's heir*, and his curtesy would be merged in the inheritance. (V. C. 1873, ch. 119, § 1 (cl. 10) ; V. C. 1887, ch. 113, § 2548 (cl. 10).)

2<sup>1</sup>. Estate in *Fee-Qualified*, or *Base Fee*.

Where land is granted to a woman and her heirs, as long as *A has heirs of his body* ; the woman marries, has issue and dies, and A dies *without issue*, whereby the woman's estate is determined, her husband would seem upon principle to be entitled to *curtesy*, as in a like case a wife would be to *dower*, because the estate has run out its appointed time, without impairing the wife's *seisin during the coverture*. But it must be allowed that the authorities (*i. e.*, the *text-writers*) do not favor such a conclusion. (4 Kent's Com. 49 ; 1 Lom. Dig. 97-'8 ; Seymour's Case, 10 Co. 96 a.)

But Seymour's case does not, as has been thought, militate against it. So far as relates to *dower*, the opinion intimated therein was a mere *obiter dictum*, no question of dower existing in the cause ; yet it is apprehended to have been in that case an unobjectionable doctrine ; for the case supposes that tenant in tail, with remainders over, conveys the land to husband or wife, in fee-simple by an *innocent conveyance* (*e. g.*, bargain and sale), which operates no *discontinuance of the entail*, and that the issue in tail, or the remainderman, *enters upon the bargainee*, the husband or wife, whereby his or her estate is determined *quoad* the fee-simple, as *from the beginning*, or at least from the death of the tenant in tail ; thus likening the case to a recovery by *title paramount*, when, as

we have seen, there can be neither curtesy nor dower. See Case of Fines, 3 Co. 84 a, n. (A.)

The case stated by Kent (4 Com. 49), of what he calls a *collateral limitation*, e. g., an estate to a man and his heirs so long as a tree shall stand, or until St. Paul's church is finished, is not properly a *fee-simple at all*, since by the limitation it cannot continue forever, but is properly a *descendible freehold* merely, as described by Lord Coke in Seymour's Case, 10 Co. 98 a; although by Mr. Preston, and also by Plowden, it is denominated a *determinable fee*. (Walsingham's Case, 2 Plowd. 557; 1 Prest. Est. 432, 441.) Supposing it to be, as Lord Coke styles it, merely a descendible freehold, curtesy and dower do not belong to it; but if it be a *determinable fee*, upon the principles above stated the consort ought to be entitled to curtesy and dower, however the sentiments advanced by *text-writers* may be adverse thereto.

3<sup>d</sup>. Estate-Tail Determined by a *Failure of Issue*.

Here the estate having expired by its limitation, without impairing the previous seisin of the wife, the husband is entitled to curtesy, as in like case the wife is to dower, they being incidents annexed by the law to the limitation itself, and forming tacitly a part of it. (1 Th. Co. Lit. 561, & n's (13) & (14); Id. 565, & n. (L.); 1 Bright's H. & Wife, 133; Paine's Case, 8 Co. 34 a.)

4<sup>d</sup>. Estate of Inheritance Determined by *Title Paramount*; w. c.

1<sup>st</sup>. Estate on Condition which is *Determined by Condition Broken*.

This is an instance of the consort's seisin being determined in such a manner as to destroy it in law for the past, as well as for the future. A grantor entering for express condition broken is seised just as before the grant, by *title paramount* to that of the grantee, so that in law the grantee's seisin is wholly avoided *ab initio*. (Post, p. 264.) Hence, neither curtesy nor dower can be legally claimed in an estate so determined. (1 Bright's H. & Wife, 349-50; 1 Washb. R. Prop. 208; 4 Kent's Com. 49.)

But in case of a condition *implied*, it is believed to be otherwise; for when the grantor enters for the breach of such a condition, it seems that he holds under, and not *paramount* to the grantee, and therefore takes the land subject to all the latter's charges and incumbrances, and, it is presumed, *a fortiori*, to all charges like curtesy and dower, which the law attaches to the grantee's ownership. (1 Th. Co. Lit.



469; 2 Do. 117.) It may not be certain, however, that an estate of *inheritance* is liable in any case to be determined by a condition *implied*, unless it be considered such a condition that the grantee of such an estate shall not convey it to an *alien enemy*, or to a *corporation* in excess of what its charter or the law allows. (*Post*, pp. 589 & seq., 596.)

2<sup>m</sup>. Estate Determined by *Eviction by Superior Title*.

Here also the consort's seisin is determined as *from the beginning*; and so in contemplation of law, having never had seisin during the coverture, there can be no title to curtesy, nor in a like case to dower. (1 Bright's H. & Wife, 350; 1 Th. Co. Lit. 618, n. (R. 1).)

5<sup>l</sup>. Estate Determined by *Executory Limitation*.

Executory limitations are limitations of estates to take effect at a future time, created by conveyances operating under certain statutes, which, by dispensing with *actual livery* of seisin, in order to pass a freehold, made great changes in the rules governing the transfer of estates in lands. These statutes are the statutes of *wills* (32 Hen. VIII. c. 1, and 34 Hen. VIII. c. 5), of *uses* (27 Hen. VIII. c. 10), and of *grants* (8 & 9 Vict. c. 106); provisions corresponding to which are found in our Code, viz.: *Wills*, V. C. 1873, ch. 118, § 2; *Uses*, V. C. 1873, ch. ch. 112, § 14; and *Grants*, V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 112, §§ 2512, &c.; Id. ch. 107, §§ 2426, 2417. By means of conveyances operating under these statutes, estates of freehold (including *estates of inheritance*) may be made to arise or *spring up* at a future time, without any preceding estate, or to *shift* upon a contingent event, from one person to another. The designation, *executory limitation*, includes both of these classes; and in respect to *shifting* limitations, is applied, not without some inaccuracy, to the first limitation which is supplanted by the other, as well as to that which follows and takes its place. The case supposed is (*e. g.*) a devise (in a *will*) or a bargain and sale (under the *statute of uses*), or a grant (under 8 & 9 Vict., the statute of grants, V. C. 1887, ch. 107, § 2417), to a woman in fee-simple, but if she should die under twenty-one, and without issue, or on any other condition or contingency, then to another person in fee-simple. The woman marries, has issue born alive, which, however, soon dies, and then she dies under twenty-one. Her husband is entitled to curtesy, notwithstanding the determination of the wife's estate, because it is determined by the regular efflux of one

of the periods marked for its duration, and in a manner which *does not affect her previous seisin*. (Buckworth v. Thirkell, 3 Bos. & Pul. 652, *note*; S. C. 4 Dougl. 323; 1 Collect. Jurid. 332; Goodenough v. Goodenough, K. B. 1775, 3 Prest. Abstr. 372; Moody v. King, 2 Bingh. 447; Taliaferro v. Burwell, 4 Call. 321; 1 Washb. R. Prop. 212 & seq.; Jones & ux. v. Hughes, 27 Grat. 560; Medley v. Medley, 27 Grat. 568.)

This conclusion is resisted strenuously by the text-writers, although supported by principle, and by such an array of judicial authority. (Park on Dower, 179; Sugd. on Pow. 438; 3 Prest. Abstr. 372; 1 Bright's H. & Wife, 35, 349.) The case principally relied on by them is Sumner v. Partridge, 2 Atk. 47, in which, however, the main point was that a limitation in fee to the wife, and if she died *before the husband*, then the estate to pass to *her children*, did not entitle the husband to curtesy, which is merely the doctrine of Barker v. Barker, 2 Sim. 249. (*Ante*, p. 128, 4<sup>k</sup>.)

6<sup>l</sup>. Where the *Subject of the Estate Ceases to Exist*.

Where the subject of the estate ceases to exist, there can be of course no curtesy. Thus, where a woman makes a gift in tail, reserving a rent to her and her heirs, marries and has issue; the donee in tail dies *without issue*; the wife dies in the life-time of tenant in tail; the husband shall *not have curtesy of the rent*, because it ceased to exist with the determination of the estate-tail, for which it was a compensation. If, however, the wife was still living when the estate-tail ran out, she would become seised of the *land*, and the husband would be entitled to curtesy in that. (1 Th. Co. Lit. 561; 1 Bright's H. & Wife, 132.)

3<sup>g</sup>. Birth of *Issue Alive*; *w. c.*

1<sup>h</sup>. Proof that Issue was *Born Alive*.

It was once supposed that it was necessary that the child should be *heard to cry*. Any proof, however, of the fact of its being born alive suffices. (1 Bl. Com. 127; 1 Th. Co. Lit. 563.)

2<sup>h</sup>. The Issue must be Born *During the Coverture*.

Hence, if the wife die, and the child is by the Cæsarean operation ripped from her womb alive, *after her death*, no curtesy is allowed. (2 Th. Co. Lit. 562; 2 Bl. Com. 127; 1 Washb. R. Prop. 141; Paine's Case, 8 Co. 35 a.)

4<sup>k</sup>. Death of Wife.

This is the last of the four requisites for curtesy. During the wife's life-time (after the birth of issue), the husband is said to be tenant by the curtesy *initiate*. Upon

her death, he is styled tenant by the curtesy *consummate*. (2 Bl. Com. 128; 1 Th. Co. Lit. 563, n. (H).)

The tenant by the curtesy *initiate* has for divers purposes, even during the life of the wife, an estate which the law respects. Thus, by the feudal law, he did homage alone, and not in conjunction with his wife as before the birth of the issue; and he may make a feoffment in fee, or a lease for his life, which the heir of the wife cannot during the tenant's life avoid. (1 Th. Co. Lit. 558; 1 Bright's H. & W. 124; Bac. Abr. Curtesy, (D.); Greneley's Case, 8 Co. 72 b, 73 a.) And hence it is supposed that the husband's debts may be charged on the lands of which he is thus tenant by the curtesy initiate, to the extent of his interest. (Breeding v. Davis, 77 Va. 646.)

But the "Married Woman's Law" of 4th April, 1877, (V. C. 1887, ch. 103, §§ 2284 & seq.,) is understood to have abolished tenancy by the curtesy *initiate*. (Breeding v. Davis, 77 Va. 646, &c., Alexander v. Alexander, 85 Va. 369, &c.) But see Brown v. Boscover, 84 Va. 432.

#### 4<sup>e</sup>. Estates in Dower.

The doctrine which belongs to the estate in dower may be presented under the heads following, namely: (1), The definition of an estate in dower; (2), The origin and design of dower; (3), The requisites of the estate in dower; (4), The mode of endowment of a widow; (5), The modes of barring or preventing dower; and (6), The priority of dower over the husband's debts;

W. c.

#### 1<sup>f</sup>. Definition of Estate in Dower; w. c.

##### 1<sup>g</sup>. Dower at Common Law.

Where a woman marries a man seised at *any time during the Coverture*, of an estate of *inheritance* such as that the issue of the marriage may by possibility inherit it, as *heir to the husband*, and the husband dies, the wife surviving is entitled to one-third *for her life*, as tenant in dower. (1 Th. Co. Lit. 569, 578.)

There are several species of dower existing at common law, by the custom of *particular places*, or otherwise under *special circumstances*, which will be found explained, *post*, p. 156. See 2 Bl. Com. 132-'3; 1 Th. Co. Lit. 603.

##### 2<sup>g</sup>. Dower in Virginia, by Statute.

"A widow shall be endowed of one-third of all the *real estate* whereof her husband, or any other *to his use*, was, *at any time during the coverture*, seised of an estate of *inheritance* (or entitled to a right of entry, or action for such estate), *unless* her right to such dower shall have been *lawfully barred or relinquished*." (V. C. 1873, ch. 106 §§ 1, 2; V. C. 1887, ch. 102, §§ 2267, 2268.)

There seems to be no other difference between the common

law and this statutory dower, than that the latter does not require *seisin* even in law, but is content with a *right of entry or of action*, where the widow would have been entitled to dower, if the husband, or any other to his use, had recovered possession.

## 2<sup>d</sup>. Origin and Design of Dower; w. c.

### 1<sup>st</sup>. Origin of Dower.

It seems to have originated amongst the Germans. The Feudists recognized it in the maxim, *non uxor marito, sed uxori maritus affert*. The usage was for the husband and oldest son to go to war, whilst the wife and younger sons tilled the land, and raised provisions for the army. Hence, as she had the third part *in toil*, upon her husband's death she was allowed a third part of the feud during her life for the maintenance of herself and younger children. The Saxons appear to have first introduced it into England, and the Normans to have regulated it according to the usages of Normandy. (Bac. Abr. Dower; 1 Th. Co. Lit. 567, n. (A).)

### 2<sup>d</sup>. Design of Dower Originally.

Designed originally for the sustenance of the widow, and the nurture and education of the younger children; although the widow is in modern times under no legal obligation to employ her dower for the latter purpose. (1 Th. Co. Lit. 567, n. (1); Id. 569; 2 Bl. Com. 129, 130.)

In modern times it would seem that dower ought not to be regarded as designed only for the sustenance of the widow, after the husband's death, but also as a means of equalizing the marital rights of the husband and wife, in the property of one another.

### 3<sup>d</sup>. Requisites of the *Estate in Dower*.

These requisites, save in *respect to seisin*, and the birth of issue, are almost identical with those for curtesy, so that, for brevity's sake, continual reference will be had to the expositions already made of that topic. They are, (1), Marriage; (2), Seisin of husband; (3), Death of husband; w. c.

#### 1<sup>st</sup>. Marriage.

A marriage is required, which is neither void *per se*, nor actually avoided *ab initio* by divorce, according to the maxim, *ubi nullum matrimonium, ibi nulla dote*. (1 Com. Dig. 89 & seq.; 1 Th. Co. Lit. 557, n. (B); Id. 569, 571-572, and n. (C).)

w. c.

#### 1<sup>h</sup>. Effect of Marriage being Void *Per Se*; w. c.

1. Effect, at *Common Law*, of Marriage being Void *Per Se*.

As in this case there is not, nor ever has been, a marriage between the parties, there is *no dower*, as we have



seen there is *no curtesy*. (1 Bl. Com. 436 & seq.; 1 Th. Co. Lit. 571-'2, n. (C.); Id. 557, n. (B.); 1 Lom. Dig. 90; 1 Min. Insts. 259, 262 to 265; *Ante*, p. 116, 1<sup>i</sup>.)

2<sup>i</sup>. Effect, *in Virginia*, of Marriage being Void *Per Se*; w. c.

1<sup>k</sup>. What Causes Render a Marriage Void *Per Se* in Virginia, without Divorce.

(*Ante*, p. 116, 1<sup>k</sup>; V. C. 1873, ch. 105, §§ 1, 3; V. C. 1887, ch. 101, §§ 2252, 2254; 1 Min. Insts. 264-'5.)

2<sup>k</sup>. Effect of Marriage being Void *Per Se* in these Cases.

No marital right whatever can ensue, and so there can be neither *dower* nor *curtesy*. *Ante*, p. 116, 2<sup>k</sup>; 1 Th. Co. Lit. 571-'2, n. (C.); 1 Lom. Dig. 90; 1 Min. Insts. 301-'2.)

2<sup>b</sup>. Effect of Marriage being Avoided by Divorce *a Vinculo Matrimonii*, by Decree of *Competent Court*; w. c.

1<sup>i</sup>. Effect of Marriage being Avoided by Divorce *a Vinculo* for a Cause subsisting at the *Time of the Marriage*; w. c.

1<sup>k</sup>. Doctrine at Common Law.

The marriage being in such case avoided *ab initio*, there can be no *dower* nor *curtesy*, according to the doctrine already expounded. (*Ante* p. 116, 1<sup>k</sup>; 2 Bl. Com. 130; 1 Th. Co. Lit. 557, n. (B.); Id. 571-'2, 609; 1 Min. Insts. 299, 301-'2.)

2<sup>k</sup>. Doctrine *in Virginia*; w. c.

1<sup>i</sup>. The Causes Subsisting at the Time of the Marriage for which it *may be Annulled in Virginia*.

See *Ante*, p. 117, 1<sup>i</sup>.

w. c.

1<sup>m</sup>. Causes *Subsisting at the time of the Marriage* for which the Marriage *may be Annulled in Virginia*, but to take Effect *only from the Sentence of Divorce*.

They are consanguinity and affinity (where the marriage is solemnized in Virginia; or, out of Virginia, if the parties go out for the purpose and with the intention of returning, and after marriage do return to and reside in the State), insanity and incurable impotency of body. (V. C. 1873, ch. 105, § 1; V. C. 1887, ch. 101, §§ 2252, 2253; *Ante*, p. 117.)

2<sup>m</sup>. Causes *Subsisting at the Time of the Marriage* for which the Marriage may be *Annulled in Virginia*, *Ab Initio*.

They are stated, *Ante*, p. 117, 2<sup>m</sup>. (V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, §§ 2252, 2257.)

2<sup>i</sup>. Effect in Virginia of the *Annulment* of the Marriage for Causes *Subsisting at its Date*.

When the marriage is determined *ab initio* (as in the cases referred to *supra*, 2<sup>m</sup>), no marital right, and consequently no right to *dower or to curtesy*, attaches. But in the cases alluded to, *supra*, 1<sup>st</sup>, where the marriage is void only from the *date of the sentence*, it seems consonant to reason to suppose that, in the absence of any *special provision* in the sentence itself, *dower and curtesy* having already attached to the *existing property* of the parties, is not, *as to that property*, impaired by the divorce. See *Ante* p. 118, 2<sup>d</sup>; V. C. 1873, ch. 105, §§ 1, 4, 12; V. C. 1887, §§ 2252, 2254, 2263.)

But this latter conclusion is wholly refuted by the case of *Porter v. Porter*, 27 Grat. 600, which is sustained virtually by the later cases of *Harris v. Harris*, 31 Grat. 33-4; and *Cralle v. Cralle*, 79 Va. 188. See 2 Bish. Marr. & Div. §§ 706, 708, 712; *Wait v. Wait*, 4 Comst. (N. Y.) 101; *Ante* p. 118.

The cases of *Porter v. Porter*, of *Harris v. Harris*, and of *Cralle v. Cralle*, are supposed to establish the law in Virginia, that in any case of divorce *a vinculo*, there can be no dower and no curtesy, even though the divorce were granted for a *supervenient* cause.

The writer has presumed, in connection with a previous passage (*Ante*, p. 118), to state the considerations which, independently of those cases and prior to their occurrence, had led him to a contrary conclusion.

## 2<sup>d</sup>. Effect of the Marriage being Annulled for a *Supervenient Cause*; W. C.

### 1<sup>st</sup>. Doctrine at *Common Law*.

At common law no marriage can be annulled, for a *supervenient cause*, except by special act of parliament, which is then the law of the case. There is, therefore, *no common law doctrine upon the subject*. (1 Bl. Com. 440; *Ante*, p. 118, 1<sup>st</sup>.)

### 2<sup>nd</sup>. Doctrine in *Virginia*.

The marriage having been for a time a *valid and subsisting* marriage, it might be supposed that, in the absence of any *special order to the contrary* in the sentence of divorce, all the marital rights (including *dower and curtesy*), which have *already attached* to the *existing property* of the parties, remain unimpaired; whilst rights which have not attached (*e. g.* that to a *distributive share*), are barred; and certainly no claim can arise on the part of either consort to the *after-acquired property* of the other. (*Ante*, p. 119, 2<sup>nd</sup>; V. C. 1873, ch. 105, § 12; V. C. 1887, ch. 101, § 2263.)

But the student will observe that it is now established law in Virginia, that there can be neither dower nor curtesy (without a special order of court) in *any case* of divorce *a vinculo*, even for a supervenient cause. (Porter v. Porter, 27 Grat. 600; Harris v. Harris, 31 Grat. 33-4; Cralle v. Cralle, 79 Va. 188; *Ante*, pp. 119, 137.)

The supervenient causes for a divorce *a vinculo*, in Virginia, are stated, *ante* 119, 2<sup>k</sup>. (V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257.)

3<sup>b</sup>. Effect of Divorce *a Mensa et Toro*; w. c.

1<sup>i</sup>. Doctrine at Common Law.

It had no effect on dower. (*Ante*, p. 121, 1<sup>i</sup>.)

2<sup>i</sup>. Doctrine in Virginia; w. c.

1<sup>k</sup>. Effect of a simple Divorce *a Mensa*, &c.

In the absence of any order in the sentence of divorce, it has no more effect on dower and curtesy than at common law. (V. C. 1873, ch. 105, § 12; V. C. 1887, ch. 101, § 2263.)

2<sup>k</sup>. Effect of Divorce *a Mensa*, &c., with a Decree of *Perpetual Separation* Superadded.

It has no effect as to dower and curtesy in respect to *existing property*; but it operates like a divorce *a vinculo matrimonii*, in respect of *after-acquired property*, barring the claim of dower or of curtesy thereto. (V. C. 1873, ch. 105, § 13, 12; V. C. 1887, ch. 101, §§ 2264, 2263.)

2<sup>g</sup>. Seisin of the Husband.

The seisin which is requisite for dower is not the same as that required for curtesy, although many of the same principles are applicable. Let us observe, (1), The kind of seisin required in the husband; and (2), The estate whereof the husband must be seised;

w. c.

1<sup>h</sup>. The Kind of Seisin *Required in the husband*.

In explaining the doctrines touching the kind of seisin required to be in the husband in order to entitle the wife to dower, we must advert to, (1), Seisin *in law*; (2), Sole seisin; (3), Seisin of partners in trade; (4), Mere right of entry or of action; (5), Equitable (in contradistinction to legal) seisin; (6), Momentary seisin; and (7), Legal seisin of the husband, not for his benefit;

w. c.

1<sup>i</sup>. Seisin *in Law*.

Thus, where lands *descend* to the husband as heir, and before he enters, either in person, or by his agent or tenant, he dies, he has a *seisin in law*, which entitles his wife to dower. *Actual seisin* is not required, etc., as it is in curtesy, because "it lieth not in the power of the

wife to bring it to an actual seisin, as the husband may do of the wife's land." (1 Th. Co. Lit. 574.)

The seisin need not continue during the *whole coverture*. It is enough if it exists *beneficially*, in the husband, for *ever so short a period* during the coverture. The husband's alienation after marriage, or his disseisin by a wrongdoer, will not affect the wife's claim. (1 Th. Co. Lit. 568, n. (B.); Id. 609.)

## 2<sup>i</sup>. Sole Seisin.

At common law, the husband must not be seised as a *joint-tenant*, in consequence of the right of survivorship (*jus accrescendi*), existing between joint-tenants, whereby the land immediately, *at the husband's death*, vests in the surviving tenant, and thus the right of dower, as of curtesy, is anticipated. In Virginia, the right of survivorship being abolished, except where the land is *expressly limited* to the survivor, etc., the title to dower and to curtesy, except in that case, takes place by the express terms of the statute, as to joint-tenants, as well as in respect of tenants in common and co-parceners. (1 Th. Co. Lit. 564, 745-'6; V. C. 1873, ch. 112, §§ 18, 19; V. C. 1887, ch. 107, §§ 2430, 2431.)

If a decree be made for the sale of the land with a view to partition, the husband being a joint-tenant, tenant in common, or co-parcener, the question has been considerably discussed whether the wife will be entitled to dower in her husband's portion, as against the purchaser at the sale under the court's decree, supposing no statutory provision to be made for the case, or whether her dower, although she be not a party to the suit, is divested by the decree and the sale. It has been held in Missouri, that the dower is thus divested (*Lee v. Lindell* (22 Mo.) 64 Am. Dec. 260), and also in Ohio, (*Weaver v. Gregg*, (6 Ohio St.) 67 Am. Dec. 355). These decisions, which are independent the one of the other, are well reasoned, especially that in Ohio. In New York, however, it is held that unless the wife is a party to the proceeding, she is not repelled by it from claiming her dower (*Coles v. Coles*, 15 Johns. 322). But in Virginia all doubt is removed by statute, which enacts that "A sale of land so made by order of court shall operate to bar the contingent right of dower of the wife in the share of her husband in the land so sold, *whether she be a party to the suit or not*," (V. C. 1887, ch. 114, § 2564.)

## 3<sup>i</sup>. Seisin of Partners in Trade.

In England the doctrine is considered settled, that real estate purchased for partnership purposes, with partnership funds, and used as part of the stock in



trade, is to be considered to *every intent* as personal property, not only as between the members of the partnership, respectively, but also as between the surviving partner and the representatives of the deceased. And although the legal title to the land be partly or wholly in the heir of the deceased partner, or in whomsoever else it may be vested, yet, in equity, it is still deemed partnership property, in respect to which the partnership is the *cestui qui trust*, and the holder of the legal title is merely the *trustee* for the concern. Hence, upon the death of one of the partners, whereby, in general, the partnership is dissolved, the survivor or survivors become entitled, as representing the *cestui que trust*, to have the land sold, and the proceeds applied to pay the debts of the firm, and if any surplus remains, it is to be divided between such survivor or survivors and the *personal representative*, and *not the heir* of the decedent. (Gow, Partnership, 34, 35, 549; Stor. Part. § 93, & n. 2; 3 Kent's Com. (12th ed.) 37, & n. (d), 39, & n. (b) and 1; Phillips v. Phillips, 1 My. & K. (7 Eng. Ch.) 649; Randall v. Randall, 7 Sim. (10 Eng. Ch.) 271.) And this doctrine is believed to be the prevailing one at present in Virginia, and in other States. (Pierce v. Trigg, 10 Leigh, 422 & seq.; Wheatley v. Calhoun, 12 Leigh, 272 & seq.; Brooke v. Washington, 8 Grat. 255; Sigourney v. Munn, 7 Conn. 11; Buck v. Winn, 11 B. Mon. (Ky.) 326; Galbrith v. Gedge, 16 B. Mon. 631; Andrews v. Brown, 21 Ala. 437. But see Davis v. Christian, 15 Grat. 36.)

Such partnership real estate being thus regarded in equity, as to all intents and purposes *personalty*, of course is not subject to dower or to curtesy in favor of the consort of a deceased partner. (1 Br. H. & Wife, 331 & seq.; Stor. Part. § 93, & n. 2; Burnside v. Merrick, 4 Met. (Miss.) 537; Dyer v. Clark, 5 Met. 562; Howard v. Priest, 5 Met. 582; Sumner v. Hampson, 8 Ohio, 328; Duhring v. Duhring, 20 Mo. 174; Pierce v. Trigg, 10 Leigh, 422 & seq., 431; Wheatley, v. Calhoun, 12 Leigh, 272-3. But see 1 Lom. Dig. 99, 100; 1 Greenl. Cruise, 180; 1 Washb. Real Prop. 159-60.)

It must be observed, however, that if two persons in contemplation of a partnership, as for milling, mining or farming, purchase land to be used for such business, on the individual responsibility of the partners, and not with partnership funds, nor on partnership responsibility, the land is not converted into partnership stock, but retains its character of *realty*. To raise a partnership-trust by such a purchase, it must be made *at the time* with partnership funds, or on partnership responsi-

bility, as well as for partnership purposes. And although an instalment of the purchase money should chance incidentally to have been paid for and on behalf of one of the individual partners, out of the social funds, this would not raise such a trust, or give title to anything but re-imbursement of the firm. The consort of a deceased partner would in such a case be entitled to dower, or to curtesy of his or her moiety in the real estate purchased. (1 Lom. Dig. 100; Wheatley v. Calhoun, 12 Leigh, 273.)

And further, it should be noted that, even where the land has been purchased with partnership funds, for partnership purposes, the implied trust in favor of the partnership may be repelled, not perhaps as against the creditors of the concern, but as to the partners themselves, and their heirs, personal representatives, and consorts respectively, by any clear and express agreement to the contrary contained in the articles of partnership, or made at the time of the purchase or afterwards. And where such implied trust is repelled, the right to dower or to curtesy will exist. (1 Lom. Dig. 100; 1 Greenl. Cruise, 180; Stor. Part. § 93, n. 2.)

4<sup>i</sup>. Mere Right of Entry, or Mere Right of Action.

At common law neither dower nor curtesy was allowed in these, nor is curtesy admitted in them even yet; but by statute in Virginia, dower may be had in them, whenever the wife would have been entitled to it, had the husband, or any other to his use, *recovered possession* of the land. (V. C. 1873, ch. 106, § 2; V. C. 1887, ch. 102, § 2268.)

5<sup>i</sup>. Equitable (in Contradistinction to *Legal*) Seisin :  
W. C.

1<sup>k</sup>. Dower in General Trusts.

At common law no dower is allowed in trust-estates, although curtesy is. The reasons of the difference have been explained, *Ante*, p. 125, 5<sup>l</sup>. See 2 Bl. Com. 127, n. (9); Darcy v. Blake, 2 Sch. & Lefr. 388.

In Virginia this diversity is removed. Where one has such an inheritance in an use or trust as, if it were a legal estate, would entitle the consort to dower or curtesy, dower or curtesy is allowed therein. (V. C. 1873, ch. 112, § 17; V. C. 1887, ch. 107, § 2429; Heth v. Cocke, 1 Rand. 344; Wheatley's Heirs v. Calhoun, 12 Leigh, 265; Rowton v. Rowton, 1 H. & Munf. 92.)

2<sup>k</sup>. Dower in Lands Subject to *Mortgage or other Lien* :  
W. C.

1<sup>l</sup>. Dower where the Lien is *Paenitentia* to *Dower*.

Supposing a mortgage or deed of trust to be made by the husband, *before marriage*, or with the *wife's*

*concurrency*, afterwards, so that the lien is paramount to the dower. We are to observe (1), The doctrine as to dower in the equity of redemption; (2), The doctrine as to the payment of the annual interest on the debt, whilst the lien stands; (3), The doctrine as to the widow's contribution to pay the principal, if the lien is foreclosed.

W. C.

1<sup>m</sup>. Doctrine as to Dower in the *Equity of Redemption*.

The general principle is that if the equity of redemption is *not foreclosed* in the husband's life-time, so that at his death it still subsists as an equitable interest *in the lands*, dower may be had therein. (Heth v. Cocke, 1 Rand. 344; 1 Lom. Dig. 102.)

But if the equity of redemption were *foreclosed* in the husband's life-time, the land sold, and a surplus after the payment of the debt secured by the lien remained (which surplus is the measure of the value of the equity of redemption), at common law there can be *no dower therein*, (nor in a corresponding case, curtesy); because by the foreclosure it has become *personalty*, as if by relation to the time before the marriage, when the lien was created. (Wilson v. Davisson, 2 Rob. 384; 1 Lom. Dig. 104, and n. ‡.)

In Virginia, by statute, enacted in consequence of the case of Wilson v. Davisson, *dower* is allowed *in the surplus* after satisfying the lien, and the wife's rights therein are to be cared for, and protected *in equity*. (V. C. 1873, ch. 106, § 3; V. C. 1887 ch. 102, § 2269; Jaeger v. Bossieux, 15 Grat. 83; Robinson v. Shacklett, 29 Grat. 100, 107.)

2<sup>m</sup>. Doctrine as to the Payment of the *Annual Interest* on the debt whilst *the Lien Stands*.

The widow having one-third of the land, must pay *one-third of the annual interest*, where the debt is not of the husband's contracting, but he acquired the land subject thereto, (1 Lom. Dig. 476; Id. 51; 1 Bright's H. & W. 344, 387-'8; 1 Th. Co. Lit. 576, n. (25); Banks v. Sutton, 2 P. Wms. 716; *Post* pp. 175-'80.)

But if the debt were one contracted *by the husband himself*, and the creditor's lien is paramount to the dower, the dowress is entitled to have the incumbrance, created by the husband, cleared off out of the *husband's personality* in the hands of his personal representative; and if that be insufficient, out of the lands in the hands of the husband's heir or devisee. In this latter case, therefore, the wife is not called upon to contribute anything to pay the annual in-

terest, until the personalty and the other lands of the husband are exhausted. (1 Th. Co. Lit. 568, n. (B.); 1 Bright's H. & Wife, 344, 387 '8; Heth v. Cocke, 1 Rand. 344.)

3<sup>m</sup>. Doctrine as to the Widow's *Contribution* to Pay the *Principal*, if the *Lien* is *Foreclosed*.

The widow is to contribute towards the payment of the principal of the debt, where she is obliged to contribute at all, along with the heir, such a sum as would equal the aggregate of her payments of annual interest, (if she were to continue to pay it during her life), *reduced to cash*, calculating at *compound interest*. The computation is made by taking (from the tables of mortality), her *probable duration* of life, and having thus ascertained approximatively for how many years she would continue to pay the annual interest, the *present cash value*, at *compound interest*, of *each payment* is to be estimated, and the aggregate is the amount the widow must contribute. This computation, which is founded on *an average*, derived from a comparison of many thousand lives, ought to be corrected by reference to whatever in the widow's constitution, or state of health, may put her above or below an average life, which of course can be done only conjecturally, and is a problem demanding the soberest judgment. (Wilson v. Davisson, 2 Rob. 384; Am. Alm. 1835, p. 84; 1 Lom. Dig. 126; Id. 51; Earl of Portmore v. Taylor, 4 Sim. 182.)\*

\* *Note*.—The value of a widow's dower, or of any other life-estate, is calculated in the same way; and as this has not unfrequently to be done, it will be worth while to explain the method.

It may be done *arithmetically*, thus: Supposing the widow's probable duration of life, as derived from the tables, is five years, and the *annual interest* which she has to pay (or her *annual income*, if the estimate is of the value of her life-estate), is \$60, the computation would be as follows:

1st year's interest (or income), paid <i>now</i> , instead of at the end of the year,	\$56.604
2d   "       "       "       "       "       "       "	53.400
3d   "       "       "       "       "       "       "	50.377
4th   "       "       "       "       "       "       "	47.525
5th   "       "       "       "       "       "       "	44.855

Present value of contribution (or of dower),   \$252.761

But this process is intolerably tedious, if the annual sum be considerable, and the probable duration of life long. To those who already know, or will take the trouble to learn the use of *logarithms*, a much more convenient method is as follows: The *formula* to be employed (which to an algebraist it is needless, and to one not an algebraist, it is vain to demonstrate), is

$$P = \frac{s \left\{ (1+r)^n - 1 \right\}}{r \left\{ (1+r)^n \right\}}$$

where P=Amount of contribution, or value of dower; s=Annual interest, or income; r=Rate *per cent.*, of interest; and n=Number of years of duration of life. The annual interest (or income) in the case supposed, is \$60, the rate *per cent.*



2<sup>d</sup>. Dower, where the Widow's Claim is *Paramount to the Lien*,  
*e. g.*, Mortgage or deed of trust *after marriage, with-*

.06, and the probable duration of life five years. Substituting these figures in the *formula*, we have

$$P = \frac{60 \left\{ (1.06)^5 - 1 \right\}}{.06 \left\{ (1.06)^5 \right\}} :$$

and applying *logarithms*—

Log.  $1.06 (=0.025306) \times 5 = 0.126530$ , whose Nat. No. is 1.33824

Log.  $(1.33824 - 1) = \text{Log. } .33824 = 1.529225$

Log.  $1.06 \times 5 = \dots\dots\dots 0.126530$

1.402695, whose Nat. No. is .25275

60

$-(.25275) \quad 1000 \times .25275 = 252.75$

.06

The wife's contribution (or the value of her dower) would be \$252.75.

Another example, with a larger annual sum, and a longer probable duration of life, will better illustrate the comparative facility of this method. Suppose the annual interest (or income) to be \$319.98, and the debt (*i. e.*, the third part) to which the widow is to contribute, or the fee-simple value of the dower land, to be \$5,333, while the widow's expectation of life, by the tables, is 27 years,

The *formula*,

$$P = \frac{s \left\{ (1+r)^n - 1 \right\}}{r \left\{ (1+r)^n \right\}}$$

with the substitutions, will be

$$P = \frac{319.98 \left\{ (1.06)^{27} - 1 \right\}}{.06 \left\{ (1.06)^{27} \right\}}$$

from which, applying logarithms, we get

Log.  $1.06 (=0.025306 \times 27 = 0.683262$ , whose Nat. No. is 4.82238

Log.  $(4.82238 - 1) = \text{Log. } 3.82238 = 0.582322$

Log.  $1.06 \times 27 \quad \quad \quad 0.683262$

1.899070

Log.  $(319.98) = \text{Log. } 5333 = 3.726972$

3.626042, whose Nat. No. is 4227

That is, the widow's contribution (or the value of her dower), is \$4,227.

To verify the result, take the residue (\$1,106), and see if in twenty-seven years, improved at *compound interest*, it will yield \$5,333. The *formula* for compound interest is  $s = p(1+r)^n$ , which, substituting for the letters, their value, is  $s = 1,106(1.06)^{27}$ ; and applying logarithms—

Log.  $1106 = 3.043710$

Log.  $1.06 \times 27 = 0.683262$

3.726972, whose Nat. No. is \$5,333.

A table of values already calculated for all probable ages is in *Am. Alm.* 1835, p. 84, but its correctness seems questionable.

As tables of the probabilities of life may not be always accessible, the following

*out the wife's concurrence.* Here, of course, the widow's claim is not affected *by the lien.*

### 6<sup>i</sup>. Momentary Seisin.

rule, stated by De Moivre, may easily be remembered. Regarding 86 as practically the extreme limit of human life, he proposes to deduct the actual age from that number, and to divide the remainder (which is styled the *complement of life*) by 2, which gives approximately the probable duration of the life in question. Thus, supposing one to be of the age of 50, his probable expectation of life is expressed by  $\frac{86-50}{2} = \frac{36}{2} = 18$ , &c. (De Moivre on Chances and Annuities, 265, 283.) Dr. Price, in his work on Annuities, seems to approve this rule as affording a close approximation to the more elaborate tables, at least between the ages of 30 and 70 or 75. (1 Price on Annuities, 2, n. b.)

In Virginia the legislature has by statute prescribed the mode of computing the *present value* of a life annuity, or of any life interest whose annual income is fixed. And as the table found in the act gives the tabulated results already calculated, it is believed without material inaccuracy, so as to save both time and trouble in making the computation, it is deemed best still further to prolong this note, by transcribing the essential parts of the statute.

The act provides—

“That when a party, as tenant for life, or by the curtesy or in dower, is entitled to the annual interest on a sum of money, or is entitled to the use of any estate, or a part thereof, and is willing to accept a gross sum in lieu thereof, or the party liable for such interest, or affected by such claim, has a right to pay a gross sum in lieu thereof, or if the court in any legal proceeding decree a gross sum to be paid in lieu thereof, the sum shall be estimated according to the then value of an annuity of six *per centum* on the principal sum during the probable life of such person, according to the following table :

“TABLE

“Showing the present value, on the basis of six *per centum* interest, of an annuity of ONE DOLLAR, payable at the end of every year that a person of a given age may be living, for the ages therein stated.

Age.	Present value.	Age.	Present value.	Age.	Present value.	Age.	Present value.	Age.	Present value.	Age.	Present value.
0	\$10.439	17	\$14.012	34	\$12.675	51	\$10.422	68	\$6.546	85	\$2.909
1	12.078	18	13.956	35	12.573	52	10.208	69	6.277	86	2.739
2	12.925	19	13.897	36	12.465	53	9.988	70	5.998	87	2.599
3	13.652	20	13.835	37	12.354	54	9.761	71	5.704	88	2.515
4	14.042	21	13.769	38	12.239	55	9.524	72	5.424	89	2.417
5	14.325	22	13.697	39	12.120	56	9.280	73	5.170	90	2.266
6	14.460	23	13.621	40	12.002	57	9.027	74	4.944	91	2.248
7	14.578	24	13.541	41	11.890	58	8.772	75	4.760	92	2.337
8	14.526	25	13.456	42	11.779	59	8.529	76	4.579	93	2.440
9	14.500	26	13.368	43	11.668	60	8.304	77	4.410	94	2.492
10	14.448	27	13.275	44	11.551	61	8.108	78	4.238	95	2.522
11	14.384	28	13.182	45	11.428	62	7.913	79	4.040	96	2.486
12	14.321	29	13.096	46	11.296	63	7.714	80	3.858	97	2.368
13	14.257	30	13.020	47	11.154	64	7.502	81	3.656	98	2.227
14	14.191	31	12.942	48	10.998	65	7.281	82	3.474	99	2.004
15	14.126	32	12.860	49	10.826	66	7.049	83	3.286	100	1.596
16	14.067	33	12.771	50	10.631	67	6.803	84	3.102		

“Rule for computing the present value of the life-estate or annuity.

“Calculate the interest at six *per centum*, upon the sum to the income of which, or upon the value of the property to the use of which the person is entitled. Multiply this interest by the *present value* of an annuity of one dollar, as set opposite the person's age in the table, and the product is the *gross value* of the life-estate of such person therein.” (V. C. 1887, ch. 102, §§ 2281, 2282.)

The statute adds two examples, of which it will suffice to state one: of a widow

The husband's seisin may be ever so momentary, if it be *bona fide for his benefit*. (1 Th. Co. Lit. 576, n's (G.) and (H.); 2 Bl. Com. 131; 1 Lom. Dig. 95; Bac Abr. Dower, (C.) 2; 1 Washb. R. P. 176);

W. C.

1<sup>k</sup>. Father and Son Hanged from the *Same Cart*.

The son (the tenure being *gavelkind*, in which no forfeiture ensues from felony) having been observed to survive the father a *single moment*, his widow was endowed. (2 Bl. Com. 132, n. (y); 1 Lom. Dig. 95; 1 Bright's H. & Wife, 326, and n. (c); Droughton v. Randall, 2 Cro. (Eliz.) 503.)

2<sup>k</sup>. Vendee's Deed of Trust to Secure Purchase-Money for Land, in Pursuance of *Contract of Sale*.

The vendee's widow is *not entitled* to dower, as against the vendor, because *quoad* the vendor's lien, the vendee was never *beneficially seised*. (Moore v. Gilliam, 5 Munf. 346; Gilliam v. Moore, 4 Leigh, 30; Wheatley's Heirs v. Calhoun, 12 Leigh, 274; Childers v. Smith, Gilm. 200; 1 Lom. Dig. 103.) And where the deed conveying the land, and the deed of trust to secure the purchase-money are of the same date, they must be *intended* to be parts of the same transaction; the seisin of the husband is that instantaneous seisin, where the land is merely *in transitu*, and is not vested *beneficially* in the husband. (1 Washb. R. Prop. 176; 4 Kent's Com. (12th ed.) 39; 1 Th. Co. Lit. 576; Bac. Abr. Dower, (C.) 2; Holbrook v. Finney, 4 Mass. 566; Clark v. Munroe, 14 Mass. 351; Stow v. Tift, 15 Johns. (N. Y.) 458; McCauley v. Grimes, 2 Gill. & Johns. (Md.) 318, 324; Mayburry v. Brien, 15 Pet. 39; Gilliam v. Moore, 4 Leigh, 32; Summers v. Darne, 31 Grat 801.) But in Kentucky, such seisin was held sufficient to entitle the purchaser's widow to dower, in McClure v. Harris, 12 B. Monr. 261.

The same proposition is true as to the vendor's *implied lien* for the purchase-money, when such lien exists. In Virginia by statute it must be *expressly* reserved, never existing merely *by implication*. (Wilson v. Davisson, 2 Rob. 384; V. C. 1873, ch. 115, § 1; V. C. 1887, ch. 110, § 2474.)

But if the lien were created in pursuance of an *after-arrangement*, and not either expressly or impliedly by the *original contract* of sale, the widow is *entitled* to dower. (Blair v. Thompson & als. 11 Grat. 441.)

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whose age is 36, being entitled to dower in land, the whole worth \$12,000, and one-third \$4,000. The interest on that sum is \$240, which being multiplied by the figures representing the present value of an annuity of *one dollar*, at the age of 36, as appears by the table (viz.: 12.465), gives \$2,991.60 as the present gross value of the dower. (V. C. 1887, ch. 102, § 2283.)

7<sup>l</sup>. Legal Seisin of the Husband, but *not for His Benefit*.

No dower attaches. At least a court of equity will enjoin a widow from setting up her claim founded on such a seisin. (*Hinton v. Hinton*, 2 Ves. Sr. 634; 4 Kent's Com. 43; 1 Lom. Dig. 101.)

The cases of this kind which are most likely to occur are, (1), Where the husband is only a trustee, or where he is a mortgagee; and, (2), Where, before marriage, he *contracted to sell*, but died without conveying the title;

W. C.

1<sup>k</sup>. Widow of Trustee or Mortgagee.

The widow of a trustee or mortgagee is not entitled to dower, the husband not being seised *beneficially*. (2 Bl. Com. 137, n. (30); 1 Th. Co. Lit. 576, n. (25); 1 Lom. Dig. 101-2.)

2<sup>k</sup>. Where Husband, *Before Marriage*, Contracted to sell, but Died *without conveying Title*.

The wife cannot claim dower, for although the husband has the legal title, yet he is not *beneficially seised* during the coverture, as against the vendee. (1 Bright's H. & Wife, 359; 1 Lom. Dig. 101-2; 1 Washb. R. Prop. 139, 163, 107; *Braxton v. Lee's Heirs*, 4 Hen. & M. 376; *Waller v. Waller*, 33 Grat. 86-7.)

2<sup>h</sup>. Estate whereof Husband *Must be Seised*.

In order to set forth the estate whereof the husband must be seised, the following heads must be discussed, namely: (1), The kinds of property wherein dower may be had; (2), The general doctrine as to the estate required to be in the husband; (3), Illustrations of the general doctrine; and (4), The effect of the determination of the husband's estate;

W. C.

1<sup>i</sup>. The Kinds of Property *wherein Dower may be had*.

The widow is dowable of *all the real estate* whereof the husband, or any one to his use, at *any time* during the coverture, was *seised of an estate of inheritance*, such as that *issue born of the marriage* may, by possibility, *inherit the same as heir to the husband*, unless her right to such dower has been *lawfully barred or relinquished*; and she is also dowable of lands wherein her husband, or any other to his use, had a *right of entry or of action*, when she would have been entitled to dower therein, had her husband or such other recovered possession thereof. (1 Th. Co. Lit. 603; *Id.* 581, and n. (L.), 582-3; V. C. 1873, ch. 10 i, § 1, 2; *Id.* ch. 15, § 9 (cl. 10); V. C. 1887, ch. 102, §§ 2267, 2268; *Id.* ch. 2, § 5 (cl. 10); *Ante*, p. 134, 1<sup>l</sup>.)



The several kinds of property (besides the common case of lands) wherein dower may be claimed, whether upon just foundation or not, may be enumerated as follows, viz.: (1), Rents of all kinds, except rent-service; (2), Fisheries, franchises, etc.; (3), Mines; (4), Wild and uncultivated forest lands; (5), Shares in canals, roads, &c.; and (6), Lands exchanged by the husband during coverture;

W. C.

1<sup>k</sup>. Rents of all Kinds, *except Rent-Service.*

Of course the estate in the rent, in order that the widow may be entitled to dower, must be an *estate of inheritance*, as in lands. And since there cannot be an estate of inheritance in a *rent-service*, so neither can there be dower or curtesy therein. On the other hand, as in rent-charge and rent-seck there may be estates of inheritance, they may be the subjects of dower and curtesy. (*Id.*, pp. 53-4.) Rents being thus sometimes the subjects of dower and curtesy may devolve on the consort *an election* whether to insist on the right of dower, etc., in the rent, or in the land out of which it issues. Thus, if the husband, seised in fee, conveys the land in fee-simple, reserving a rent to him and his heirs, and dies, the wife may claim to be endowed *either of the land or of the rent*, the husband having been seised during the coverture of both; but she cannot have dower of both, and will be constrained to *elect between them*, holding the land, if she elects to take that, of course discharged of the rent. And in like manner, if a husband, seised of a rent-charge in fee, purchase the inheritance in the lands out of which it issues, whereby the rent is extinct and merged, yet as to the wife, since he was seised during the coverture both of the land and of the rent, the rent still subsists for *her benefit*, and she may elect of which she will be endowed. (1 Lom. Dig. 101.)

2<sup>k</sup>. Fisheries, Franchises, &c.

Of these, and of *all incorporeal hereditaments*, except *corodies and annuities*, a widow is dowable. Corodies and annuities are exceptions, because they are charged *on the person* only, and do not cease to be personalty, because, by an extraordinary anomaly, they have the one attribute of real estate of passing to the *heir*, instead of to the personal representative. (1 Th. Co. Lit. 583; 1 Washb. R. Prop. 168; 1 Lom. Dig. 97; 1 Bright's H. & Wife, 331.) And indeed, a franchise may be likewise of the same character, that is, a mere *personal* hereditament, where it has no relation to property real; and then, it is believed, that neither

curtesy nor dower can be had therein any more than in a corody or annuity.

### 3<sup>k</sup>. Mines.

A widow is dowable of mines and quarries, but only of those which were *opened* and worked in the husband's life-time; although what shall be regarded as an *open mine or quarry* is not always easy to define. It seems that if *any part* of a bed or deposit of mineral matter has been excavated for the purpose of mining, the *whole bed*, and the *strata* lying under it, are to be deemed, for dower purposes, an *open mine*, and that in order to reach such mine, new pits or shafts may be sunk to the original *stratum*, and also to the *strata* below: nor is it less *open* because the working has been discontinued. On the other hand, for a dowress, or any life-tenant, to *open new mines* is waste, which will be punished with damages, and, as being of irremediable injury to the reversioner, will be inhibited by injunction from a court of equity. (3 Th. Co. Lit. 237, and n. (H.); 1 Do. 581, n. (L.); Clavering v. Clavering, 2 P. Wms. 388; Stoughton v. Leigh, 1 Taunt. 402; Crouch v. Puryear, 1 Rand. 258; 1 Washb. R. Prop. 166; 1 Bright's H. & Wife, 330.)

### 4<sup>k</sup>. Wild and Uncultivated *Forest Lands*.

Of this class are lands in the Dismal Swamp, capable of use *for timber alone*. In Virginia dower is allowed in them, and the dowress may make merchandise of the timber, at least if that has been the mode of their enjoyment by the fee-simple proprietor. And so in most of the States as to *wild lands* generally. (Macauley v. Dismal Swamp Co. 2 Rob. 507; Hickman v. Irvine, 3 Dana (Ky.), 121; Allen v. McCoy, 8 Ham. (Ohio), 418; Chapman v. Schröder, 10 Ga. 321; 1 Washb. Real Prop. 167.) In some of the States, however, a different doctrine prevails, no dower being allowed, because the lands cannot be enjoyed, it is said, *without waste*; although, in Virginia, it would not be esteemed waste, supposing timber enough to be left for the use of the lands, and supposing also that the market value of the timber does not exceed the cost of getting it; for in that case the cutting of timber would not be a permanent *injury* to the land. (1 Washb. R. Prop. 167; Findlay v. Smith & ux. 6 Mumf. 134.) And supposing the land to have been employed by the husband for purposes involving the use of great quantities of wood, as for a smelting furnace, or for the manufacture of salt, purposes which give their chief value to the premises, it is supposed that the dowress may continue the employment without exposing herself to the

charge or to the consequences of waste. (*Findlay v. Smith*, 6 Munf. 134.)

5<sup>k</sup>. Shares in Canals, Railroads, &c.

Some authorities hold that, in its *nature*, such property is real estate, and so, wherever there is a proper estate of inheritance, that dower must attach, independently of statute. (*Price v. Price*, 6 Dana (Ky.), 107; *Park, Dow.* 113.) But in Virginia there is a statute declaring that *shares of stock* in joint-stock companies shall be *deemed personal estate*, which of course, puts dower in them quite out of the question. (1 Th. Co. Lit. 581, n. (L.); 1 Washb. R. Prop. 167; 1 Lom. Dig. 97; V. C. 1873, ch. 57, § 21; V. C. 1887, ch. 47, § 1125.)

The better opinion seems to be that, whilst a corporation, in its collective capacity, may own real estate which, as to the body politic that owns it, has all the incidents and attributes of *realty*, yet the *shares* of the several corporators, even without any statutory provision, are always *personalty*. Such shares are, indeed, nothing more than a right to have a proportionate part of the company's profits. The land, buildings and structures of a canal, railroad or turnpike company, or other corporation, as well as all its other property, constitute the mere instruments whereby the joint stock is made to produce that profit, and belong for that purpose, not to the individual members, but exclusively to the corporate body, which is altogether a separate person. (*Ang. & A. Corp.* (10th ed.) § 557; *High. v. Brent*, 2 Yo. & Col. Exch. 268, 294; *Bradley v. Holdsworth*, 3 M. & W. 423-4; *Bank of Waltham v. Waltham*, 10 Met. (Mass.) 595.)

6<sup>k</sup>. Lands *Exchanged* by Husband during Coverture.

The husband having been seised during the coverture of both tracts, the widow may *elect* after the husband's death, to be endowed of either parcel, but she cannot have *dower in both*. (1 Th. Co. Lit. 576; 1 Washb. R. Prop. 159; 1 Lom. Dig. 101.)

2<sup>i</sup>. The General Doctrine as to the *Estate* or Interest *Required* to be in the Husband.

It is a doctrine applicable to dower, as well as to curtesy, that the consort must have, at some time during the coverture, (1), The *immediate estate of freehold* in possession; and (2), The *first estate of inheritance* (such as that issue born of the marriage may, by possibility, inherit it *as heir to the consort*); (3), Without any intermediate *vested estate of freehold*. (1 Th. Co. Lit. 560, & n's (E.) & (F.); *Id.* 582, n. (M.); 4 Kent's Com. 39; 1 Lom. Dig. 105; *Ante*, p. 127.)

3<sup>i</sup>. Illustrations of the General Doctrine.

Abundant illustrations of the general doctrine may be found in the cases following; (1). Lease by husband *before marriage*, for term of *years*, reserving rent; (2). Lease by husband *before marriage*, for term of *life*, reserving rent; (3). Where there is a *vested* intermediate estate of freehold; (4). Where no issue of the marriage can, by possibility, inherit the land *as heir to the husband*; and (5). The doctrine of *dos de dote peti non debet*; w. c.

1<sup>k</sup>. Lease by Husband *before Marriage*, for Term of *Years*, Reserving Rent *during Term*.

Husband marries, and dies before the term ends. Here the wife is *entitled to be endowed*, the husband having had the *immediate freehold* in possession during the coverture. She does not, indeed, *oust the tenant*, whose claim to the possession is paramount to her's, but being by endowment possessed of the *reversion*, she has *one-third of the rent as incident thereto*. (1 Th. Co. Lit. 582, & n. (40); Id. 559-'60, & n. (10).)

2<sup>k</sup>. Lease by Husband *before Marriage*, for Term of *Life*, Reserving Rent *during the Term*.

Husband marries and dies before term ends. The wife *cannot be endowed* of the land, because the husband was never during the coverture seised of the *immediate freehold* thereof in possession; nor of the *rent*, because the husband had not in that an estate of *inheritance*. (1 Th. Co. Lit. 582-'3; Id. 559-'60, & n. (10); Blow v. Maynard, 2 Leigh, 30, 56; Cooke's Ex'or v. Phillips, 12 Leigh, 248; 1 Bright's H. & Wife, 339.)

By parity of reason, in case of rent in fee reserved upon a grant in fee, if the person entitled to the rent buys a life estate in the land, whereby the rent is *suspended*, and then marries and dies, his widow cannot be endowed, either of the rent or of the land. (1 Lom. Dig. 80; 1 Th. Co. Lit. 560.)

3<sup>k</sup>. Where there is an *Intermediate Vested Estate of Freehold*.

*e. g.*, Conveyance to H *for his life*, remainder, if by any means that estate should come to an end in H's life-time, to Z *for the residue of H's life*, remainder after H's death, to *H and his heirs*. Here H (the husband) has the *immediate freehold* in possession, and, as is supposed, the *first estate of inheritance* (by the limitation to *H and his heirs*, notwithstanding V. C. 1873, ch. 112, § 11; V. C. 1887, ch. 107, § 2423); but the intermediate *vested estate of freehold* in Z prevents dower, as we have seen it would in a like case prevent



curtesy. Z's estate is *vested* (although limited upon a most *remote contingency*), because it has a *present capacity* to take effect in possession, if the possession should become vacant. (2 Bl. Com. 137, n. (30); 2 Th. Co. Lit. 292, n. (1); Id. 128, n. (D.); 2 Bl. Com. 169, n. (10); 1 Bright's H. & Wife, 519; Park on Dow. 83 & seq.; 1 Sugd. Pow. 233.) And the liability to determine by forfeiture or surrender, etc., is one of the regular incidents to an estate for life to which its nature is subject in its original limitation. (Ferne's Rem. 16, 216-'18, 347; Duncomb v. Duncomb, 3 Lev. 437; Hooker v. Hooker, Cas. Temp. Hardw. 17; *Post*, p. 171-'2.) Hence, the remainder limited to Z is not to take effect in derogation of the preceding estate in H, but awaits its regular expiration by one of the two limitations which are appointed to determine it. (*Post*, p. 171-'2.)

4<sup>k</sup>. Where no Issue *Born of the Marriage* can by Possibility *Inherit the Estate as Heir to the Husband*.

*e. g.*, Devise to H and his heirs, but if he die leaving issue, then to his children and their heirs. Here no issue born of the marriage can *inherit* the husband's estate *as his heir*, but will take *by purchase*, under the terms of the devise, as we have seen in the case of curtesy. (Barker v. Barker, 2 Sim. 249; Sumner v. Partridge, 2 Atk. 47; 1 Th. Co. Lit. 577-'8; 1 Lom. Dig. 81; *Ante*, p. 128, 4<sup>k</sup>.)

5<sup>k</sup>. Doctrine of *Dos de Dote, Peti non Debet*; w. c.

1<sup>l</sup>. The Principle of the Maxim *Dos de Dote*, &c.

The principle of the maxim is, that by endowment of his ancestor's widow, the heir terminates his seisin, not from that time only, but *by relation*, from the *ancestor's death*, so that, in contemplation of law, he was *never seised* of the portion assigned as dower, and thus, as to that, wants the *immediate freehold* in possession. (1 Th. Co. Lit. 574-'5, & n's (E.) & (F.); 1 Lom. Dig. 105-'6; 1 Washb. R. Prop. 209.)

2<sup>l</sup>. Cases Illustrative of the Maxim *Dos de Dote*, &c.  
w. c.

1<sup>m</sup>. Where Husband (Deriving the Lands *by Descent* from the Ancestor) Endows the Ancestor's Widow, and Dies, living the Ancestor's Widow, *Himself leaving a Widow*.

This case is a full illustration of the maxim, and the husband's widow cannot be endowed of the land with reference to the third part assigned to the ancestor's widow, but only of the remaining *two-thirds*. (1 Th. Co. Lit. 574-'5, & n's (E.) & (F.); 1 Lom. Dig. 105-'6; Blow v. Maynard, 2 Leigh, 29.)

2<sup>m</sup>. Where Husband, under like Circumstances, Dies *without Endowing* the Ancestor's Widow, Himself leaving a Widow, and *both Widows come to be Endowed*.

If the *ancestor's widow* be first endowed, it determines the *husband's* seisin *ab initio*, and his widow can have dower only of the remaining *two-thirds*; but if the *husband's widow* be endowed first, she shall have it *of the whole*. In the latter case, however, it seems the *ancestor's* widow may *perhaps* recover of the *husband's* widow one-third of what the latter has obtained, although if she does, and the husband's widow survives, she may re-enter upon the third originally assigned her, "because," says Coke, "she had in it an estate for term of *her life*, and the estate for the life of the ancestor's widow is lesser in the eye of the law, as to her, than (the estate for) *her own life*." (1 Th. Co. Lit. 575, & n. (F.); 1 Bright's H. & Wife, 352; 1 Washb. R. Prop. 209 & seq.)

3<sup>m</sup>. Where the Husband (having Derived his Estate *by Purchase* from the Ancestor) Endows the Ancestor's Widow, and Dies, living the Ancestor's Widow, *Himself leaving a Widow*.

In this case, the husband's seisin under his conveyance, in the *life of the ancestor* (before the title of dower of the ancestor's widow *was consummated*), is not avoided; and so he, having been seised during the coverture of the *whole land*, his widow (supposing him married before ancestor's death) is entitled to be endowed of *one-third of the whole*, but without encroaching upon the part already assigned to the widow of the ancestor. (1 Th. Co. Lit. 574-5, & n's (E.) & (F.); Bustard's Case, 4 Co. 122; 1 Bright's H. & Wife, 353-4; 1 Washb. R. Prop. 210 & seq.)

4. Effect of the Determination of the Husband's Estate; W. C.

1<sup>k</sup>. The General Doctrine.

If the consort's estate expires by the *regular efflux of the period* originally marked out for its duration, leaving the *previous seisin* of the consort unimpaired, dower (and curtesy) are *prolongations* of the consort's estate, annexed by *force of law*; but if the consort's estate is determined in such a manner as to defeat and *annul the consort's seisin* as from the *beginning*, so that, in contemplation of law, the consort was *never seised during the coverture*, or if the *subject of the consort's estate* ceases to exist, dower (and curtesy) are

denied. See *Ante*, p. 129, 1<sup>k</sup>, the corresponding doctrine in respect of curtesy. (1 Th. Co. Lit. 561, n's (13) & (G.); Id. 565, & n. (L.); Paine's Case, 8 Co. 34 a; 1 Washb. R. Prop. 312; 1 Lom. Dig. 97.)

2<sup>k</sup>. Illustrative Examples of the General Doctrine.

Illustrative examples of the general doctrine are to be found in the following cases, namely, (1), Estate in fee-simple, and a total failure of heirs; (2), Estate in fee-qualified, or base fee, and the occurrence of the event upon which it is to be determined; (3), Estate-tail and failure of heirs of the body; (4), Estate of inheritance, determined by title paramount; (5), Estate by way of executory limitation, determined by the event; and (6), Where the subject-matter ceases to exist;

W. C.

1<sup>l</sup>. Estate in *Fee-Simple*, and a Total Failure of Heirs.

The wife, at common law, would be entitled to dower, as we have already seen (*Ante*, p. 130, 1<sup>l</sup>), the husband, under like circumstances, would be to curtesy. But, in Virginia, the wife, in such a case, would be the *heir of the husband*, and her dower would be merged in the inheritance. (1 Lom. Dig. 97; 1 Bright's H. & Wife, 348; V. C. 1873, ch. 119, § 1, (cl. 10); V. C. 1887, ch. 113, § 2548, (cl. 10).)

2<sup>l</sup>. Estate in *Fee-Qualified*, or *Base-Fee*.

Upon principle, it would seem that, in this case also, the wife should be entitled to dower, but the authorities, at least the text-writers, do not favor such a conclusion. (*Ante*, p. 130, 2<sup>l</sup>; 4 Kent's Com. 49; 1 Lom. Dig. 97-8; Seymour's Case, 10 Co. 96 a.)

3<sup>l</sup>. Estate-Tail, and Failure of *Heirs of the Body*.

It is agreed that, in this case, the wife is entitled to dower, as the husband, under like circumstances, is to curtesy. (*Ante*, p. 131, 3<sup>l</sup>; 1 Th. Co. Lit. 561, & n's (13) & (G).)

4<sup>l</sup>. Estate of Inheritance, Determined by *Title Paramount*; W. C.

1<sup>m</sup>. Estate on *Condition*, where Condition is Broken.

The husband's seisin, by the entry of the grantor for the condition broken, is *annulled*, as it were, from the *beginning*, the grantor being re-seised as of his *original estate*. The dower of the wife is therefore defeated, as in a like case would be the husband's curtesy. (*Ante*, p. 131, 1<sup>m</sup>; 4 Kent's Com. 49; 1 Bright's H. & Wife, 349-50; 1 Washb. R. Prop. 208.)

2<sup>m</sup>. Estates Determined by Eviction by *Superior Title* to Husband's.

For the reason just stated, there can be no dower (nor curtesy) in this case. (*Ante*, p. 132, 2<sup>m</sup>; 1 Th. Co. Lit. 618, n. (R. 1); 1 Bright's H. & Wife, 350.)

#### 5<sup>l</sup>. Estate Determined by *Executory Limitations*.

The general nature of executory limitations is briefly explained, *Ante*, p. 132, 5<sup>l</sup>, where also the effect on *curtesy* of the determination of the consort's estate is stated. It will suffice here to say that a like effect results in respect of dower. If the husband's estate is determined by an executory limitation, the wife is, notwithstanding, to be endowed. (Buckworth v. Thirkell, 3 Bos. & Pul. 652, note; S. C. 4 Dougl. 323; Moody v. King, Bingh. 447; Taliaferro v. Burwell, 4 Call, 321; Jones & ux. v. Hughes, 27 Grat. 560; Medley v. Medley, 27 Grat. 568; *Ante*, p. 132, 5<sup>l</sup>, and authorities there.)

#### 6<sup>l</sup>. Where the *Subject-Matter Ceases to Exist*.

*e. g.*, A man conveys land to A and his heirs, as long as *T* has heirs of his body, reserving a rent to *him* and his heirs, and marries, and dies, and *T* dies without issue, whereby A's estate, and consequently the rent, are at an end. The wife cannot be endowed of the rent, because it has ceased to exist, and as Lord Coke observes, "no state thereof remaineth." (1 Th. Co. Lit. 561; 1 Bright's H. & Wife, 132; *Ante*, p. 133, 6<sup>l</sup>.)

#### 3<sup>c</sup>. Death of Husband.

The *natural*, not the *civil*, death of the husband consummates the title of the wife to dower. (1 Th. Co. Lit. 569, 580; 1 Bl. Com. 132-'3.)

#### 4<sup>l</sup>. Mode of Endowment of Widow.

The mode of the endowment of a widow is to be discussed under these heads, namely: (1), The different species of dower; (2), The estimate of value in assigning dower; and (3), The actual assignment thereof;

W. C.

#### 1<sup>c</sup>. Different Species of Dower.

The different species of dower enumerated by the older writers are the following, namely: (1), Dower at common law, or more properly *common dower*; (2), Dower *ad ostium ecclesiæ*; (3) Dower *ex assensu patris*; (4), Dower by the custom of particular places; and (5), Dower *de la plus belle*;

W. C.

#### 1<sup>h</sup>. Dower at Common Law, or more Properly *Common Dower*.

This is the species of dower the requisites of which have been explained, and which essentially is that which prevails in Virginia. (1 Th. Co. Lit. 569 & seq.; 1 Com.



Dig. 88; V. C. 1873, ch. 106, §§ 1, 2; V. C. 1887, ch. 102, §§ 2267, 2268.

2<sup>h</sup>. Dower *ad Ostium Ecclesiæ*.

Dower *ad ostium ecclesiæ* is where a man of full age, seised in fee-simple, *after marriage solemnized* with a woman, at the *door of the church*, endows his wife of some certain quantity, *by metes and bounds*, of his lands, the whole, half, or other lesser part. The wife not being *sui juris* is free, when she becomes a widow, to waive this special provision, and to take her dower at common law; but if she choose to abide by it, she may enter upon it immediately upon her husband's death, without further assignment. (1 Th. Co. Lit. 594, 596 '7, 600, 601; 2 Bl. Com. 132, &c.)

3<sup>h</sup>. Dower *ex Assensu Patris*.

Dower *ex assensu patris* is assigned, like dower *ad ostium ecclesiæ*, only by the husband as *heir apparent* of a living ancestor, whether father, or any other, with the assent of the ancestor, instead of as being himself the proprietor. The incidents are the same. (2 Bl. Com. 133; 1 Th. Co. Lit. 597.)

4<sup>h</sup>. Dower by the *Custom of Particular Places*.

By such custom, or *local law*, the widow may be entitled to one-half, one-fourth, or even *the whole* of the husband's lands. But no custom or *local law* can exist by usage in Virginia, because it cannot have the requisite *immemorial continuance*, inasmuch as, when our ancestors came hither in 1607, they brought with them, as we know historically, the general common law of England, but *no local customs*; so that, if any such custom is now alleged to exist, it originated since 1607. (Harris v. Carson, 7 Leigh, 637; Mason v. Moyers, 2 Rob. 606; Gross v. Criss, 4 Grat. 262.)

5<sup>h</sup>. Dower *de la Plus Belle*.

Dower *de la plus belle* belongs exclusively to a state of feudality. It occurred where a husband died seised of *chivalry* and of *socage* lands, leaving his son and heir under the age of fourteen. The lord of the chivalry-lands enters as guardian in chivalry on the lands held in chivalry, and the widow as guardian in socage takes possession of the residue held in socage; and she then brings a writ of dower against the guardian in chivalry, to be endowed of one-third of the chivalry lands. It was a privilege of the guardian in chivalry, and one of considerable importance, to insist that the widow, instead of demanding any part of her dower of the chivalry lands, to the prejudice of his interests, shall endow herself, *de la plus belle*, of the fairest portion of the tenements which she

has as guardian in socage, to the full extent of her dower in *all* her husband's lands. (1 Th. Co. Lit. 603.)

## 2<sup>d</sup>. The Estimate of Value in Assigning Dower; w. c.

### 1<sup>h</sup>. Doctrine at Common Law.

As against the husband's *heir*, the lands are valued as at the *time of assignment*; as against a *purchaser* from the husband in his life-time, as at the time of purchase, because that value was the *measure of the purchaser's recovery* from the husband's estate, on his covenants of title. (2 Bl. Com. 132, n. (24); 1 Th. Co. Lit. 583, n. 43; *Tod v. Baylor*, 4 Leigh, 498. See *Braxton v. Coleman*, 5 Call, 433.)

### 2<sup>h</sup>. Doctrine in Virginia, by Statute.

The lands are directed to be valued in all cases as at the time of the *assignment of dower* as well against the *purchaser* as against the *heir or devisee*. (V. C. 1873, ch. 106, § 11; V. C. 1887, ch. 102, § 2277.)

But as that would operate harshly upon purchasers who, before the husband's death, had put costly improvements on the property, the courts of equity are by statute empowered to relieve the purchaser from the widow's recovery of *dower in kind*, on the terms of his paying to the widow, during her life, lawful interest from the *commencement of her suit*, on one-third of the value of the land at her husband's death, *deducting the value of the permanent improvements then existing, made after the purchase*, by the purchaser or his assigns. (V. C. 1873, ch. 106, § 12; V. C. 1887, ch. 102, § 2278.) Thus, supposing the land at the husband's death, including the permanent improvements made by the purchaser after his purchase, to be worth \$39,000, namely: the improvements \$30,000 and the land itself \$9,000, the widow would be entitled, in a *court of law*, to recover as her dower one-third of the property at the valuation of \$39,000, that is, to the extent of \$13,000; but, by the statute, a court of equity is empowered to relieve him of this recovery, upon his securing to be paid to the widow, during her life, lawful interest from the commencement of her suit, on one-third of \$9,000, that is, on \$3,000.

## 3<sup>d</sup>. The Assignment of Dower; w. c.

### 1<sup>h</sup>. The Rights of Widow, before Assignment, in Respect of her Dower; w. c.

#### 1<sup>i</sup>. The Doctrine at Common Law.

At common law the widow had no *right of entry* upon her husband's lands, nor even a right to remain in his mansion-house an hour after his death. From that moment, if she continued therein, it was merely by the sufferance of the heir. (1 Th. Co. Lit. 584, n. (Q); *Gillb. Ten.* 26; 1 *Lom. Dig.* 41.)

2<sup>l</sup>. The Doctrine, by Statute, in *England*.

By the statute of *Magna Charta*, 9 Hen. III., c. 7, (A. D. 1225), the widow was entitled to remain *forty days* (called her *quarantine*), in the deceased husband's chief mansion-house, within which time dower should be assigned her, and meantime she should have reasonable *estover* out of the estate, that is, needful sustenance in *victu et vestitu*, or food and clothing; and if deforced thereof, she was allowed a *ricontiel* writ (*de quarantina habenda*), addressed to the sheriff, and to be finally executed by *him* without delay, commanding him unconditionally to restore the possession to her, without the intervention of any court. "But of little effect," says Lord Coke, "was that act (entitling the widow to remain forty days in the mansion-house until her dower was assigned), for that *no penalty* was provided if it was not done." (1 Th. Co. Lit. 584; 1 Lom. Dig. 109.)

Hence, there was speedily a demand for additional legislation; and accordingly, by statute of *Merton*, 20 Hen. III., c. 1 (A. D. 1236), the widow was allowed to *recover damages* in her writ of dower (*unde nihil habet*), from the time of her husband's death, provided her husband *died seised*. (1 Th. Co. Lit. 584-'5, and n's (45), (R.) and (S).)

3<sup>l</sup>. The Doctrine, by Statute, in *Virginia*.

Until her dower is assigned, the *widow* (and this word imports a continuance of the *state of widowhood*, so that if she marries she forfeits the special provision, and can only fall back on her dower) shall be entitled to demand of the heirs or devisees of the husband, one-third part of the issues and profits of the other real estate which was devised or descended to them, of which she is dowable; and in the meantime may occupy the *mansion-house* and curtilage without charge; and if deprived thereof she may, on complaint of unlawful entry or detainer, recover the possession, with damages for the time she was so deprived. (V. C. 1873, ch. 106, § 8; Id. ch. 130; V. C. 1887, ch. 102, § 2274; Id. ch. 123, §§ 2716 &c.; 1 Lom. Dig. 109 to 111; 1 Th. Co. Lit. 584; Bac. Abr. Dower, (B.) 1.)

2<sup>b</sup>. Modes of Assignment of Dower; w. c.1<sup>l</sup>. Voluntary Assignment of Dower.

See Gilb. Ten. 26; 1 Th. Co. Lit. 589, &c.; Bac. Abr. Dower (D.); 1 Lom. Dig. 111, & seq.: w. c.

1<sup>k</sup>. By whom *Dower should be Assigned*.

It should be assigned by the *tenant of the freehold*, whether the *rightful tenant or not*, and none can assign it unless he be *tenant of the freehold*, dower being.

itself an estate of freehold. The tenant of the *freehold* is, for the most part, the husband's *heir or devisee* (who, if an infant, or *non compos*, may act by guardian or next friend), but it is conceivable that he may be an alienee, or even a *disseisor*. (1 Th. Co. Lit. 606, 591, n. (Z.); Miller v. Beverly, 1 H. & M. 372; 1 Lom. Dig. 111-112.)

2<sup>1</sup>. Method of Allotting Dower; w. c.

1<sup>1</sup>. Instrument of Assignment.

It need not be *by deed*, nor even *in writing*, not being a *conveyance*. It is sufficient if it be *by parol*, although it would be imprudent not to have a written memorial of the transaction. The dower, however, does not pass by the *assignment*, but by intendment of law. (1 Th. Co. Lit. 592, and n. (A. 1); 1 Lom. Dig. 114.)

And to every assignment of dower, at least by the heir, a warranty in law is annexed, that the dowress, if evicted by title paramount, shall recover in value, not according to that which she hath lost, but a third of the two remaining thirds of the lands whereof she is dowable, and doubtless, since the first endowment has failed, as of the value at re-assignment. (1 Lom. Dig. 117.)

2<sup>1</sup>. Method of Making Allotment of Dower; w. c.

1<sup>m</sup>. Where Husband is *Seised, along with Others, as Tenant in Common, Co-Parcener, etc.*

The allotment must be made (as he was seised) to be held *undividedly* with the co-tenant, as tenant *in common*. But either tenant may then demand a partition, so as to hold in severalty. (1 Lom. Dig. 113; 1 Th. Co. Lit. 593, and n. (C. 1); *Post*, pp. 477 & seq., 496.)

2<sup>m</sup>. Where Husband is *Seised in Severalty*; w. c.

1<sup>n</sup>. Where the Property is *Susceptible of Division*.

The widow ought to be endowed *in severalty*, by *metes and bounds*, like any other tenant holding under the heir; although by mutual agreement, such assignment by metes and bounds may be waived. (1 Th. Co. Lit. 592, and n. (B. 1); 1 Lom. Dig. 113; Bac. Abr. Dower, (D.) 1.)

2<sup>n</sup>. Where the Property is *not Susceptible of Division, e. g., a Mill, a Franchise, etc.*

The widow is to be endowed in a *special manner*, so as to attain the justice of the case, as nearly as may be, *e. g.*, of every third *toll-dish*, or for a *third of the time*, etc. So she may have a *rent*, in lieu of a portion of the lands themselves; but the rent must *issue out of the lands whereof she is dowable*; and and if it does not, although the widow *agree to it*, it



is not in a *court of law* a bar to her recovery of dower anew, although a *court of equity* would hold it to be a satisfaction thereof. (1. Lom. Dig. 113-'14; 1 Th. Co. Lit. 581.)

3<sup>n</sup>. Out of what Lands *Dower is to be Assigned*.

It must be out of lands of which the widow is dowerable, or of a rent issuing out of them, if such assignment be practicable, or else it is no bar to a future recovery of dower, at least in a *court of law*, for the same reason as in the case of the rent, namely, that a title to a freehold estate *cannot be barred by a collateral satisfaction; a doctrine* which, as we have seen, is controlled in *equity*, where such collateral satisfaction, if *fairly* agreed to by the widow, will repel any subsequent claim on her part. (1 Lom. Dig. 114; Wilson v. Branch, 77 Va. 69, &c.; Blair v. Thompson, 11 Grat. 451; White v. White, 16 Grat. 267.)

In making the assignment, regard is to be had mutually to the rights of all the parties concerned; and hence, if the husband has sold a portion of his land, and dies seised of other real estate, on which he, in his life-time, and his widow since his death, lived, her dower ought to be assigned out of the latter tract, in exoneration of the land the husband had sold. (Stimson v. Thorn, 25 Grat. 284.)

4<sup>n</sup>. Assignment of Dower *on Condition*.

It is a principle that the assignment must be *without condition* (which is void and inoperative), for the widow comes to her dower *in the per*, by her husband, and is in, in *continuation of his estate*; but *in equity*, such conditional allotment, if agreed to by the widow, is valid. (1 Lom. Dig. 114; 1 Bright's H. & Wife, 379.)

3<sup>l</sup>. Admeasurement of Dower.

Where the infant heir, or his guardian, assigns too much dower, he may, at full age, have a writ of *admeasurement of dower*, which is a *vicontiel writ*. If an *adult heir*, who is *compos mentis*, assigns too much, and there is no fraud, he is without remedy. (2 Bl. Com. 136; 1 Lom. Dig. 115-'16.)

2<sup>l</sup>. Compulsory Assignment of Dower.

The doctrines connected with the compulsory assignment of dower involve the discussion of, (1), The judicial remedies for the recovery of dower; (2), The rents and profits accompanying the assignment of dower; (3), The mode of assignment of dower upon legal process; and (4), Collusive assignment of dower by, or recoveries against, guardians of infant heirs;

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1<sup>k</sup>. Judicial Remedies for Recovery of Dower.

The judicial remedies for the recovery of dower may be classed under the following heads, namely: (1). Writ of dower *unde nihil habet*; (2). Writ of right of dower; (3). Bill in chancery; (4). Ejectment; and (5). Motion to appoint commissioners to assign dower;

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1<sup>l</sup>. Writ of Dower *Unde Nihil Habet*.

This is a common law remedy (one of the two provided by the common law) to recover dower, and, by statute of *Merton*, 20 Hen. III., c. 1, to recover also damages for the detention (provided the husband died seised), when no dower had been assigned her *in that tract*. (1 Th. Co. Lit. 585, and n. (R.); 1 Lom. Dig. 118-19; V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2, § 3.)

The writ of dower *unde nihil habet* exists with us, as at common law, although in practice it is superseded by the bill in equity, and is not so convenient as the statutory remedy by ejectment, presently to be mentioned. In it, as in equity, and in ejectment, damages are to be recovered against the heirs or devisees of the husband, or their assigns, from the husband's death, but not exceeding five years before the suit is commenced; and against purchasers from the husband in his life-time from the commencement of the suit. (V. C. 1873, ch. 106, §§ 10, 11; V. C. 1887, ch. 102, §§ 2276, 2277.)

2<sup>l</sup>. Writ of Right of Dower.

This is the second *common law remedy* for dower, being applicable to recover dower only, without damages, when a part has already been assigned her *in the same tract*. (1 Th. Co. Lit. 585, n. (R).)

It seems that we are to understand the writ of right of dower to be abolished in Virginia, by the statute declaring that "*no writ of right shall be brought*" after 1st July, 1850. (V. C. 1873, ch. 131, § 38; Id. ch. 209, § 1; V. C. 1887, ch. 124, § 2759; Id. ch. 206, §§ 4202 &c.; 1 Lom. Dig. 118.) But it is probable the question will never receive a judicial solution, the remedies by bill in equity and by ejectment being in point of facility and certainty so far preferable to the writ of right of dower, that no one is likely to be tempted to try the latter.

3<sup>l</sup>. Bill in Chancery.

The courts of equity assumed jurisdiction to assign dower in consequence of the obstacles which the widow encountered in the courts of law; obstacles arising sometimes from the difficulty of ascertaining the precise lands of which she was dowable, sometimes

the persons to be sued, and again in consequence of the embarrassments arising from *trust-terms*, etc. It has been an acknowledged branch of equitable jurisdiction for more than a century, and there is no need in any case to suggest any particular obstacle to proceeding at law. (Ad. Eq. 233-4; 1 Stor. Eq., §§ 624 & seq.; 1 Th. Co. Lit. 588, n. (X.); 1 Lom. Dig. 120, &c.)

In Virginia, our statute in terms prescribes a bill in equity as a remedy for the recovery of dower, "where the case is such that a bill would now lie for such dower," which is believed to be in *all cases*. (V. C. 1873, ch. 106, § 10; V. C. 1887, ch. 102, § 2276.) Accordingly, the proceeding in equity is incomparably the most usual.

#### 4<sup>1</sup>. Ejectment.

Ejectment did not, at common law, lie for dower, because the widow had no *right of entry*; but in Virginia she is allowed by statute to recover her dower, and damages for its being withheld, by such remedy *at law* as would lie on behalf of a tenant for life having a *right of entry*, and the court of law may appoint commissioners to assign it. (1 Lom. Dig. 111; V. C. 1873, ch. 106, § 10; Id. ch. 131, § 29; V. C. 1887, ch. 102, § 2276; Id. ch. 124, § 2750.) And the period of limitation to a suit for the recovery of dower is the same as to other suits for lands, namely: fifteen years east, and ten years west of the Alleghany mountains. (V. C. 1873, ch. 146, § 1; V. C. 1887, ch. 139, § 2915.)

#### 5<sup>1</sup>. Motion to the County or Corporation Court to appoint Commissioners to Assign Dower.

Such a motion *by the heir* was never improper, because, as he is compellable to make the assignment, the acts of the commissioners, appointed at his instance, are regarded as *his acts*; and the practice has now been partly sanctioned by statute; although the statute limits the application to "the court in which the will of the husband is admitted to record, or administration of his estate is granted." (1 Tuck. Com. 68, B. II; Moor & ux. v. Waller, 2 Rand. 418; V. C. 1873, ch. 106, § 9; V. C. 1887, ch. 102, § 2275; Helm v. Helm, 30 Grat. 414.)

But a similar motion *by the widow* is wholly irregular and inadmissible; and although, in the absence of any opposition, such a step may have been taken and unadvisedly admitted by the county courts in a few instances it is *malus usus et abolendus*. (1 Tuck. Com. 68, B. II; Roper v. Sanders, 21 Grat. 74; Helm v. Helm, 30 Grat. 414.)

## 2<sup>k</sup>. Rents and Profits Accompanying Assignment of Dower.

As we have seen, damages were first allowed in England (how long soever the dower might have been withheld) by Stat. *Merton*, 20 Hen. III., ch. 1, and by that statute only when the husband *died seised*. (1 Th. Co. Lit. 584 '5; 1 Tuck. Com. 68, B. II.)

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### 1<sup>l</sup>. Doctrine in Virginia when Husband *Dies Seised*, as against *Husband's Heirs*, etc.

The statute directs that damages shall be allowed as against the husband's heirs and devisees from the husband's death to the time of recovery, but not exceeding *five years before suit commenced*. (V. C. 1873, ch. 106, § 11; V. C. 1887, ch. 102, § 2277.)

The same statute further provides, that if, after suit brought, the widow or the tenant die before recovery of damages, the same may be recovered by her personal representative, or against his. (V. C. 1873, ch. 106, § 11; V. C. 1887, ch. 102, § 2277.)

This provision was intended to obviate a possible doubt that the widow's action would abate in the event of the death either of herself or of the tenant. Such an action in England does, indeed, *die with the person*, but in Virginia an action may be maintained by or against a personal representative for *any injury or damage to property*, so that the apprehension which suggested the provision in question seems with us to be superfluous. (V. C. 1873, ch. 126, § 20; V. C. 1887, ch. 119, § 2655.)

Even in England, *in equity*, damages are recoverable, notwithstanding the death of either party. (1 Lom. Dig. 122; 1 Bright's H. & Wife, 412.)

### 2<sup>l</sup>. Doctrine in Virginia, when Husband *Dies not Seised*, as against *his Alience*.

Damages are allowed against such alienee of the husband, from the *commencement of the suit* to the time of recovery. (V. C. 1873, ch. 106, § 11; V. C. 1887, ch. 102, § 2278; *Tod v. Baylor*, 4 Leigh, 498; *Thomas v. Gammel*, 6 Leigh, 9; 1 Lom. Dig. 121-'2, & n. 1.)

## 3<sup>k</sup>. Mode of Assignment of Dower, upon Legal Process.

In England the sheriff must assign, not only one-third of *each tract*, but a third of each *species of land*, arable, meadow, pasture, wood, etc. (1 Lom. Dig. 114-'15.)

In Virginia, one-third *in value* is to be assigned, in such manner as shall best subserve the mutual conven-



ience of the parties. But the land cannot be sold, and a compensation in money provided in lieu of the dower, without the widow's consent, unless it be *impossible* to assign the dower *in specie*, the case not being within the statute (V. C. 1873, ch. 120, § 3; V. C. 1887, ch. 114, § 2564) touching partitions. (1 Tuck. Com. 66, B. II; *White v. White & als.* 16 Grat. 264; *Simmons v. Lyles*, 27 Grat. 922.)

4<sup>k</sup>. Collusive Assignments of Dower by, or Recoveries Against, *Guardians of Infant Heirs.*

The heir may recover the lands, notwithstanding the assignment or recovery, unless the widow show herself entitled to the dower she got. (V. C. 1873, ch. 106, § 13; V. C. 1887, ch. 102, § 2279.)

5<sup>l</sup>. Modes of *Barring* or of *Preventing* Dower.

To *bar* dower is to extinguish the title to it after it *has accrued*; to *prevent* it, is to provide that it *shall not accrue*.

The modes of barring or preventing dower may be enumerated as follows: (1), Divorce *a vinculo*; (2) Elopement from husband and living in adultery; (3), Recovery of land by title paramount to that of husband; (4), Alienage of either husband or wife; (5), Death of husband before the wife attains the age of *nine years*; (6), Widows detaining from the heirs the title-deeds of the inheritance; (7), Widow after husband's death releasing her dower to him who ought to assign it; (8), Assignment of outstanding terms for years in trust, *attendant upon the inheritance*; (9), Sundry devices whereby land is exempt from the dower of a purchaser's wife; (10), The wife's uniting with the husband in conveying the land as prescribed by law; and (11), Jointure;

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1<sup>g</sup>. Divorce *a Vinculo.*

The circumstances under which, and the extent to which dower is barred or prevented by a divorce have been already fully explained. (*Ante*, pp. 116 & seq., 1<sup>g</sup>; and *Ante*, pp. 135 & seq., 1<sup>g</sup>.)

2<sup>g</sup>. Elopement from Husband, and *Living in Adultery.*

If a wife, of her own free will, leave her husband and live in adultery, she shall be barred of her dower, unless her husband be afterwards reconciled to her, *and* suffer her to live with him. (V. C. 1873, ch. 106, § 7; V. C. 1887, ch. 102, § 2273.)

This is a re-enactment, almost *verbatim*, of the statute Westm. II., 13 Edw. I., c. 34, in the construction of which it has been adjudged that going willingly, with or to an adulterer, is a *living in adultery* although she remain not with him continually, or be detained by him *against her*

*will*; also that the husband's license and previous consent to the adultery will not purge her guilt, or repel its consequences; and that whilst subsequent cohabitation is, in general, satisfactory proof of reconciliation, it is not necessarily so, and reconciliation, as well as cohabitation, is requisite to rehabilitate the wife. (1 Th. Co. Lit. 609-610, & n's (108) & (H, 1); Haworth & ux. v. Herbert & ux. 2 Dy. 106 b; 1 Lom. Dig. 130 '31; Woodward v. Dowse, 10 C. B. N. S. (100 E. C. L.), 722, 732; Stegall v. Stegall, 2 Brock. 256, 260; Bell v. Nealy, 1 Bail. Law (S. C.) 312; S. C. 19 Am. Dec. 686; Walters v. Jordan, 13 Wed. Law (N. C.) 361; S. C. 57 Am. Dec. 558; Reel v. Elder, 62 Pa. St. 316.)

### 3<sup>d</sup>. Recovery of Land by Title Paramount to that of Husband.

Although it was never doubted that a judgment obtained against the husband *by collusion* would not bar his wife's claim of dower, yet it was much questioned whether a recovery by *simple default* of the husband, without proof of his actual concurrence *in a design* to defeat the dower, would not have the effect of doing it. Indeed the better opinion was that, at common law, such recovery by default *was a bar*. Hence, by Stat. Westm. II., 13 Ed. I., c. 4, it was provided that the widow shall have her dower notwithstanding such recovery *by default*. (Bac. Abr. Dower, &c. (F).)

In Virginia, a widow is declared by statute to be not barred by a recovery obtained by *default or collusion*. (V. C. 1873, ch. 106, § 13; V. C. 1887, ch. 102, § 2279.)

### 4<sup>th</sup>. Alienage of either Husband or wife; w. c.

#### 1<sup>st</sup>. Doctrine at Common Law.

An alien, at common law, is incapable of holding any estate whatsoever in lands (save only to a *very limited* extent, for purposes of *habitation*, in advancement of trade), and, therefore, an *alien husband* can possess no lands of which a citizen wife can be endowed, nor can the *alien wife* of a citizen husband pretend to claim dower, which is a freehold. (1 Th. Co. Lit. 572 '3; 1 Lom. Dig. 95-'6, 82; 1 Bl. Com. 372, and n. (6).)

#### 2<sup>nd</sup>. Doctrine in Virginia, by Statute.

Any alien, *not an enemy*, may inherit, purchase, or hold real estate, as if he were a citizen, and, therefore, it is apprehended that *alienage* (save that of an alien-enemy), is no bar to dower, whether it exist in the husband or the wife. Indeed, by the laws of the United States, the wife of a citizen, if she is capable of being naturalized, is *ipso facto* a citizen, provided she resides within the United States at any time during the coverture, and possibly if she does not so reside. (V. C. 1873, ch. 4, § 18; V. C.

1887, ch. 6, § 43; 1 Bright, Dig. 132; Rev. Stats. U. S. § 1994; Kelly v. Owen, 7 Wal. 498; Burton v. Burton, 38 N. Y. 373; 2 Bish. Md. Wom. § 505.)

5<sup>g</sup>. Death of Husband before the Wife Attains the Age of *Nine Years*.

Dower is given, or at least was *originally* allowed, for the sustenance of the wife, and also of the *younger children*; and as previous to the age of *nine years* she is deemed incapable of bearing children, she is said *non promereri dotem*. (1 Th. Co. Lit. 569; 1 Lom. Dig. 89; *Ante*, p. 135.)

6<sup>g</sup>. Wife Detaining the Title-deeds of the Inheritance from the Heir.

If the heir (who alone is admitted to plead *detinue of charters*, and not a purchaser from either husband or heir), plead such *detinue*, he must aver his readiness *then, and always*, to render dower, if the charters are returned; and if the widow *then deliver* them, she shall have immediate judgment for the dower; but if she deny the detainer, and it is found against her, *she is barred for ever*. (Bac. Abr. Dower, &c. (F.); 1 Th. Co. Lit. 610, n. (H. 1); 1 Lom. Dig. 133.)

Our registry-laws may possibly be held to modify this doctrine to an important extent, forasmuch as it is scarcely conceivable, when conveyances are all registered, and office copies are admissible to prove their contents, that the heir *can be prejudiced* by the widow's detention of the title-deeds. (V. C. 1873, ch. 114, §§ 4, 5; Id. ch. 117; V. C. 1887, ch. 109, §§ 2463, 2465; Id. ch. 111, §§ 2500 & seq.; Washb. R. Prop. 196.) It is not known, however, that any case has occurred disaffirming in this particular the doctrine of the common law.

7<sup>g</sup>. Widow, after Husband's Death, Releasing her Dower to Him who ought to Assign it.

See Bac. Abr. Dower, &c. (F.); 1 Bright's H. & Wife, 543; Altham's Case, 8 Co. 150, &c.

8<sup>g</sup>. Assignment of Outstanding Terms for Years, in Trust, *Attendant upon the Inheritance*.

See 4 Kent's Com. 89 & seq.; 1 Bright's H. & Wife, 520 & seq.; Wms. Real Prop. 384.

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1<sup>h</sup>. Doctrine at Common Law; w. c.

1<sup>i</sup>. Principle of the Doctrine.

The principle of the doctrine is that "where equities are equal, *the law* (i. e., the *legal title*) shall prevail." (Wms. Real Prop. 384; 2 Stor. Eq. § 1000.)

2<sup>i</sup>. Illustration of the Doctrine.

A purchaser having bought and *paid for* land, and *taken a conveyance*, without notice of a claim to dower therein by the widow of some *previous proprietor*, pro-

cures an assignment to trustees *for him*, of a long term for years, which had been created, and vested in trustees, *before the widow's claim accrued*, the trusts having been accomplished, but the term remaining still outstanding in the original trustees, which, at law, is always a term *in gross*, although in equity it is considered to be *attendant on the inheritance*. The purchaser has now a legal title vested *in his own trustees*, which is anterior and paramount to the widow's claim to dower; and as he has *equal equity* with her (that is, to have the satisfied trust term removed out of the way, by equity compelling a reconveyance of it by the trustee, or his representatives, so as to re-unite it to, and merge it in the inheritance), his legal title will prevail. The widow would indeed be entitled to dower *in the reversion*, but there being no rent incident thereto, it is a *dry reversion*, and there must be a *cesset executio* during the term, so that the dower would avail her nothing.

The doctrine in England goes farther, and holds, as settled by a series of authorities, that a purchaser for valuable consideration may protect himself against the *dower* of the *vendor's wife*, by a term created previously to the attaching of her right of dower, although he had *actual notice* of the marriage, and of her title to dower; a protection to which a purchaser *with notice* is not entitled in any other instance or against any other person. As *res integra*, it is admitted that this proposition is, as Lord Eldon declares, monstrous; the rule, however, which thus discriminates between dower and other incumbrances, though resting on no sound principle, but chiefly, if not solely, on the practice of conveyancers, is, in England, become inveterate. (3 Sugd. Vend. 75; *Bodmin v. Vandebendy*, 1 Vern. 358 '9, and n. (1); *Hill v. Adams*, 2 Atk. 208; S. C. as *Swannock v. Lyford*, 1 Ambl. 7, 8; *Wynn v. Williams*, 5 Ves. 134; *Mole v. Smith*, 1 Jac. (4 Eng. Ch.) 497; *Maundrell v. Maundrell*, 10 Ves. 271-'2.) The first case which recognized this remarkable discrimination between dower and other incumbrances in the particular in question, was *Bodwin v. Vandebendy*, 1 Vern. 358, above cited, which was followed by Lord Hardwicke, in *Hill v. Adams*, 2 Atk. 208, where the diversity was by counsel referred to the fact that a trust term attendant on the inheritance is the inheritance itself; and that a woman cannot, at common law, be endowed *of a trust estate*; an idea which receives some confirmation from what fell from Lord Hardwicke in *Swannock v. Lyford*, 1 Ambl. 7, 8.

### 3<sup>d</sup>. Necessity of Assignment of Term to Trustees.

The purchaser is not protected, unless the term is *as-*



*signed to a trustee, in trust for him; for whilst a satisfied term, attendant upon the inheritance, protects alike all interests growing out of it (dower included), yet "it is capable of being disannulled, and being made to protect particular interests only; but that can be done only by assignment specially to trustees for the benefit of that interest."* (Per Sir Wm. Grant, *M. R. Maundrell v. Maundrell*, 7 Ves. 582; S. C. 10 Ves. 270; *Willoughby v. Willoughby*, 1 T. R. 767; 2 Th. Co. Lit. 601, n. (C.); 4 Kent's Com. 87.)

2<sup>b</sup>. Doctrine *by Statute*, in England, 8 and 9 Vict. c. 12.

The statute 8 and 9 Vict. c. 12, does away with the effect of satisfied attendant terms, in affording protection against dower and other incumbrances, *unless they were assigned for the purpose, prior to 31st December, 1845.* (Wms. Real. Prop. 387; 1 Bright's H. & Wife, 523-'4.)

This statute does not exist in Virginia; and although it is not usual with us to create long terms, and to have them attendant upon the inheritance, yet it may be done with the same effect as at common law.

9<sup>a</sup>. Sundry Devices whereby Land is Exempted from the Dower of a *Purchaser's Wife*.

See 2 Th. Co. Lit. 292, n. (1); 2 Bl. Com. 137, n. (30); 1 Bright's H. & W. 516 & seq.;

w. c.

1<sup>h</sup>. The *Desideratum* in these Devices.

The *desideratum* in all these devices is to enable the husband to enjoy and to alien the land *without obstruction*, whilst the wife's claim to dower is *prevented*. (1 Bright's H. & W. 518.)

2<sup>h</sup>. The Several Devices Employed, and the Principles on which they are respectively Founded; w. c.

1<sup>i</sup>. *First Device*.

The first device depends on the principle that the husband must be *sole-seised*.

*Example:* Conveyance to H and a trustee, and their heirs; but as to the trustee and his heirs, in trust for H and his heirs. (1 Bright's H. & W. 516.)

1<sup>k</sup>. Objections to *First Device*.

If the trustee survives, the whole estate vests in him (at common law) by the right of survivorship, excluding the wife's dower as to the *legal estate*, whilst the equitable estate is not subject to dower. But the trustee or his heirs may be faithless, and refuse to convey to the husband's heirs, or to their assignees, or by a positive breach of trust, may embarrass the title, necessitating a suit in equity; and, at all events, there will be the trouble and expense of procuring the title to be divested out of the trustee or his heirs. But,

besides all this, the husband may *survive the trustee*, when the estate survives to and vests in him, and so becomes *subject to dower*. (1 Bright's H. & W. 516-517.)

2<sup>k</sup>. Value of the First Device in *Virginia*.

It would not avail at all, the widow with us being *dowable of a joint*, and also of an *equitable estate*. (V. C. 1873, ch. 112, §§ 17, 18, 19; V. C. 1887, ch. 107, §§ 2429 to 2431; *Ante*, pp. 141, 142.)

2<sup>i</sup>. *Second Device*.

The second device depends on the principle that a widow is not *dowable of a trust estate*.

*Example*: Conveyance to a trustee and his heirs, *in trust for H and his heirs*. (1 Bright's H. & W. 517; w. c.)

1<sup>k</sup>. Objections to *Second Device*.

Those stated *supra*, 1<sup>k</sup>, in respect to the embarrassments of title connected with *trust estates*. (1 Bright's H. & Wife, 517-'18.)

2<sup>k</sup>. Value of *Second Device* in *Virginia*.

It would be of no avail, a widow here being *endowable of trusts*. (V. C. 1873, ch. 112, § 17; V. C. 1887, ch. 107, § 2429; *Ante*, p. 142.)

3<sup>i</sup>. *Third Device*.

The third device depends upon the principle that a power of *appointment* exercised, *defeats the appointee's seisin* from the beginning. (1 Bright's H. & Wife, 518; Ray v. Pung, 5 B. & Ald. 561; Maundrell v. Maundrell, 10 Ves. 263 & seq.; Paine's Case, 8 Co. 34 b, n. (A).)

*Example*: Conveyances to *such uses as H shall appoint*, and until appointment, to the use of H and his heirs; and H makes an appointment to the use of P and his heirs;

w. c.

1<sup>k</sup>. Objection to *Third Device*.

It answers the purpose well, provided the husband *makes an appointment*; the appointee being regarded as holding under the husband's *grantor*, and the husband's seisin being *wholly defeated*. But, until appointment, he is *seised of the inheritance*; and if he dies without exercising his power at all, his widow will be *entitled to dower*. (1 Bright's H. & Wife, 518, 342; 1 Washb. R. Prop. 208 '9; Maundrell v. Maundrell, 10 Ves. 263 '4; Cunningham v. Moody, 4 Ves. Sr. 177; Doe v. Martin, 4 T. R. 65; Doe v. Welles, 7 T. R. 478.)

2<sup>k</sup>. Value in *Virginia* of *Third Device*.

No reason is perceived why it may not have the same

effect in Virginia as in England, save only the doubt (which is a serious one) whether, under our statute of uses, an use can be raised in favor of one *not within the consideration*; that is (in case of bargain and sale), of one who does not supply the money. (2 Lom. Dig. 193; V. C. 1873, ch. 112, § 14; V. C. 1887, ch. 107, § 2426; Gilb. Uses, 398 & n. (2); Introd. to same, lv; 1 Spence's Eq. Jur. 450-'51.)

The appointee, however, may *possibly* be entitled by *way of trust*, and if so, dower would still be defeated. It would seem, however, that if the objection that the appointee supplied no part of the consideration is of any avail at all, it would effectually *exclude a trust*. But the appointee may probably take *by way of grant*, under the statute of grants. (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417.)

#### 4. *Fourth Device.*

The fourth device depends on the principle that, by the *rule in Shelley's case* (1 Co. 104; 2 Th. Co. Lit. 143, & n. (P.); *Post*, p. 341, 342; 1 Lom. Dig. 513; 2 Do. 298 & seq.), an *equitable freehold* in the ancestor does not unite with a *legal inheritance* in his heirs, or the heirs of his body, so as to vest in him a *seisin* of the inheritance, and so *vice versa*. In either case his heirs, or the heirs of his body, take the inheritance by *way of contingent remainder*. (Fearn's Rem. 52, &c., 59 n. (d).) It is aided also by the principle of the *third device*. (1 Bright's H. & Wife, 519.)

*Example*: Conveyance to such uses as H shall appoint, and in default of appointment, to a trustee and his heirs, in trust for *H for his life*, and subject thereto to the use of *H and his heirs*. (1 Bright's H. & Wife, 519.)  
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#### 1<sup>st</sup>. *Objection to Fourth Device.*

One principal objection is the *interposition of the trustee*. If the husband makes an appointment, this inconvenience is obviated, there being no necessity for any action or concurrence on the part of the trustee in order to vest the estate in the appointee; and so, if the husband dies without appointing, the *legal estate* immediately vests in his heirs, independently of the trustee. But whilst the husband lives, and forbears to make an appointment, the *legal title* being in the trustee may occasion him some trouble and annoyance. But there is a further, and perhaps more material objection, in that the inheritance is not vested in the husband at all, but is limited by way of contingent remainder to *his heirs*, etc., unless it shall be prevented by the limitation, departing from the English formula,

being, as is here supposed, not to *H's heirs*, but to *H and his heirs*. And although it is believed that this last limitation would vest the inheritance in the husband, that conclusion must remain doubtful until it is sanctioned by judicial decision.

2<sup>k</sup>. Value in Virginia of *Fourth Device*.

There are two sources of doubt in respect to the operation of this device in Virginia. *First*, it is doubtful whether, under our statute of uses, *any use* would arise, or be executed, in *favor of H's appointees*, for the reason, such as it is, already indicated (*supra*, p. 170, 2<sup>k</sup>); and *secondly*, it may be questioned whether, under our statute (intended to abolish and now abolishing the rule in *Shelley's case*—V. C. 1873, ch. 112, § 11; V. C. 1887, ch. 107, § 2423) the limitation to *H and his heirs* does not create a contingent remainder *in the heirs*; from which it would result that the dower would be prevented, indeed, but at the expense of the *husband's inheritance*. To this last doubt, it seems to the writer that not much weight is to be attached (1 Bright's H. & Wife, 519; Park on Dow. 83 & seq.; 1 Sugd. Pow. 233); nor indeed is much weight due to the former, if viewed in the light of *principle*, but it is strongly sustained by *authority*. (2 Lom. Dig. 193; Gilb. Uses, &c. 46. *Contra*, Gilb. Uses, &c. 51, n. (7); Id. 254-'5.)

5<sup>i</sup>. *Fifth Device*.

The fifth device depends on the principle that the husband must have the *immediate estate of freehold* in possession, and the *first estate of inheritance*, without any *intermediate vested estate of freehold*. (*Ante*, p. 151, 2<sup>k</sup>, 3<sup>k</sup>.)

*Example*: Conveyance to H *for his life*, and if, by any means, that estate should come to an end in H's life-time, remainder to Z for the *residue of H's life*, remainder, after H's death, to *H and his heirs*. (1 Bright's H. & Wife, 518-'19; Fearne's Rem. 217-'18; Duncomb v. Duncomb, 3 Lev. 437; *Ante*, p. 152.)

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1<sup>k</sup>. Objection to *Fifth Device*.

There seems to be none at common law. The device appears to satisfy completely the conditions of the *desideratum*, as stated, *Ante*, p. 168, 1<sup>h</sup>. The husband may enjoy and aliene the land *without obstruction* (the inheritance being vested in him by the rule in *Shelley's Case*), and yet the wife's claim to dower is *prevented*. Z's interposed remainder is technically *vested*; because it has a *present capacity* to take effect in possession if the *possession were vacant* (2 Bl. Com. 169, n. (10);



Fearne's Rem. 216); and yet it is so remotely *contingent in fact*, and its taking effect at all is so wholly in the control of the husband himself, that it does not practically diminish the value of his estate.

It has sometimes been questioned whether the limitation to Z is a good remainder, upon the ground that it is intended to take effect *in derogation of the preceding estate in H*, which is contrary to the nature of a remainder. (*Post*, pp. 382 & seq.) But that it is a valid remainder is an *undoubted*, although not an *undoubted* fact, whether the *rationale* of it be satisfactorily explicable or not. Thus, it was held to be a good remainder in *Duncomb v. Duncomb*, 3 Lev. 437, which was approved by Lord Hardwicke, in *Hooker v. Hooker*, Rep. Temp. Hardwicke, 17; and the fact is indeed the foundation of the practice of the limitation of a remainder to trustees to preserve contingent remainders. (Fearne's Rem. 326.) It is also admitted by Mr. Fearne, or rather insisted on by him, in several passages; *e. g.*, pp. 16, 217-18, 347, and some others; and by Mr. Douglas, in a note to *Goodtitle v. Billington*, 2 Dougl. 755, n. (1.)

The explanation afforded by Mr. Fearne (none of the other writers seem to have vouchsafed any explanation at all,) is merely that "*forfeiture* is one of the regular modes of determination *incident to an estate for life*, and to which its nature is subject in its original limitation." (Fearne's Rem. 16.)

The limitation in question, therefore, is in effect a limitation to "*H for life, or until his estate shall by any means come to an end in his life-time*, and in the latter case, remainder to Z," etc. Hence, Z's remainder is *not in derogation* of H's life-estate, but *awaits its regular expiration* by one of the two limitations which are appointed to determine it.

So presented, the explanation is sustained and confirmed by Lord Vaux' case, 1 Cro. (Eliz.) 269, wherein a grant to A until B returned from beyond sea, *or died*, and then to C, was held a good remainder in C; also by *Luxford v. Cheeke*, 3 Lev. 125-'6, where a devise to W for life, if she do not marry, but *if she do marry*, remainder over, was held to create a valid remainder, to take effect at her death, if she did not marry, and if she *did marry*, immediately upon the marriage. Lord Coke and Mr. Fearne both cite approvingly Lord Vaux' case. (2 Th. Co. Lit. 59; Fearne's Rem. 19.)

3<sup>k</sup>. Value in Virginia of *Fifth Devise*.

It is believed that it would be effective for the purpose desired. It is certain, indeed, that it would pre-

vent dower from accruing to the purchaser's widow. The doubt is that, under the operation of the statute intended to abolish the *rule in Shelley's case* (V. C. 1873, ch. 112, § 11; V. C. 1887, ch. 107, § 2423), such a limitation might fail to vest the inheritance in the husband, but, instead, carry it, by way of *contingent remainder*, to the husband's heirs. It is supposed, however, that the limitation to *H and his heirs* would, notwithstanding the statute, give the husband *the inheritance*. (1 Bright's H. & Wife, 519; Park on Dow, 83 & seq.; 1 Sugd. Pow. 233.)

10<sup>g</sup>. Wife's Uniting with the Husband in Conveying the Land in the Manner Required by Law.

In determining the doctrine touching the wife's uniting with the husband in conveying the land, so as to relinquish her claim to dower, let us examine, (1), the reasons for the inability of *femes covert*, in general, to contract; (2), The mode, at common law, whereby married women may convey real estate; and (3), The mode prescribed by statute in Virginia for married women to convey;

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1<sup>h</sup>. Reasons for the Inability of *Femes Covert* to Contract in General; w. c.

1<sup>i</sup>. Wife's Existence is merged in that of the Husband.

1 Bl. Com. 442, 444; 1 Min. Insts. 366-'7.

2<sup>i</sup>. Wife is supposed to be under the Controlling Influence and Virtual Constraint of her Husband.

1 Bl. Com. 444; 1 Min. Insts. 366-'7.

2<sup>h</sup>. Mode at Common Law whereby *Married Women may Convey*.

At common law a married woman is enabled to convey by levying a fine or suffering a common recovery, both of which, however, have been superseded in England by statute 3 & 4 Wm. IV., c. 74 (A. D. 1833), which substitutes for them a simple deed executed with the concurrence of the husband, and a *privy examination* before certain functionaries named in the statute. (2 Bl. Com. 137; Wms. Real Prop. 212-'13.)

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1<sup>i</sup>. The Nature of a Fine.

A fine is a collusive suit, commenced by an intended grantee against the grantor, and by leave of the court *compromised*, the lands in question being by the compromise acknowledged to be the *right of the grantee*. When a married woman is a party to it, she is examined by the court apart from her husband, to ascertain whether she joined in the fine of her own free will, or was compelled to it by the menaces or the undue influence of her husband. (2 Bl. Com. 348 & seq.; Wms. Real Prop. 46-'7, 212.)

2<sup>l</sup>. Reasons for the Efficacy of a Fine, as to Married Women: w. c.

1<sup>k</sup>. It Purported to be a Suit *in Iuvitum*.

The law did not, of course, forbid a married woman *to be sued* for land which a third person claimed. The fine *purported to be such a suit*, and the object being to facilitate conveyances by married women, no averment of the fictitiousness of the action was permitted. Thus the *unity of husband and wife* was obviated.

2<sup>k</sup>. The Privy Examination of the Wife by the Court, or by some Accredited Officer thereof.

By this privy examination it was sought to do away with the objection that the wife was likely to act under the duress and compulsion of her husband's authority and influence. (2 Bl. Com. 351.)

3<sup>b</sup>. Mode Prescribed by Statute in Virginia for Married Women to Convey.

The statute, by its *inherent force*, obviates the legal unity of husband and wife in the cases where it applies, and formerly did away with the objection of the husband's supposed influence by a *privy examination*, as prescribed. (V. C. 1873, ch. 117, § 4.) But the Code of 1887, very unhappily, as the writer is constrained to think, dispenses with the privy examination altogether. (V. C. 1887, ch. 111, § 2502.)

w. c.

1<sup>i</sup>. The Principle on which the Statute is to be Construed.

It is an *exception* to the common law, and so must be *construed strictly*. A substantial compliance with it is sufficient, but no requirement can be pretermitted, without invalidating the transaction. Thus, the statute until 1888 applies to no other transaction than a *conveyance* of lands or chattels; not to a power of attorney, nor to any executory contract (Shanks, &c. v. Lancaster, 5 Grat. 111); the husband must be a party (Sexton v. Pickering, 3 Rand. 468); and both he and the wife must sign it (Tod v. Baylor, 4 Leigh, 498); there must appear to have been a *privy examination* of the wife (Healy & als. v. Rowan & als. 5 Grat. 431), and an *explanation* to her of the conveyance (Hairston v. Randolph, 12 Leigh, 445; Harkins v. Forsyth, 11 Leigh, 294); nor is any disability obviated, save that of coverture, *e. g.*, *not infancy*. (Thomas v. Gammel & ux. 6 Leigh, 9.) But some important statutory changes in these requirements have been made by the Code of 1887, and subsequent statutes. Thus, the statute does now include a wife's contract to convey and *power of attorney*. (Acts 1889-'90 p, 193,

ch. 238), and the *privy examination* and *explanation* are dispensed with. (V. C. 1887, ch. 111, § 2502.)

Dower is said to be a mere *contingent possibility* of right in the wife, which her conveyance along with her husband, in due form, only *releases and extinguishes*, without *passing* anything, so that one who receives such a conveyance, if the wife survive the husband, cannot be regarded as an *assignee* of the wife's claim to dower, entitled to assert it as she might have done but for the conveyance. (1 *Bish. Marr. Women*, § 348; 1 *Washb. Real Prop.* 203, 248; *Moore v. N. York*, 4 *Seld. (N. Y.)* 40; *Learned v. Cutter*, 18 *Pick. (Mass.)* 9; *Maguin v. Reggin*, 44 *Mo.* 512, 515; *Carr v. Porter*, 33 *Grat.* 286.)

- 2<sup>i</sup>. The Authorities before whom the Acknowledgement may be Made.

*In Virginia* it may be before a court authorized to admit the conveyance to record, or the clerk thereof, or his duly qualified deputy, at any place within the county or corporation, before a justice of the peace, or a commissioner in chancery, or a notary public; *in the United States*, but *without the limits of Virginia*, before a justice of the peace, a commissioner in chancery, a notary public, or a commissioner appointed for such purposes by the governor of Virginia (V. C. 1873, ch. 116, § 2; V. C. 1887, ch. 41, § 924.) *Beyond the limits of the United States*, before any diplomatic or commercial agent of the United States abroad, or before any court of such country, or before the chief magistrate of any city, town, or corporation there. (V. C. 1873, ch. 117, §§ 3, 4; V. C. 1887, ch. 111, §§ 2501, 2502.)

- 3<sup>i</sup>. The Formalities Required; w. c.

1<sup>k</sup>. Prior to the Code of 1887; that is, before May 1st, 1888.

- 1<sup>l</sup>. Privy Examination.

See *Healy, &c. v. Rowan, &c.* 5 *Grat.* 431.

- 2<sup>l</sup>. Explanation of the Writing.

See *Hairston v. Randolph*, 12 *Leigh*, 445; *Harkins v. Forsyth*, 11 *Leigh*, 294.

- 3<sup>l</sup>. Acknowledgment of Wife; w. c.

1<sup>m</sup>. That the Writing is *her Act*.

2<sup>m</sup>. That she Executed it *Willingly*.

3<sup>m</sup>. That she does not wish to Retract it.

See *Grove v. Zumbro*, 14 *Grat.* 516.

- 4<sup>l</sup>. Certificate of the Authorities.

The certificate must embrace the foregoing particulars (the form is prescribed by the statute V. C. 1873, ch. 117, § 4); and if the wife be *abroad*, it must be under the functionary's *official seal*. (*Id.*)

- 5<sup>l</sup>. Recordation of the Writing.



When such writing and *certificate* have been delivered to the proper clerk, and admitted to record, *as to the husband, as well as the wife*, it shall operate to convey her right of dower, and every right, title, and interest which, at that date, she may have in the property, as effectually as if she were *then an unmarried woman*; but it shall not operate any further upon the wife or her representatives by means of *any covenant or warranty* contained in it. (V. C. 1873, ch. 117, §§ 6, 7; Thomas v. Gammel & ux. 6 Leigh, 9.)

2<sup>k</sup>. By Code of 1887, &c.

The Code of 1887, as we have seen, dispenses altogether with the privy examination of the wife, the explanation to her of the writing, and the detailed acknowledgment of the writing as her act, of her willing execution of it, and of her not wishing to retract it. It requires only that the husband should unite with her in the conveyance, the same formalities being required of her as of any other party to a writing in order to have it recorded.

The provision is as follows: "When a husband and his wife have signed a writing to convey any estate, real or personal, such writing may be admitted to record as to *each of them*, according to the provisions of §§ 2500 or 2501; and when it shall have been so admitted to record *as to the husband as well as the wife*, it shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title, and interest of every nature, which at the date of such writing she may have in any estate conveyed thereby, as effectually as if she were at the said date *an unmarried woman*. Such writing shall not operate any further upon the wife and her representatives, by reason of any covenant or warranty contained therein which is not made with reference to her separate estate, as a source of credit, or which, if it relates to her said right of dower or to any estate or interest conveyed other than her own, is not made with express reference to her separate estate as a source of credit." (V. C. 1887, ch. 111, § 2502.) And a subsequent statute of 1889 '90, allows a wife to execute a contract, and also a *power of attorney* to convey her lands. (Acts 1889-'90, p. 193, ch. 238.)

11<sup>g</sup>. Jointure; w. c.

1<sup>h</sup>. Origin of Jointure, as a Bar to Dower; w. c.

1<sup>i</sup>. State of the Law Previous to the Statute of Uses, 27 Hen. VIII., c. 10; w. c.

1<sup>k</sup>. Doctrine as to Barring Dower *by Contract with Wife*; w. c.

1<sup>l</sup>. Dower not Barrable *before Marriage*.

Because no right can be barred before it accrues.  
(Gilb. Uses, 147; Vernon's Case, 4 Co. 1 b; 1 Lom. Dig. 136.)

2<sup>l</sup>. Dower not Barrable *after Marriage*; w. c.

1<sup>m</sup>. Because Wife *is not Sui Juris*.

2<sup>m</sup>. Because no Freehold can be Barred by a *Collateral Satisfaction*. (Vernon's Case, 4 Co. 1 b; 1 Lom. Dig. 136; Bac. Abr. Dower, &c. (F).)

2<sup>k</sup>. Expedient Resorted to in Order to Provide for the Wife in Consequence of the Universal Prevalence of Uses.

Soon after the introduction of uses, in the latter part of the reign of Edward III. (*about A. D. 1370*), they prevailed so extensively that forasmuch as a widow was not dowable of an use, expectant husbands were required to make some special provision for their wives. This was commonly done by revoking the existing uses of a portion of their lands (as they always reserved the power to do), and limiting them anew to the husband himself until marriage, then *jointly* to himself and his wife *during coverture*, remainder to the *survivor* for life, etc. Hence, the provision was styled a *jointure*, which means no more than a *joint estate*. (2 Bl. Com. 137.)

2<sup>i</sup>. Effect of the *Statute of Uses*, 27 Hen. VIII., c. 10.

The statute of uses ordained that such as had the *use* of lands should to all intents and purposes be reputed to be absolutely *seised* and possessed *of the soil itself*. In consequence of the *legal seisin* thus devolved on their husbands, all the *then wives* of England would have had a double provision, namely, their jointure and their dower, had not the same statute provided that a *jointure*, provided it had *certain attributes*, should *constitute a bar* to the widow's claim to dower. (2 Bl. Com. 137-'8.)

2<sup>h</sup>. Requisites of Jointure, in Order that it may Prevent Dower; w. c.1<sup>i</sup>. Requisites by the *Statute of Uses*. (27 Hen. VIII., c. 10.)

See 2 Bl. Com. 138; 1 Th. Co. Lit. 611; 1 Lom. Dig. 137;

w. c.

1<sup>k</sup>. Must be an Estate of *Freehold* in *Land or Tenements*.2<sup>k</sup>. Must take Effect *Immediately* at the Husband's Death, and be for the *Life of the Wife at least*.3<sup>k</sup>. Must be made *to Herself*, and not to another in *Trust for Her*.

- 4<sup>k</sup>. Must be particularly *Expressed* to be in *Satisfaction* of her whole Dower.  
 5<sup>k</sup>. Must be made *Before Marriage*.  
 2<sup>i</sup>. Equitable Jointure.

When the foregoing requisites *are not all found* in the provision made by the husband for the wife, by will or otherwise, and yet it is *manifest* that the husband did not intend her to have the provision and her dower also, she will be compelled, *in equity*, to elect between them, and this is known as *equitable jointure*. Founded, as it is, on the *intention of the husband*, as disclosed in the will or other instrument containing the provision, it often involves very intricate considerations. (2 Bl. Com. 138, and n. (33); 2 Th. Co. Lit. 612, n's (114), (115); 1 Com. Dig. 147 & seq.; 1 Bright's H. & Wife, 447 & seq.; Higginbotham v. Cornwell, 8 Grat. 83; Findlay's Ex'or v. Findlay, 11 Grat. 434; Craig's Heirs v. Walthall & ux. 14 Grat. 518; Dixon v. McCue, &c., Id. 540.)

- 3<sup>i</sup>. Requisites of Jointure in Virginia.

See V. C. 1873, ch. 106, §§ 4 to 6; V. C. 1887, ch. 102, §§ 2270 to 2272.

W. C.

- 1<sup>k</sup>. Jointure may be *any Estate, Real or Personal, Intended* to be in Lieu of Dower, *Conveyed or Devised* for the Jointure of Wife.

The statute enacts that "If any estate, real or personal, intended to be in lieu of dower, shall be conveyed or devised for the jointure of the wife, such conveyance shall bar her dower of the real estate, or the residue thereof." (V. C. 1873, ch. 106, § 4; V. C. 1887, ch. 102, § 2270.)

This enactment opens up in *every case* all the nice and uncertain problems of *intention* which formerly belonged to *equitable jointure* alone. Its tendency, however, to beget litigation is considerably mitigated (although at the expense of the widow's interests) by a clause in the statute which declares that every such provision *by deed or will* shall be *taken to be intended in lieu of dower*, unless the *contrary appear* in the deed or will, or some other writing, signed by the *party making the provision*. (V. C. 1873, ch. 106, § 4; V. C. 1887, ch. 102, § 2270.)

- 2<sup>k</sup>. If the Conveyance or Devise be *Before Marriage*, and *without the Assent*, or *During the Infancy* of the Wife; or if it be *After Marriage*, the Widow may *Waive the Jointure*, and Demand her Dower, *within a Year*.

Such an election is to be made within *one year from the husband's death*, or from the *probate of his will*,

if the provision be by will, in any *court of record* in the county or corporation in which the husband *resided at his death, or by writing recorded in such court*, or in the clerk's office thereof, upon such acknowledgment or proof as would suffice for a conveyance of land; and when she shall *elect and receive* her dower, the estate so conveyed or devised to her shall *cease and determine*. (V. C. 1873, ch. 106, § 5; V. C. 1887, ch. 102, § 2271.)

3<sup>b</sup>. Effect in Barring Dower of Ante-nuptial Contract that neither Consort will take any Interest in the Property of the other.

It would seem, *upon principle*, that such a contract does not in general bar the wife from claiming her dower; not *at common law*, for the reasons stated *Supra*, pp. 176 '7; not in pursuance of the *statutes* making jointure a bar (V. C. 1873, ch. 106, § 4; V. C. 1887, ch. 102, § 2270), because they manifestly contemplate a provision made from the *husband's* property, and not merely by relinquishing what he might otherwise have claimed of the wife's, by virtue of his marital rights; and not by reason of any power of *equitable interposition*, for the power of equity in the premises extends only to enforce a *substantial observance of the statute*, by compelling the wife, when she becomes a widow, to elect between the provision made for her support by her husband, and her dower. (4 Kent's Com. (12th ed.) 55, 57.)

The proposition, however, is far from being beyond the reach of question. There is known only one case which judicially declares such a contract to be a bar to dower, namely, Naill v. Maurer, 25 Md. 522; but the doctrine of that case is countenanced by a number of other American cases (it is believed by not one English), as *e. g.*, Faulkner v. Faulkner, 3 Leigh, 255; Charter v. Charter, 8 Grat. 456; Findley v. Findley, 11 Grat. 434, and is adopted by Mr. Bishop, in 1 Bish. Marr. Wom. §§ 422, 423 & seq.

The doctrine of election, when applied to a widow's claim of dower, is founded on the same reasons, and governed by the same rules as in any other case. And a dominant principle in such cases is, that one claiming a benefit under an instrument must abandon every right the assertion whereof would defeat, even partially, any of the provisions of that instrument. Hence, if the widow's taking her dower would interfere with any of the provisions of the will, she must elect. (Dixon v. McCue, 14 Grat. 540; Rutherford v. Mayo, 76 Va. 117.)

And it should be observed, that the widow's renunciation is not to disappoint the testator's disposition further than is necessary to enforce her right; and therefore the



property renounced by the widow ought to be applied to indemnify the beneficiaries under the will, who are disappointed by her act. (*Mitchells v. Johnson*, 6 Leigh, 461; *McReynolds v. Counts*, 9 Grat. 242; *Morriss v. Garland*, 78 Va. 226.)

4<sup>h</sup>. Effect of Loss of Jointure by *Title Paramount*.

If the widow be lawfully deprived of her jointure, or any part thereof, she shall be *endowed* of so much of the real estate of her husband whereof, but for the jointure, she would have been dowable, as is *equal in value* to that of which she was deprived. (V. C. 1873, ch. 106, § 6; V. C. 1887, ch. 102, § 2272; 2 Bl. Com. 138; 1 Th. Co. Lit. 570, n. (6); *Id.* 614, n. (M, 1); *Cooper v. Cooper*, 77 Va. 205.)

5<sup>h</sup>. Advantages of Jointure over Dower.

The principal advantage is that the widow may *enter upon her jointure* immediately after her husband's death without any formal process, as she might have done also in case of dower *ad ostium ecclesiæ*, etc.; whilst she must wait for her dower *to be assigned her*, and if it be delayed, can compel it to be done only by process of law. This diversity, however, is much diminished in importance, by the statutory provision that the widow may remain in the occupancy of her husband's mansion-house until her dower is assigned her, and meanwhile shall have one-third of the profits of the lands whereof she is dowable. And if she be deprived of such mansion-house and curtilage, she may on complaint of unlawful entry or detainer recover possession thereof, *with damages* for the time she was so deprived. (V. C. 1873, ch. 106, § 8; V. C. 1887, ch. 102, § 2274; 2 Bl. Com. 138; 1 Th. Co. Lit. 615, n. (O. 1).)

6<sup>h</sup>. Priority of Dower over Husband's Debts.

We are to note, (1), Debts of the husband due *before marriage*; and (2), Debts contracted by the husband, *during coverture*.

See 1 Lom. Dig. 128-'9, 107.

W. C.

1<sup>st</sup>. Debts of Husband due *Before Marriage*.

Let us take notice of, (1), Debts of the husband due before marriage which are *charged on his land* by mortgage, judgment or other specific charge; and (2), Debts of the husband due before marriage, and *not charged specifically on his land*;

W. C.

1<sup>h</sup>. Debts due before Marriage which are *Charged on the Land*, by Mortgage, etc., made by the Husband prior to Marriage.

The debts have priority over the claim to dower, but

the dowress is entitled to dower in the equity of redemption, and to have the incumbrances thus created by the husband cleared off *out of the personality*, and out of the lands in the hands of the husband's heir or devisee. (1 Th. Co. Lit. 568, n. (B.); 1 Bright's H. & W. 344, 387 '8; Heth v. Cocke, 1 Rand. 344.) And where there is a judgment outstanding at the time of the marriage, which constitutes a lien upon the land, the widow can only claim her dower therein, subject to such lien, unless the judgment and the marriage occurred on the same day, in which case the dower-right is so far favored as to be allowed priority. (1 Washb. R. P. 165; 4 Kent's Com. 42; 1 Lom. Dig. 101; Robbins v. Robbins, 8 Blackf. (Ind.) 174; Queen Anne's Co. v. Pratt, 10 Md. 3; Ingram v. Morris, 4 Harringt. (Del.) 111; Robinson v. Shacklett, 29 Grat. 99.)

But where the debts are not of the husband's contracting, as where the estate comes to him before the marriage, charged or encumbered with them, the widow must take her dower *cum onere*; for the husband's personal property and general estate are not liable to answer for the debts of other persons; and consequently, in the instance supposed, are not liable to exonerate the dowable estate from incumbrances so charged upon it. (1 Bright's H. & Wife, 388.) In such a case, however, the widow may be endowed of the land *subject to the incumbrances*, which would imply that she should keep down the interest on her third. Inasmuch, however, as the incumbrancer is not bound to accept his debt in parcels, he may demand that the widow shall pay the whole, or else submit to a foreclosure in respect to the whole property; and if she pays the whole accordingly, she may compel the heir, or other person interested in the two-thirds, to contribute *pro rata*. (1 Bright's H. & Wife, 344, 387 '8; Gibson v. Crehore, 3 Pick. (Mass.) 475; S. C. 5 Pick. 146.)

And so, by parity of reason, if the wife's *separate property* becomes charged with the *proper debt* of the husband, his estate is to exonerate hers: but it is not so if the debt were not originally the husband's, as where the wife received her separate estate charged therewith, and the husband promised to pay it. Here the wife's separate estate is *primarily liable*, and not the husband's estate. (1 Bright's H. & Wife, 270-272 & seq.)

It may be observed also, that as the widow's dower is a continuation of the husband's seisin, she becomes, in consequence, liable to her due proportion, one-third, of all duties and services to which the estate was subject in his possession, and for such one-third she is answerable to the reversioner or other person entitled to claim them. Thus, if a base or qualified fee were granted to the hus-

band and his heirs, as long as Z should have heirs of his body, reserving a rent to the grantor and his heirs, and the husband dies, and Z afterwards dies, *without heirs of his body*, whereby the husband's estate is determined, yet the wife is entitled to dower *in the land*, and as incident thereto, must pay the grantor one-third of the rent reserved on the grant to the husband. (1 Bright's H. & Wife, 394-5; 1 Th. Co. Lit. 568, and n. (2); Ascough's Case, 9 Co. 135 a, 135 b.)

2<sup>h</sup>. Debts due *Before Marriage*, not Charged *Specifically* upon the Land, by Mortgage, Judgment, or Otherwise.

In respect to these debts, the claim of the widow to dower has priority. (1 Th. Co. Lit. 568, n. (B).)

2<sup>g</sup>. Debts Contracted by the Husband *During the Coverture*.

These are in *all cases* (even in cases of bankruptcy), postponed to the wife's claim to dower, which is indefeasible by *any act of the husband alone*, wherein the wife does not concur. Her title is indeed *consummate* by his death, but it has relation to the time of the marriage, and to the seisin which her husband had then, or at any time during the coverture. (1 Lom. Dig. 107; 1 Bright's H. & Wife, 387; Fulwood's Case, 4 Co. 64 b; James' Bankruptcy, 38; Simmons v. Lyles, 27 Grat. 922.)

3<sup>g</sup>. Settlement by Husband on Wife in Consideration of the Wife's *Relinquishment of her Dower*; w. c.

1<sup>h</sup>. There must be an *Actual Relinquishment*, not a mere *Agreement to Relinquish*.

Such an *agreement* is not binding on the wife, nor capable of enforcement, and, therefore, constitutes *no consideration* for the settlement. (Harrison & als. v. Carroll, 11 Leigh, 476.) And if, for any cause, a settlement on the wife be annulled, which was made in consideration of her parting with her rights, she is to be placed in the same position, and restored to the same rights with which she was invested by law, before she united in the deed of relinquishment, so far as it can be done without prejudice to the rights of creditors or purchasers. (Davis v. Davis, 25 Grat. 595.)

2<sup>h</sup>. Doctrine Touching the *Extent of the Settlement*.

The proper measure of the extent to which property may be settled, as against the husband's creditors, is the *value of the dower interest* relinquished. (Quarles v. Lacy, 4 Munf. 251; Blanton v. Taylor, Gilm. 209; Harvey v. Alexander, 1 Rand. 219; Taylor v. Moore, 2 Rand. 563; Lee v. Bank of U. States, 9 Leigh, 200; Harrison & als. v. Carroll, 11 Leigh, 484; Wm. & M. Coll. v. Powell, 12 Grat. 372 & seq.; Burwell's Ex'ors v. Lumsden, 24 Grat. 446; Davis v. Davis, 25 Grat. 590; Sykes v. Chadwick, 18 Wal. 141.)

3<sup>h</sup>. Mode of Estimating the Value of the Wife's *Contingent Dower Interest*.

This is a problem more difficult of determination than the value of the life-estate of one who is already a widow, since it involves the computation, not only of the duration of one life, but the *chances of survivorship* besides, as between the husband and wife. By the aid of the tables of mortality, however, and the *calculus of chances*, tables have been formed, exhibiting the *present value* of the right of dower of a married woman, for every \$100 worth of her husband's estate whereof she is dowable, for all probable ages of both parties, thus:

AGE OF THE WIFE.			AGE OF THE HUSBAND.				
			26	30	34	40	58
18,	-	-	3.99	4.51	5.03	5.99	11.40
22,	-	-	3.77	4.25	4.74	5.69	10.95
26,	-	-	3.53	3.97	4.42	5.35	10.47
30,	-	-	3.23	3.69	4.10	4.99	9.96
44,	-	-	2.34	2.63	2.92	3.54	7.65

These figures are taken from extensive tables of the description indicated, found in the *American Almanac* for 1835, p. 88. See *Wilson v. Davisson*, 2 Rob. 384.

These computations, it will be observed, only affect to find the *average results* in a vast number of cases, but are liable to be greatly disturbed in any one, or in a few cases, by peculiarities of constitution, locality, and other circumstances, to which, therefore, reference must be had, wherever a practical result is sought. The extent to which the *average estimates* ought to be changed by these peculiar circumstances is not susceptible of being defined, but must depend on the exercise of a sound discriminating judgment. (*Shelley v. Nash*, 3 Madd. (Am. ed. 125) 232; *Earl of Portmore v. Taylor*, 4 Sim. (6 Eng. Ch.) 182; *Ante*, pp. 143 to 145.)

7<sup>f</sup>. Points of Difference between *Curtsey* and *Dower*: w. c.

1<sup>g</sup>. *Dower takes One-Third of the Consort's Estate; Curtsey takes All.*

2<sup>g</sup>. *Seisin in Law* (and in Virginia, by Statute, even a *Right of Entry or of Action*, V. C. 1873, ch. 106, § 2; V. C. 1887, ch. 102, § 2268), is sufficient *for Dower*; *Seisin in fact* is Required *for Curtsey*.

3<sup>g</sup>. No Issue is Requisite *for Dower*; Issue *Born Alive* is Required *for Curtsey*.

4<sup>g</sup>. *Dower Requires to be Assigned*; *Curtsey Needs no Assignment*, but takes Effect Immediately upon the Wife's Death.

5<sup>g</sup>. *Dower is Forfeited by Adultery*; Adultery by the Hus-



band *does not affect his Curtesy*. But curtesy, and all other interest in her estate, as distributee or otherwise, is declared by the Code of 1887, to be barred when the "husband unlawfully deserts or abandons his wife," supposing the desertion or abandonment to continue until her death. (V. C. 1887, ch. 103, § 2296.)

## CHAPTER IX.

### OF ESTATES LESS THAN FREEHOLD.

#### 2<sup>o</sup>. Estates Less than Freehold.

Estates less than freehold include (1), Estates for years; (2), Estates at will; and (3), Estates by sufferance;

W. C.

#### 1<sup>d</sup>. Estates for Years.

In contemplating the doctrines applicable to estates for years, we are to have regard to, (1), The definition of estates for years; (2), The modes of creating such estates; (3), The meaning of words importing time; (4), The little esteem in which estates for years were originally held; (5), The characteristic qualities of estates for years; and (6), The incidents which belong to estates for years;

W. C.

#### 1<sup>o</sup>. Definition of Estates for Years.

"Tenant for term of years is, where a man letteth lands or tenements to another for term of *certain* years, after (*i. e.*, according to) the number of years that is accorded between the lessor and the lessee. And *when the lessee entereth* by force of the lease, then is he *tenant for term of years*." (1 Th. Co. Lit. 628; 1 Lom. Dig. 171.)

#### 2<sup>o</sup>. Modes of Creating Estates for Years; W. C.

##### 1<sup>st</sup>. The General Doctrine.

As even an estate of *inheritance*, at common law, required *no writing* for its creation, so, *a fortiori*, did not an estate for years, how long soever the term. The safeguard relied on for both parties, and in order to afford a proper *notoriety* to the transaction, was, in the case of *freeholds*, livery of seisin (where the grantor and grantee *went together to the premises*, and the grantor formally made delivery of the same to the grantee), and in case of *terms for years*, entry by the lessee (when the lessee merely *took possession*, or entered), the lessor's presence being so immaterial that even though he should die, the lessee might still afterwards, at any time during the term, enter, and consummate his estate. (1 Th. Co. Lit. 630-31; 2 Bl. Com. 144; *Post*, p. 667.)

These methods, by *livery of seisin* in case of *freeholds*, and by *entry* in case of *terms for years*, might answer well

enough for an unlettered people, few of whom could read; nay, to such a people they were the best expedients that could be devised: but as society advanced to a higher state of refinement, *writing* and a public and general *registry*, afforded a far more efficient protection to the interests of the parties, and of the public. Accordingly, in Virginia it is enacted, in pursuance of the policy of the English statute of *frauds and perjuries*, 29 Car. II., c. 3, § 1, 2, 3, that no estate of inheritance, or freehold, or for a term of *more than five years*, in lands, shall be conveyed unless *by deed or will* (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413), and in order to confer upon the transaction the requisite *notariety*, it is provided that every *contract in writing*, made for the conveyance or sale of real estate, or a term therein of *more than five years*, and every *deed conveying* any such estate or term, shall be void as to *creditors*, (whether they have notice or not), and as to *subsequent purchasers* for valuable consideration, without notice, *until and except* from the time that it is duly *admitted to record* in the county or corporation wherein the property embraced in such contract or deed may be; and if it lie in several counties or corporations, it must be recorded in each, in order to protect so much as may lie therein. But with this qualification, that any such contract or deed of conveyance which is admitted to record *within twenty days* from the day of its being *acknowledged before and certified by* a justice, notary public, or other person authorized to certify the same for record, shall be as valid as to creditors and subsequent purchasers as if *executed on the day of acknowledgment and certificate*. (V. C. 1873, ch. 114, §§ 4 to 7, 11, 12; V. C. 1887, ch. 109, §§ 2463 to 2467, 2472, 2473; McClure v. Thistle's Ex'or, 2 Grat. 182; Withers v. Carter & als. 4 Grat. 413.)

When the term does not exceed *five years*, it may be created, as at common law, *by parol*, that is, *verbally*. (*Post*, p. 667; 2 Th. Co. Lit. 404. n. (A).)

## 2<sup>d</sup>. Contracts for *Future Leases*, etc.

At common law, *contracts for future leases* for years, and indeed for estates of any duration, might have been *verbal*, but the same policy which wisely sought to prevent *frauds and perjuries* by requiring *conveyances* to be *by deed or will*, dictated also that *contracts* to convey or lease for a term should also be better authenticated than by the parol testimony of witnesses. Hence, in Virginia it is provided in imitation of the same English statute of *frauds and perjuries*, 29 Car. II., c. 3, § 4, that no action shall be brought to charge any person upon any *contract* for the sale of real estate, or for the *lease thereof for more than a year*, unless the contract, or some memorandum or note thereof, *be in writing, and signed by the party to be*

charged thereby, or his agent. And, as we have seen (*supra*, 1<sup>f</sup>), if the term is to exceed *five years*, in order to be good against creditors and subsequent purchasers for value, and without notice, the contract *must be registered*. (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840, (cl. 6th); *McClure v. Thistle's Ex'ors*, 2 Grat. 182; *Withers v. Carter & als.* 4 Grat. 413.)

### 3<sup>e</sup>. Letting Lands *upon shares*.

This practice, whilst very common in the United States, is rare in England, so that the English books afford little light upon the subject, and the American authorities are by no means uniform. In Virginia provision is made for distraining for rent in such cases. (1 Washb. Real Prop. 364 & seq.; V. C. 1873, ch. 134, § 15; V. C. 1887, ch. 127, § 2795);

W. C.

### 1<sup>g</sup>. Where the *Specific Crops Produced* are to be Divided.

The occupant of the land, in such a case has no *interest in the soil* (which is necessary in order to make him a *tenant*), and notwithstanding the land-owner's part may be in the contract denominated RENT, it is not to be so regarded; the lands are in the sole possession of the land-owner, and the parties are *tenants in common* of the crops produced. The arrangement is only a mode of *paying for labor* or services of the occupant. (1 Washb. R. Prop. 365; *Lowe v. Miller*, 3 Grat. 265; *Hanks v. Price*, 32 Grat. 110; *Parrish's Case*, 81 Va. 7.)

### 2<sup>g</sup>. Where the Occupant is to Pay *as much* as a Certain Quantity of the Crop, but *not Confined to the Specific Crops* Grown on the Premises.

The occupant *is a tenant*, and the crops belong to him solely. The portion to go to the land-owner is *rent*, and he has no interest in any *ascertained part of the product* until it is delivered. (1 Washb. R. Prop. 365.)

### 3<sup>g</sup>. Where, although a Part of the *Specific Crops Produced* is to be Paid, yet the agreement Recognizes Them as *entirely the Property of the Occupant*.

The occupant, in such a case, *is a tenant*; *e. g.*, if a lien be reserved on the crops as *security for the rent*. (1 Washb. R. Prop. 366.)

### 3<sup>e</sup>. Meaning of Words *Importing Time*.

The words which import *time* are, (1), Year; (2), Month; and (3), Day;

W. C.

### 1<sup>f</sup>. Year.

The word *year* means the period in which the earth fully completes its annual orbit around the sun. It is commonly computed to be actually 365 days and 6 hours, but more accurately it is but 365 days, 5 hours, 48 minutes

and a fraction. Practically, however, a year consists of 365 days, except *leap year* which is 366;

W. C.

## 1<sup>st</sup>. The Julian Calendar.

Julius Caesar (when *pontifex maximus*, and at the summit of his power, B. C. 46), arranged the calendar upon the supposition that the year consisted of 365 days and 6 hours *exactly*, and reckoning three years to consist of 365 days, gave to the fourth 366. The day thus *intercalated* every fourth year was inserted after the 24th of February (*ante diem sextum kalendas martii*), and in consequence of being also reckoned as the *sixth day* before the kalends of March, was styled *bis-sextum* and long afterwards *bis-sextilem*; and hence the year itself is termed *bis-sextile*, or in English *leap year*, because it *leaps over*, or *exceeds* others, by one day.

The mode of reckoning time had previously fallen into such confusion that this reform was then a very valuable one; and as it placed the reckoning behind *the sun* only about 11 minutes a year, that is, a day in about 130 years, it was very long before any considerable inconvenience arose from it. In the progress of centuries, however, the error became more serious, until in 1582, Pope Gregory XIII. undertook to reform the calendar.

## 2<sup>nd</sup>. The Gregorian Calendar.

Gregory having determined to reform the calendar, took as his starting point the period of the Council of Nice, the first general Council of the Church (A. D. 325), and desiring to fix the vernal equinox permanently, on or near March 21st, on which day it happened in that year, and finding that the reckoning had lingered behind the sun, in the interval between A. D. 325 and 1582, about ten days, he ordered that the day succeeding the 4th of October, 1582, instead of being called the 5th should be counted the 15th. And to prevent similar accumulations of error thereafter, he further directed that at certain convenient periods the intercalary day of the Julian correction should be omitted, viz., in the *centennial years* A. D. 1700, 1800, and 1900, and being inserted again in 2000, should be again left out in 2100, 2200, and 2300, and again inserted in 2400, etc.: thus reducing the error of the Julian correction to about 2h. 42½m. in 400 years, or one day in 3546 years, which he very reasonably thought the world could afford to disregard! (Norton's Astron., §§ 362 & seq.; 2 Burn's Ecc. Law, 348 & seq.; Tit. Calendar.)

The Gregorian calendar was adopted immediately in all countries of the *Romish* faith; but in the *Protestant* states it was not introduced until almost two centuries



later, such was the unreasoning bigotry of the times. And Russia to this day employs the Julian calendar, making a very inconvenient difference of about twelve days between her mode of computing time and that of the rest of the Christian world. (Nort. Astron. § 367.)

3<sup>g</sup>. The "*Change of Style*" in England.

The Gregorian calendar, and mode of computation of time, were adopted in England, and in the English dominions throughout the world, (and, therefore, in Virginia), in 1752, by Statute, 24 Geo. II., c. 23; whereby it was enacted that the natural day next following the 2d day of September in that year, should be reckoned the 14th day of September, omitting for that time only the eleven intermediate days (the error of the Julian correction having, since 1582, amounted to another day), and provision was made, identical with that of Gregory, for maintaining the correction through subsequent centuries. (2 Bl. Com. 140, n. (3); 3 Th. Co. Lit. 357, n. (F.); Jac. Law. Dict. *Year*; Bouv. Law. Dict. *Year*; 2 Burn's Ecc. Law, 348 & seq.)

The same statute also changed the commencement of the English *civil* year from 25th of March to 1st of January, so as to correspond with the *church year*, which had always begun on the 1st of January (thereby introducing the mode of dating 175 $\frac{3}{4}$  for days between the 1st of January and 25th of March). It seems, from ancient charters, that, prior to the Conquest, the year began at *Christmas*. (3 Th. Co. Lit. 357, n. (F.); Jac. Law. Dict. *Year*.)

4<sup>g</sup>. Fractions of a Year.

Half a year is reckoned *always* for 182 days in England, and a quarter of a year 91 days. When the year consists of 365 days, this is a necessary rule, in order to avoid a *fraction of a day*; and in leap-year it grows out of the Stat. *de anno bissextili*, 21 Hen. III., enacting that the intercalated day in leap-year, together with the preceding day, shall be accounted *for one day only*. It may, therefore, be well doubted whether, as 21 Hen. III. has not been enacted in Virginia, 183 days is not with us to be deemed the *half* of leap-year. (2 Bl. Com. 141, 140, n. (3); 3 Th. Co. Lit. 356-7.)

2<sup>d</sup>. Month; w. c.

1<sup>st</sup>. Doctrine at Common Law as to the Meaning of *Month*.

In general, the word *month* means at common law, a *lunar month* of twenty-eight days, unless the contrary appear. But by the usage of the parties, or of the trade which they exercise, the word may mean a *calendar month*, as in the almanac or calendar. Such a usage prevails in *mercantile* transactions, and, therefore, in them a *calen-*

*dar*, and *not a lunar*, month is to be understood. (2 Bl. Com. 140, n. (3); 3 Th. Co. Lit. 357, n. (4).)

Hence the diversity between "*twelve months*," which signifies twelve *lunar months* of twenty-eight days each, and "*a twelve-month*" in the singular, which includes *all the year*. (2 Bl. Com. 140, n. (3); Catesby's Case, 6 Co. 61 b.)

## 2<sup>d</sup>. Doctrine in Virginia, as to the Meaning of *Month*.

The *general usage* in Virginia, in conformity with the principle of the common law, has changed the meaning of the word, which (unless the contrary appear) is to be understood in all cases as expressing a *calendar* and *not a lunar* month. And in *statutes* it is declared in terms, that it shall have the meaning of *calendar month*, unless it be otherwise expressed, it being superfluously added that the word "*year*" shall mean a *calendar year*, which is a mere affirmation of the common law. (Vandewall v. Com'th, 2 Va. Cas. 275; Brewer v. Harris, 5 Grat. 285; Sheets v. Selden's Lessee, 2 Wal. 189 '90; V. C. 1873, ch. 15, § 9, (cl. 7); V. C. 1887, ch. 2, § 5, (cl. 7).)

## 3<sup>d</sup>. Day.

A *day* is usually intended, not of the period of *daylight* alone (which is, rather singularly, denominated by Coke, the *artificial day*), but of the entire space of twenty-four hours, occupied by one revolution of the earth upon its axis, which Lord Coke styles the *natural day*; and, in general, the law reckons *no fraction of a day*, to which doctrine, however, there are sundry exceptions, as, for example, in case of the lien of a *fiery facias*, and, perhaps, of a commission *in bankruptcy*; also of the registry of several writings on the same day (V. C. 1873, ch. 114, § 9; V. C. 1887, ch. 109, § 2469; *Post*, p. 964); of process served on a defendant on the same day with his conviction of felony, but before his conviction (4 Min. Insts. 533; Neale v. Utz, 75 Va. (1 Matt.) 480, 484); and it is supposed, of an attachment (V. C. 1873, ch. 148; V. C. 1887, ch. 141, § 2971; 4 Min. Insts. 479 '80.) In case of an execution of *fiery facias* against the *debtor's goods*, the officer is directed to endorse on the writ, not the day only, but *the hour* when it comes to his hands; and if two or more come on the same day, at different hours, that first received is to be first satisfied. (V. C. 1873, ch. 183, §§ 29, 30; V. C. 1887, ch. 175, §§ 3589, 3590; 1 Bl. Com. 140, n. (3); *Id.* 141; 3 Th. Co. Lit. 356; 4 Min. Insts. 826 & seq.)

We have seen that when rent, or other money, is due on a day, it may be *paid, tendered, or demanded* at any time before sunset, so that sufficient daylight remains to count it, but that for all other purposes it is not due *until midnight*. (*Ante*, p. 53, 2<sup>d</sup>.)

In respect to the computation of time, the general principle seems to be that, where the time is to run from an *act done*, the day on which the act is done is *to be excluded*. Thus, if a mercantile security is payable so many days *after sight*, the day of presentment or of sight, is *not to be reckoned*, and so, where a security is to be given within six months after the testator's death, the day of the death *is to be excluded*. This doctrine, however, is discountenanced in Virginia, in *respect to statutes* which require a notice to be given, or any other act to be done a certain time before any motion or proceeding, it being declared that in such case there must be that time *exclusive of the day* for such motion or proceeding: but the *day on which such notice is given*, or such act is done, *may be counted*. (Bayl. on Bills, 155; Lester v. Garland, 15 Ves. 253; 2 Bl. Com. 140, n. (3); V. C. 1873, ch. 15, § 9, (cl. 8); V. C. 1887, ch. 2, § 5 (cl. 8).)

4<sup>e</sup>. The Little Esteem in which Estates for Years were *Originally Held*.

Originally estates for years were *entirely precarious*, at the arbitrary will of the *giver*; and were liable, even after they became more permanent, to be defeated by *collusive recoveries* suffered by the lessor. In the time of Edward I., some protection against such recoveries was afforded by the statute of Gloucester, 6 Edw. I., c. 11, and a *complete* protection by 21 Hen. VIII., c. 15. (Bract. 27 b; 1 Reeves' Hist. Eng. Law, 303; 2 Id. 150; 3 Id. 335; 4 Id. 232; 1 Th. Co. Lit. 628; 2 Bl. Com. 141-'2.)

Hence, estates for years were commonly very short, for the most part, in the hands of *mere bailiffs or servants* of the lord, and not being allowed to be *freeholds*, were held to pass, after the tenant's death, to his *personal representative* (his executor or administrator), and not to his *real representative* (or heir); and, in short, were and are regarded as belonging, in almost all respects, to the same general class as movable goods, being termed, like them, *chattels*, but distinguished from them by the epithet *real*, expressive of their immobility. Thus, whilst movables are denominated *personal chattels*, estates for years are styled *chattels real*. (1 Lom. Dig. 403; 2 Bl. Com. 142-'3, 386-'7.)

5<sup>e</sup>. The Characteristic Qualities of Estates for Years.

The characteristic qualities of estates for years are, (1), A fixed period of duration; (2), Entry upon the premises or possession thereof; (3), They may commence *in futuro*; (4), They may be made to cease upon a future event, *without entry* by the lessor; (5), The doctrine as to their being limited by way of remainder; and (6), The covenants connected with them:

W. C.

1<sup>d</sup>. A Fixed Period of Duration.

Every estate which *must expire* at a period certain and pre-fixed, by whatever words created, whether it be for one or more years, or for a half year or a week, is an *estate for years*. Hence it is frequently called a *term determinate*, because it has a certain beginning and a certain end. But *id certum est, quod certum reddi potest*; therefore, if a man make a lease to another for *so many years as J. S. shall name*, it is a good lease for years. Hence, also, a lease for *so many years as J. S. shall live*, is not a lease for years, but a *freehold*, which, at *common law*, required *livery of seisin* in order to perfect it. But a lease *for one hundred years, if J. S. shall so long live*, is an estate of *defined duration*, and therefore an estate for years, although it may, and probably will, terminate before the lapse of the one hundred years, by the death of J. S. If no day of commencement be named, the beginning of the term is ascertained by construction of law to be from the making or delivery of the lease. (2 Bl. Com. 143; 1 Lom. Dig. 172; 1 Th. Co. Lit. 628, 632.)

2<sup>d</sup>. Entry upon the Premises, or Possession Thereof.

The bare lease does not *vest an estate* in the lessee. It only gives him a *right of entry*, which is called his *interest in the term*, or *interesse termini*. When he has *entered*, he is then, and not before, possessed of the estate or *term* (*terminus*). Thus, the word *term* does not signify merely the *time* specified in the lease, but also the estate which passes thereby; and, therefore, the *term* may expire during the continuance of the *time*, as by surrender, forfeiture, etc. The *entry* thus required to consummate an *estate for years*, differs from the *livery of seisin* which is required for a *freehold*, in being *made* by the lessee in the absence, or even after the death of the lessor, whilst *livery of seisin* is made by the lessor to the lessee on the premises, both being present in person, or by attorneys in fact, solemnly constituted *under seal*. (2 Bl. Com. 144, 314 '15; 1 Lom. Dig. 174-'5; 1 Th. Co. Lit. 630, 632.)

3<sup>d</sup>. Estates for Years may Commence *in Futuro*.

No estate of *freehold in corporeal tenements* can at *common law* be made to commence *in futuro*, (although it is otherwise by *statute* (V. C. 1873, ch. 112, §§ 5, 4; V. C. 1887, ch. 107, §§ 2418, 2417), for two reasons, namely: first, because such estate must be created by *livery of seisin*, which in its nature must have a *present* operation, or none at all; and secondly, because the freehold, having by the livery passed out of the grantor, would be *in abeyance*, leaving no one to render the military service, nor to be sued, or to sue, the occupant of the freehold being always the person by and against whom real actions for the lands



must be brought. (2 Bl. Com. 144, 165-'6, 314; 3 Th. Co. Lit 102, n. (G.))

Estates for years, on the contrary, are only chattels, and are reckoned part of the personal estate; and requiring no *livery of seisin*, but only an *ex parte entry*, to vest the tenant's interest, may be made, even at common law, to commence *in futuro*, as well as *in presenti*. (2 Bl. Com. 143-'4, 165.)

- 4<sup>f</sup>. Estates for Years may be made to Cease upon a Future Event, *without Entry* by the Lessor.

As an estate of *freehold* in lands cannot be created at *common law without livery*, so neither can it be terminated without the *corresponding notoriety of entry* by the grantor; and therefore a *mere limitation* by way of proviso is not sufficient of itself to terminate such an estate. An estate for years, however, requiring no livery to originate it, may be made to cease upon a future contingency, by a proviso in the conveyance itself. Thus, if land were conveyed at *common law* to J. S. *for life*, on condition that he should pay \$1,000 on the ensuing 4th of July, and he failed to make the payment, his estate would not be determined *ipso facto*, but there must be an *entry* by the grantor or his heirs, in order to put an end to it. If, however, J. S.'s estate, instead of being *for life*, had been *for one hundred years*, with a similar condition, it would have been determined *ipso facto*, by the default of payment. (1 Lom. Dig. 175; 2 Th. Co. Lit. 87-'8.)

This distinction is much less practical than it was formerly, since by the *statutory modes* of conveyance most usually employed (that is, conveyances under the several statutes of Uses, Wills and Grants), which dispense with *livery of seisin* altogether, or substitute a *constructive* for an *actual livery* (V. C. 1873, ch. 112, §§ 4, 14; Id. ch. 118, § 4; V. C. 1887, ch. 107, §§ 2417, 2426; Id. ch. 112, § 2514), an estate of freehold may be as well made to cease by a mere proviso or limitation, without entry, as an estate for years. (1 Lom. Dig. 561.)

- 5<sup>f</sup>. Estates for Years, Limited by Way of *Remainder*.

There was never any doubt that, *in the creation* of an estate for years, it might as well be limited by way of *remainder*, as *in presenti*; but formerly such estates *already existing* were, like other chattels, incapable of being limited by way of remainder *after a life-estate* therein, or even, it is said, *after any interest*, even for an hour, the first gift being considered (as an *estate-tail still is*) as equivalent to the *whole ownership*. A different doctrine, however at first confined to *wills*, but since applicable to *any conveyance*, has long prevailed, and it is settled that a term for years, like any other chattel, may be limited to

one for life, remainder to another. And by way of *executory limitation*, it may be given over to any number of persons, whether *in esse*, or ascertained or not, provided the future limitation *must* take effect, if at all, within a reasonable period, which is expressed by a life or lives in being, and ten months (the period of gestation) and twenty-one years thereafter. (3 Th. Co. Lit. 296. n. (D.); 1 Lom. Dig. 182.)

#### 6f. Covenants Connected with *Estates for Years*.

The general subject of covenants connected with estates for years is reserved to be treated in connection with leases, *post*, p. 781, chapter XXI. It will suffice here to refer to some of the more prominent doctrines. (1 Washb. R. Prop. 323 & seq.; V. C. 1873, ch. 113, §§ 17 to 21; V. C. 1887, ch. 108, §§ 2453 to 2457; *Post*, ch. XXI.) Let us note therefore, (1), Covenant of title; (2), Covenant to repair; (3), Covenant not to assign; (4), Covenant to pay rent and taxes; and (5), Covenants which run with the lands; w. c.

#### 1g. Covenant of Title; w. c.

##### 1<sup>h</sup>. Covenant of Title, Implied.

Every lease *for years*, by virtue of the *words of demise*, which constitute a contract for the possession, imports an implied agreement by the lessor, that the tenant shall have *quiet enjoyment* of the premises. (1 Washb. R. Prop. 234-5; *Black v. Gilmore*, 9 Leigh, 448.) And in a lease *for life*, which is the creation of an estate of freehold, and not a mere contract for the possession, the use of the word *dedi*, or the reservation of a rent, imports a *warranty* (the ancient *covenant real*, so called), but not a modern covenant of title. (2 Th. Co. Lit. 253 & seq. n. (K.); *Bac. Abr.* Covenant, (C.); *Black v. Gilmore*, 9 Leigh, 448 & seq.)

##### 2<sup>h</sup>. Covenant of Title, Express.

An express covenant of title will of course be regulated by its terms; but it has been judiciously provided by statute in Virginia, in imitation of 8 & 9 Vict. c. 119, 124, that a covenant by a lessor "for the lessee's quiet enjoyment of his term," shall have the same effect as a covenant that the lessee, his personal representative and lawful assigns, paying the rent reserved, and performing his or their covenants, shall peaceably possess and enjoy the demised premises, for the term granted, without any interruption or disturbance from any person whatever. (V. C. 1873, ch. 113, § 20; V. C. 1887, ch. 108, § 2456.)

#### 2g. Covenant to Repair; w. c.

##### 1<sup>h</sup>. Implied Covenant to Repair.

The law *implies* none on the part of the *lessor*. The

lessee is constrained to repair, in many cases, by the law of *waste*, *infra*, p. 196, 3<sup>d</sup>. (1 Lom. Dig. 178; 1 Washb. R. Prop. 355.)

## 2<sup>b</sup>. Express Covenant to Repair.

A covenant to *repair* had long come to be regarded by the courts as obliging the lessee to *rebuild*, although the premises were destroyed by an act of God. (Ross v. Overton, 3 Call, 309; Bullock v. Dommett, 6 T. R. 650; 1 Chit. Cont. (11 Am. ed.) 468.)

A statute in Virginia changes this doctrine, by limiting the obligation to *rebuild* (upon a covenant to *repair*) to the cases where the destruction is occasioned by the tenant's fault or negligence. (V. C. 1873, ch. 113, §§ 19, 18; V. C. 1887, ch. 108, §§ 2454, 2455.) The provision is, that a covenant by the lessee that "he will leave the premises in good repair" shall have the same effect as a covenant that the demised premises will, at the expiration, or other sooner determination of the term, be peaceably surrendered and yielded up unto the lessor, his representatives or assigns, in good and substantial repair and condition, *reasonable wear and tear excepted*.

## 3<sup>g</sup>. Covenant not to Assign.

The lessee may always assign or under-let the premises, unless restrained by covenants to the contrary, and such covenants are not favorably construed. (1 Washb. R. Prop. 337; V. C. 1873, ch. 113, § 18; V. C. 1887, ch. 108, § 2454.) The statute here cited enacts that a covenant by the lessee that "he will not assign without leave," shall have the same effect as a covenant that the lessee will not, during the term, assign, transfer, or set over the premises, or any part thereof, to any person, without the consent, *in writing*, of the lessor, his representatives or assigns.

## 4<sup>g</sup>. Covenant to Pay the Rent and the Taxes.

It is enacted in the spirit of the provisions already referred to (all being taken from 8 & 9 Vict. ch. 119, 124) that a covenant by the lessee "to pay the rent" shall have the effect of a covenant that the rent reserved by the deed shall be paid to the lessor, or those entitled under him, in the manner therein mentioned; and a covenant by him "to pay the taxes" shall have the effect of a covenant that all taxes, levies and assessments upon the demised premises, or upon the lessor on account thereof, shall be paid by the lessee, or those claiming under him. (V. C. 1873, ch. 113, § 17; V. C. 1887, ch. 108, § 2453; 1 Chit. Cont. (11 Am. ed.) 473; Southall v. Leadbetter, 3 T. R. 458; Bolling v. Stokes, 2 Leigh, 181.)

And the Code of 1887 provides that "No covenant or promise by a lessee to pay the rent, or that he will leave

the premises in good repair, shall have the effect, if the buildings thereon be destroyed by fire or otherwise *without fault or negligence on his part*, or if he be deprived of the possession of the premises by the public enemy, of binding him to make such payment or erect such buildings again, unless there be other words showing it to be the intent of the parties that he should be so bound. But in case of such destruction, there shall be a reasonable reduction of the rent for such time as may elapse until there be again upon the premises buildings of as much value to the tenant *for his purposes* as what may have been so destroyed; and in case of such deprivation of possession, a like reduction until possession of the premises be restored to him." (V. C. 1887, ch. 108, § 2455.)

### 5<sup>g</sup>. Covenants which *Run with the Land*.

A covenant is said to run with land when either the liability to perform it, or the right to take advantage of it, *passes to the assignee* along with the land. Of this character are all covenants extending to things *in esse*, parcel of the premises; *e. g.*, to repair *existing* structures, to dwell upon the premises, to pay rent and taxes, to cultivate the land in a proper manner, etc. And if *assigns* are named in the covenant, the covenant runs with the land, even in respect to *non-existing structures*. In Virginia, by statute, it is immaterial whether assigns be *named* or not; they are implied. (1 Lom. Dig. 332 '3; V. C. 1873, ch. 113, § 9; V. C. 1887, ch. 108, § 2445.)

### 6<sup>g</sup>. The Incidents Belonging to Estates for Years: *w. c.*

#### 1<sup>g</sup>. Estovers, or Botes.

Tenant for term of years has incident to his estate, unless by special agreement, the same estovers as tenant for life—namely, house-bote (including *fire-bote*), plough-bote, or cart-bote, and hay-bote, or hedge-bote, terms already explained. (*Ante*, p. 101, 1<sup>h</sup>; 2 Bl. Com. 144.)

#### 2<sup>g</sup>. Emblements.

The nature of emblements has been explained to be the fruits of *annual agricultural industry*, for the production whereof art combines *annually* with nature; and we have seen that when a tenant who *knows not the end of his tenancy*, sows or plants the land, and before harvest his estate is determined *without his default*, as by the act of God, of the law, or of a third person, he or his personal representative, upon considerations at once of *justice and expediency*, is entitled to the *emblements*. (*Ante*, p. 101, 2<sup>h</sup>; 2 Bl. Com. 122, 145; 1 Th. Co. Lit. 633.)

*w. c.*

### 1<sup>g</sup>. Doctrine of Emblements where the Estate is of *Determinate Duration*; *w. c.*



1<sup>h</sup>. The General Doctrine.

*No emblements are allowed*; for since he knew the end of his term, it was his own folly to sow what he could not reap. (2 Bl. Com. 145; *Ante*, p. 104, 3<sup>k</sup>.)

2<sup>h</sup>. The Doctrine by the *Custom of Particular Places*;  
W. C.1<sup>i</sup>. Doctrine by Particular Custom in England.

The *away-going* tenant may, *by custom*, be entitled to the crops growing *at the expiration* of his term, which are, strangely enough, denominated *away-going crops*. (Wigglesworth v. Dallison, 1 Dougl. 207; Chit. Cont. 366; Van Ness v. Pacard, 2 Pet. 147; 1 Washb. R. Prop. 105-6.)

2<sup>i</sup>. Doctrine by Particular Custom in Virginia.

There can be *no custom* in Virginia, in the English sense, of a *local law* (as was explained, *Ante*, B. I., p. 38, 2<sup>i</sup>), and consequently the plain terms of a *written contract* cannot be varied by proof of such a custom. But this does not preclude a *referencé to the custom of business* between particular parties and in particular communities, to aid in explaining *an ambiguity*. And *perhaps* such a custom or usage might be provable as showing the probable intent of the parties if the lease were *by parol*. (Harris v. Carson, 7 Leigh, 637; Mason v. Moyers, 2 Rob. 606; Gross v. Criss, 4 Grat. 262; Delaplaine v. Crenshaw, 15 Grat. 469; Ragland v. Butler, 18 Grat. 336; 1 Lom. Dig. 181; *Ante*, p. 105, 1<sup>l</sup>.)

2<sup>k</sup>. Doctrine of Emblements, where Estate for Years is  
Liable to be Determined by some *Uncertain Contingency*;  
W. C.1<sup>h</sup>. General Doctrine.

The estate being liable to be determined by an *uncertain contingency* (e. g., lease to J. S. for one hundred years, if he should so long live), if it is thus determined, without the lessee's default, he or his personal representative is entitled to the emblements, and to reasonable ingress and regress to cultivate, reap, and remove them. (2 Bl. Com. 145; *Ante*, p. 102, 2<sup>i</sup>.)

2<sup>h</sup>. Doctrine in Virginia, in Case of *Lessees for Years*, of  
*Tenants for Life*, or other *Uncertain Interest*.

It is provided by statute, as we have seen, (*Ante*, p. 104, 3<sup>l</sup>), that the lessee shall *retain possession of the whole premises*, until the end of the current year of the *tenancy*, paying rent therefor, which is apportioned between the life-tenant or his personal representatives, and the reversioner, or remainderman; and moreover, (as the Code of 1873 has it), the lessee is entitled, as at common law, to the emblements growing on the lands at the expiration of the estate for life, or other uncertain

interest. (V. C. 1873, ch. 135, § 1. But this last clause is omitted in the Code of 1887. (V. C. 1887, ch. 128, § 2809.)

### 3<sup>d</sup>. Liability of Tenant for Years for Waste.

The doctrine of waste, as it respects tenants *for years*, is in all particulars the same as in regard to tenants *for life*, which has been already explained. (*Ante*, p. 112, 4<sup>th</sup>; 2 Bl. Com. 282-'3; 1 Lom. Dig. 180-'81.)

### 4<sup>d</sup>. Forfeiture of Estates for Years, for *Certain Defaults of Tenant*.

This doctrine also, as it respects tenants *for years*, is identically the same as in regard to tenants *for life*, for which see *Ante*, p. 111, 3<sup>h</sup>; 1 Lom. Dig. 187; 1 Th. Co. Lit. 636, n. (K.).

### 5<sup>d</sup>. Liability for Rent, of Lessee for Years from Tenant for Life.

This doctrine has been explained in connection with estates for life. (*Ante*, p. 113, 5<sup>h</sup>.)

### 6<sup>d</sup>. Estates for Years are *not Descendible to Heirs*.

Being considered in law as chattels having *immobility* indeed, which denominates them *real*, but being devoid of that quality of indeterminate duration which characterizes *freeholds*, they do not descend, nor can in any wise be made descendible, to the *heir* of the owner, but vest in his *personal representative*, and are liable, like movables, to debts and distribution. (1 Lom. Dig. 176, 182.)

And so, for a like reason, a *freehold* cannot be derived from a *term for years*. Thus rent, granted for life, issuing out of a *long term* for years, is a good charge as long as the term lasts, but it is *only a chattel*. (1 Lom. Dig. 177.) And so if one possessed of a term for 500 years, should grant out of it an estate for life, the estate for life would be only a chattel interest.

### 7<sup>d</sup>. Doctrine of *Merge*, in Respect to Estates for Years.

Two estates, the one larger and the other less, cannot in general be vested in the same party at the same time. The less is *merged* or drowned in the larger, and is thereby extinguished. Hence, if a term for years becomes vested in him who has the freehold (where there is no intervening estate between the term and the freehold), the term is merged. However, it is in general requisite that the two estates should be held in the *same right*, and not one of them *in autre droit*, unless they are acquired by the party's *own act*, or he possesses the power of *disposition of both estates*. Moreover, in respect to the *relative antiquity* of the two estates, although they may be of the same denomination, yet if the one is *reversimur* to the other, it will be for this purpose esteemed the greater, although in actual extent it may be less. Thus, if one create a term

for ten years, and the next day one for five, and both terms come, by assignment or otherwise, to the same hands, the first will be merged in the last. So other considerations also are allowed to determine the relative magnitude of the estates, *i. g.*, the fact that the one is to the owner of both more beneficial than the other. Hence, in case of a grant of land to A for life, the remainder to B for life, if A surrenders to B, his estate will be merged in B's, not only because B's estate, being reversionary, is in contemplation of law larger than A's, but also because B's remainder for his own life is better *to him* than A's estate for his life; and if B releases to A, his estate will be merged in A's, for a like reason as the last. (1 Lom. Dig. 183 & seq.; 2 Th. Co. Lit. 557, n. (K).)

A court of equity will sometimes relieve against the *merger* and extinction of a term, and make it answer the purposes for which it was intended. (1 Lom. Dig. 186-7; Powell v. Morgan, 2 Vern. 90; Graham v. Woodson, 2 Call, 249.)

## 2<sup>d</sup>. Estates at Will.

In investigating the doctrines which belong to estates at will, we are to advert to, (1), The definition of an estate at will; (2), The mode of creating estates at will; (3), The incidents of estates at will; (4), The determination of the will; (5), The mode of preventing either party from injuring the other by a sudden determination of will; (6), Estates from year to year; and (7), Copyhold estates.  
w. c.

### 1<sup>o</sup>. Definition of an Estate at Will.

Tenant at will is where lands or tenements are let by one man to another, to hold *at the will of both parties*, by force of which lease the lessee is in possession. (1 Th. Co. Lit. 637; 2 Bl. Com. 145.)

### 2<sup>o</sup>. Mode of Creating Estates at Will.

An estate at will may be created by *express agreement* of the parties, as in the case supposed in the definition, or by the mere *construction of law*, as where one enters by consent of the owner of land, under *verbal* promise of a lease exceeding five years (to commence *in presenti*), or of a conveyance in fee; or perhaps, in case of a mortgagor remaining in possession of the premises mortgaged, without any stipulation that he may hold until default, or generally, whenever one is let into possession of lands *by consent of the owner*, without having a freehold interest, or any certain term, or an estate from year to year. (1 Th. Co. Lit. 637, & n. (A.); 1 Lom. Dig. 189, 195; Creigh's Heirs v. Henson, 10 Grat. 232; 1 Chit. Cont. (11 Am. ed.) 448; 1 Washb. 389; V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, §§ 2413, 2414; Doe, & d. Rigge v. Bell, (5 T. R. 471), and Clayton v. Blakey,

(8 T. R. 3), 2 Smith's L. C. 72-76; *Twyman v. Hawley*, 24 Grat. 514 '15.) And hence it follows, that a person thus let into possession of land by consent of the owner, as, for example, upon a *contract of purchase*, with the terms of which he fails to comply, is not liable to be turned out by an action of ejectment, notwithstanding he has not the legal title, until he has received notice to surrender the possession. (*Right v. Beard*, 13 East. 210; *Newby v. Jackson*, 1 B. & Cr. (8 E. C. L.) 448; *Roe, e. d. Blair, &c.*, 2 Ad. & El. (29 E. C. L.) 329; *Williamson v. Paxton*, 18 Grat. 475-505; *Twyman v. Hawley*, 24 Grat. 514.)

### 3<sup>e</sup>. Incidents of Estates at Will; w. c.

#### 1<sup>f</sup>. Emblements.

Tenant at will is entitled to emblements, and to free ingress and regress to cultivate, sever, and carry them away, if the *lessor* determines the estate; but if it is determined *by the lessee*, he cannot claim them. (1 Th. Co. Lit. 638 to 640; 1 Lom. Dig. 190.)

#### 2<sup>f</sup>. Liability of Tenant at Will for Waste; w. c.

##### 1<sup>g</sup>. Doctrine in England.

It seems that a tenant at will committing *voluntary waste* is considered thereby to have determined his will and estate, and is liable to the lessor as *for a trespass*; but for *permissive waste* he is not liable at all, not being within the statute of Marlebridge, 52 Hen. III., which declares all tenants *for life or years* liable, but did not embrace tenants at will. (1 Th. Co. Lit. 644-5; 1 Lom. Dig. 190-'91.)

##### 2<sup>g</sup>. Doctrine in Virginia.

It is probable that as to *voluntary waste* the law remains unchanged (*supra*, 1<sup>g</sup>); but *permissive waste* is included in our statute, which declares that *any tenant* of land committing waste thereon, shall be liable to any party injured for damages. (V. C. 1873, ch. 133, § 1; V. C. 1887, ch. 126, § 2775; 1 Lom. Dig. 190-'91.)

#### 3<sup>f</sup>. Estovers.

A tenant at will is entitled, it is said, to *estovers*. (1 Washb. R. Prop. 384.)

### 4<sup>e</sup>. Determination of the Will.

It may be by *either party*, for however expressly, or even *exclusively*, the estate were declared to be at the will of one party only, yet the principle of *mutuality* will cause it to be in law *at the will of both parties*. (1 Th. Co. Lit. 637; w. c.)

#### 1<sup>f</sup>. Express Determination of the Will.

By declaring that the lessee shall or will hold no longer; the declaration to be made *on the land*, or with notice to the other party. (2 Bl. Com. 146; 1 Th. Co. Lit. 646-647.)



2<sup>d</sup>. Implied Determination of the Will.

The will may be impliedly determined by the exertion of any act of ownership *on the part of the lessor*, as by entering upon the premises, and cutting timber, or by making a feoffment or lease for years of the land, to commence immediately; or *on the part of the lessee*, by any act of *desertion*, as assigning his estate to another, or by any act of *destruction*, as the commission of *voluntary waste*; or *as to either*, by death. The marriage of a *feme*, however, whether she be a lessor or lessee does not determine the will. (2 Bl. Com. 146; 1 Th. Co. Lit. 648.)

3<sup>d</sup>. Modes of Preventing Either Party from Injuring the Other, by a Sudden Determination of the Will; w. c.1<sup>st</sup>. Mode of Preventing the *Lessor* from Doing Injustice.

The tenant is entitled to time to *remove his effects*, and also to *emblemments*. This, as to emblements, is an imperfect safeguard, because it is applicable only to *agricultural tenancies*, and in them is of no avail, save at certain periods of the year; that is, after crops have been planted, and before they are reaped. (2 Bl. Com. 146.)

2<sup>d</sup>. Mode of Preventing the *Lessee* from Doing Injustice.

The lessor is entitled to *rent up to the next rent-day*. This also is an insufficient expedient, as the lessee, in view of it, would probably determine his will on or just before a rent-day, and so, perhaps, leave the property *without a tenant* for a greater or less space of time. (2 Bl. Com. 147.)

These methods, so inadequate on either side to prevent the parties severally from doing a prejudice one to the other, have induced the courts, for more than a century past, to lean as much as possible against construing demises to be estates at will, *by implication*. Of course, if the estate is expressly said to be *an estate at will*, it must be so deemed. But if there is any room for construction, they are held rather to be tenancies from *year to year*, as long as both parties please, especially where an *annual rent is reserved*. (2 Bl. Com. 147.)

6<sup>o</sup>. Estates from *Year to Year*.

Every *general letting*, if the lessor accepts *yearly rent*, or rent measured by any *aliquot part* of a year, if not expressed to be an estate at will, is an *estate from year to year*. Hence, where a tenant for years holds over, and the lessor *receives rent* from him, he becomes thereby a tenant from year to year. So, if the lessee of tenant for life continues to hold after the determination of his lessor's estate, and the remainderman *receives rent* from him, he is tenant from *year to year*. And in both these cases *the stipulations* will be presumed to be the same as before. So, whilst a *parol lease* exceeding five years, and entry in pursuance

thereof makes a tenancy at will *until rent is paid*, it then becomes a tenancy from *year to year*, subject to the terms of the parol agreement. (2 Bl. Com. 147, and n. (7); 1 Th. Co. Lit. 648, n's (27); and (F.); 1 Lom. Dig. 192-'3; Doe v. Bell, 5 T. R. 471; Doe v. Samuel, 5 Esp. 173; Richardson v. Langridge, 4 Taunt. 128; Harrison v. Middleton, 11 Grat. 548; Williamson v. Paxton, 18 Grat. 497.)

Upon like principles there may be a demise from *quarter to grantee*, from *month to month*, and as to lodgings, from *week to week*, where the terms of the lease indicate such a holding. (2 Bl. Com. 147, n. (8); 1 Lom. Dig. 197; Kemp v. Derrett, 3 Campb. 511.)

Tenancies from year to year do not, like estates at will, determine by the death of either party, or of both, and when such a tenancy has commenced, it continues against any assignee of the reversion. (1 Lom. Dig. 193-'4.)

W. C.

# 1<sup>f</sup>. The Class of Estates to which Estates from Year to Year Belong.

They belong to the class of *estates for years*, and consequently pass upon the death of the tenant to his personal representatives. (1 Lom. Dig. 194.)

## 2<sup>f</sup>. The Expedient Employed to Prevent the Parties from Prejudicing each Other's Interests, by a Sudden Determination of the Estate.

*Notice to quit* is required from either party. (2 Bl. Com. 147, n. (7).)

W. C.

## 1<sup>g</sup>. Period of Notice Required, and Mode of Giving it:

W. C.

### 1<sup>h</sup>. Doctrine at Common Law.

The *period* of notice, at common law, is *six calendar months*, expiring always with *some year* of the tenancy: that is, the notice must be given at least six months before the end of some year: and the mode of giving it may be *by parol*, yet it is advisable to give it *in writing*; and if there is any doubt as to the time when the year ends it is prudent to give the notice to take effect "at the expiration of the current year of the tenancy, which shall expire next after the end of one-half year from the service of the notice." (2 Bl. Com. 147, n. (8); 1 Th. Co. Lit. 648, n. (F).)

### 2<sup>h</sup> Doctrine by Statute, in Virginia.

The *period* of notice is *three months* prior to the end of *any year*, if the premises be within, and *six months* if it be without a town. The notice *must be in writing*, and when given to the tenant, it may be served upon him, or upon any one holding under him the leased premises, or any part thereof: and when given by the

tenant, may be served upon any one who, at the time, owns the premises, in whole or in part, or the agent of such owner, or according to the common law. This provision does not apply where, by special agreement, no notice is to be given. Nor is notice necessary to or from a tenant whose term is to end at a certain time. (V. C. 1873, ch. 134, § 5; V. C. 1887, ch. 127, § 2785; 1 Lom. Dig. 194-5; Creigh's Heirs v. Henson, 10 Grat. 231; 1 Th. Co. Lit. 650, n. (F).)

## 2°. Waiver of Notice.

Notice is waived, on the *lessor's part*, by accepting rent from the tenant, or distreining him for rent, for a period subsequent to the expiration of the notice; or by giving a subsequent notice; and so, on the tenant's part, notice is waived by *paying rent* subsequently accrued, or by giving a new notice. (1 Th. Co. Lit. 650, n. (F.); 1 Washb. R. Prop. 398-9.)

## 7°. Copyhold Estates.

These are, properly, *estates at will*, having originated in pure villenage. But the will is to be determined only in accordance with the *custom of the manor*, or barony, wherein they are situated; and that custom to be evidenced by a copy of the roll or record of the *court of the manor* or barony. Hence, such estates are styled estates by *copy of court roll*, and sometimes estates *by the verge*, because, according to the custom of some manors, they are transferred by the symbol of delivering a twig (*virga*). (2 Bl. Com. 147; 1 Th. Co. Lit. 653.)

This class of estates can have no existence in Virginia, because manors or baronies, and manorial courts, which are essential to them, are not found here; nor can there be any custom, as a local law, with us.

## 3<sup>d</sup>. Estates by Sufferance: w. c.

### 1°. Definition of an *Estate by Sufferance*.

An estate by sufferance is where one comes into possession of land by *lawful title*, but keeps it afterwards without any title at all. (2 Bl. Com. 150.)

### 2°. Character of the Estate by Sufferance.

The simplest illustration of an estate by sufferance is where one takes a lease for a year or other definite period, and after the year or other prescribed period is expired, continues to hold the premises without any *fresh lease* from the lessor, which *fresh lease*, however, will be implied if the *lessor receive rent* from him. So it is said when a person has entered under an agreement for a lease, which is not binding by reason of the statute of parol agreements (V. C. 1873, ch. 140, § 1), or of conveyances, as the case may be (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 133, § 2840 (cl. 6); Id. ch. 107, § 2413), the land-owner having received *no rent*,

the occupant is tenant by sufferance, according to some authorities, but it would rather seem tenant at will. After *rent is received*, he is tenant *from year to year*. At common law no rent is recoverable of tenant by sufferance, nor can the lessor before entry and resumption of the possession or demand of the possession, maintain an action of trespass, or of unlawful detainer against him, as he might against a stranger. The reason for the first doctrine is, that it was the landlord's own folly to allow the tenant to remain on the premises; and for the last, because the tenant, having been once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act, such as *entry*, or such at least as demand of the possession, will declare his continuance to be *tortious*, or unlawful. (2 Bl. Com. 150, & n's (10) & (11); 1 Lom. Dig. 197-'8; Williamson v. Paxton, 18 Grat. 475, 505; Twyman v. Hawley, 24 Grat. 513, 514.)

### 3<sup>d</sup>. Mode of Gaining Possession by Lessor.

The lessor may enter *peaceably* upon the tenant by sufferance, and thus regain the possession, or he may institute an action of *unlawful detainer*, or of *ejectment*, and by that means recover it. In Virginia, the statute is express in allowing a writ of unlawful detainer wherever "the tenant shall detain the possession of land after his right has expired, without the consent of him who is entitled to the possession." And where the lease was originally for a period *not exceeding one month*, a justice of the peace has jurisdiction. (V. C. 1873, ch. 130, §§ 1, 2, 3; Id. ch. 131, §§ 1 & seq.; V. C. 1887, ch. 123, §§ 2716 to 2718; Id. ch. 124, §§ 2722, &c.; 4 Min. Insts. (205) 217; 2 Bl. Com. 151, n. (12); 1 Rob. Pr. (1st ed.) 496.)

In England, a tenant holding over after his term has expired is, by statute 4 Geo. II., c. 28, liable to pay *double rent*. There is no similar provision in Virginia, but if any tenant, from whom rent is in arrear, shall desert the premises, and leave them uncultivated or unoccupied, without goods thereon subject to distress, sufficient to satisfy the rent, the lessor, after a notice in writing, posted on a conspicuous part of the premises, requiring the tenant to pay the rent *within one month*, may enter thereon, and so put an end to the tenancy. (V. C. 1873, ch. 134, § 6; V. C. 1887, ch. 127, § 2786.) And in cities and towns, if a tenant, being in default in the payment of rent, shall so continue for five days after *notice in writing* requiring the possession of the premises, or the payment of rent, the tenant thereby forfeits his right to the possession, which the landlord or lessor may proceed to recover in the appropriate way, as by unlawful detainer. (V. C. 1873, ch. 130, § 4; V. C. 1887, ch. 123, § 2719.)



## CHAPTER X.

## OF QUALIFICATIONS OF INTEREST IN REAL PROPERTY.

2<sup>b</sup>. Qualifications of Interest in Real Property.

The *qualifications* of the interest which a land-owner has in his real property are by means of, (1), Uses ; (2), Trusts ; and (3), Conditions ;

W. C.

1<sup>c</sup>. Uses.

The doctrine touching uses may be presented under the three heads of, (1), The origin, nature, and history of uses prior to the statute of 27 Hen. VIII., c. 10, usually called the statute of uses ; (2), The English statute of uses, 27 Hen. VIII., c. 10 ; and (3), The Virginia statute of uses ;

W. C.

1<sup>d</sup>. The Origin, Nature, and History of Uses *Prior* to the Statute 27 Hen. VIII., c. 10, usually called the *Statute of Uses*.

*Uses* and *trusts* are in their origin the same, and in their nature very similar. They both were derived from the *fidei commissum* of the Roman law, which usually was created by will, and was the disposal of an inheritance to one, in confidence that he should convey it, or dispose of the profits, at the pleasure of another. And the execution of such trusts having, before the time of Augustus, been left to the honor of the trustee, that emperor, in view of some gross instances of unfaithfulness, instituted a particular magistrate, the *prætor fidei commissarius*, to enforce the observance of the confidence reposed. (2 Bl. Com. 327-'8 ; 1 Spence's Eq. Jur. 436-'7.)

The simplicity of the common law, for the most part, eschewed the idea of one man being the ostensible owner of lands, whilst another was entitled to the beneficial enjoyment, or profits, holding such an arrangement to be repugnant to the professed object of the transaction, unfriendly to the interests of society, and calculated to encourage fraud. Yet, even at common law, similar provisions, under other names, were not wholly unknown. Thus, during the reigns of Edward II. and Edward III., Mr. Reeves mentions various instances of *feoffments on condition*, entries in *auter droit*, etc., which had the effect of creating, to some small extent, a separation between the actual and beneficial ownership. It is admitted, however, that these property arrangements assumed a much more decided shape than they had ever had before, in the latter part of the reign of Edward III., (*about* A. D. 1370) ; the statute 50 Edw. III., c. 6, (A. D. 1377), containing provisions alluding to the *taking of the profits* of lands as apart from their occupancy,

in the manner of what was afterwards called a *use*. The introduction of *uses* at that period is generally ascribed to the craft of the ecclesiastics, who expected thus to evade the existing statutes of *mortmain*, which forbade corporations, and especially religious corporations, to acquire *lands*, but did not extend the prohibition to *uses*. Blackstone is of opinion that the countenance which *uses* received, and the very rapid adoption of them throughout the realm, were owing to the protection of the court of chancery, presided over by an ecclesiastic; but the later and more thorough explorations of Mr. Spence, have made it more than probable that the ecclesiastics derived little benefit from the court of chancery, which was indeed, in the latter years of Edward III., presided over by a *succession of laymen*, and was not acknowledged as having a right to the vast powers it has since exercised, until after the statute 15 Ric. II., c. 5, (A. D. 1392), had deprived the church of the future fruits of the enterprising ingenuity of the clergy, by embracing *uses*, as well as *lands*, within the purview of the statutes of *mortmain*. The truth seems to be that, while *uses* were probably at first devised and largely employed by the clergy, they were welcomed with eagerness by the bulk of the population, who found in them the relief they coveted from the doctrine of feuds, which society had partially outgrown. At all events, this newly devised qualification of ownership flourished vigorously, partly by a judicious selection of trustees, partly by the ghostly influence of the confessional, and in part by the protection afforded by the king in council, and in some instances by the parliament itself. (2 Bl. Com. 328, 271-2; 1 Spence's Eq. Jur. 440, 339-40; 3 Reeves' Hist. Eng. L. 176 & seq.)

Notwithstanding the clergy lost the peculiar benefit of *uses* by the statute 15 Ric. II., c. 5, yet they spread with rapidity amongst the laity; and during the civil commotions between the houses of York and Lancaster (A. D. 1399 to 1485), grew almost universal as a means of securing estates against forfeitures, whilst each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore about the reign of Henry V. (A. D. 1415), it being no longer possible, in consequence of the vast multiplication of *uses* and trusts, to leave their enforcement to the dictates of honor, the coercion of the confessor, or the precarious interposition of the crown or the parliament, the chancellor, as judge for *matters of conscience*, began to entertain applications to compel their observance, which became progressively more numerous until the reign of Edward IV. (A. D. 1461), when they assumed, under the forming hand of the *court of equity*, some regular system. (2 Bl. Com. 329; 1 Spence's Eq. Jur. 443-4.)

At first it was held that the chancery could give no relief except *against the trustee* himself, and not against his heir or alienee. In the reign of Henry VI. (A. D. 1422 to 1461), this doctrine was changed with respect to the *heir*, and afterwards, by parity of reason, with respect to such *alienees* as either paid no valuable consideration, or purchased with notice of the trust. But a purchaser *for value, without notice*, might hold the land, as he may still, discharged of the trust. (2 Bl. Com. 429-30; 1 Spence's Eq. Jur. 445.)

The qualities which were admitted to belong to uses,—that is, to the interest of the *cestui que use*,—will sufficiently show why they were so acceptable to the laity of England. Thus, whilst it was held that nothing could be granted to a use whereof the use is inseparable from the possession, as annuities, ways, commons, *que ipso usu consumuntur*; or whereof the seisin could not be instantly given; and that a use could not be raised without a sufficient consideration, either valuable or of natural love and affection, at least where there was no *actual transfer of the possession* of the land to the trustee; yet, when once created, the courts of equity ascribed to them the following attributes: *First*, Uses were *descendible* to heirs, according to the rules of the common law; *second*, Uses might be assigned by *deed only*, without livery of seisin, and be *derived by will*, qualities of great value and importance, which the English people had enjoyed (at least the power to devise) before the Conquest, and the privation of which, by the introduction of feuds, soon after that event, they had never ceased to deplore; *third*, Uses were not liable to the *feodal burdens*, being held of nobody; and although the lands were liable in the hands of the trustee, yet care was taken to have such a trustee as would make those burdens as few and as light as possible; *fourth*, Dower and curtesy were neither allowed, no trust being declared for the *benefit of the consort* at the original creation of the use; *fifth*, Uses were not liable for the debts of *cestui que use*, the common law courts not acknowledging his interest, and, therefore, of course, having no process by which to reach and subject it. (2 Bl. Com. 330-31; 1 Spence's Eq. Jur. 441-42, 446 & seq.)

Some of these attributes were open to very serious objections, most of which were removed by statute in less than one hundred years after the first prevalence of uses. Thus, they were subjected to debts of *cestui que use*, against whom, if in the actual enjoyment of the profits, actions for the freehold were also allowed to be brought; he was made liable for waste, if he had not the inheritance; and finally, his conveyances and leases, although without the concurrence of his trustees, were established. (2 Bl. Com. 332; 1 Spence's Eq. Jur. 461 & seq.)

These provisions all tended to consider *cestui que use* (that is the beneficiary), as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII., c. 10 (A. D. 1536), usually called the *statute of uses*, or more accurately, the *statute for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of King Richard III., who, when Duke of Gloucester, having been frequently made *feoffee to uses* (i. e., trustee), would, upon his assumption of the crown (as the law was then understood), have been entitled to hold the lands *discharged of the use*. To obviate so notorious an injustice, the act 1 Ric. III., c. 5 (A. D. 1483), was immediately passed, which ordained that, if the king had been *joint-feoffee*, the land should vest in the other feoffees, as if he had never been named; and where he was *sole feoffee*, the *land itself* should vest in the *cestui que use*, in like manner, as he had the use. And so the statute of 27 Hen. VIII., c. 10 (A. D. 1536), after reciting the various inconveniences attending uses (amongst which are enumerated the loss to the king and other feudal lords, of wardships, marriages, and other oppressive feudal incidents, the continued insecurity to purchasers, the defeat of curtesy and dower, and, in general, “the trouble and unquietness and utter subversion of the ancient laws of the realm,” which resulted from “the imaginations and subtle inventions and practices” which went under the name of uses, trusts, and confidences), enacted that wheresoever one person by any ways or means whatsoever, should be seised of lands or tenements to the use of another, the possession of the person so seised should be transferred to him who had the use, in like quality, manner, form and condition as he had before in the use. (2 Bl. Com. 333; 1 Spence’s Eq. Jur. 463-4.)

2<sup>d</sup>. The English Statute of Uses, 27 Hen. VIII., c. 10.

Let us observe, (1), The effect of the Statute of Uses, 27 Hen. VIII.; (2), To what conveyances it is applicable; (3), The circumstances necessary to the operation of the statute; and (4), The modern doctrine of uses under the statute;

W. C.

1<sup>o</sup>. The Effect of the *Statute of Uses*, 27 Hen. VIII.

The effect is to transfer the possession of him who is seised to him who has the use, for the estate which he has in the use, so that *cestui que use* is thenceforward seised of the land, as fully and completely as if he had been enfeoffed thereof, with *livery of seisin*. The statute was said thus to execute the use, by turning it into an estate in possession in the lands. (2 Bl. Com. 333.)

2<sup>o</sup>. To what Conveyances the Statute 27 Hen. VIII. is Applicable.



The statute enacts, that wherever any person is seised of any lands, tenements, or hereditaments to the *use, confidence or trust of* any other person, by reason of any *bargain, sale, feoffment, fine, recovery, covenant, agreement, will or otherwise, by any manner or means, whatsoever it be*, for any estate whatsoever, the *cestui que use* shall be deemed in lawful *seisin and possession* of such lands, etc., of such *like estates* as he had in the use. And these words are so comprehensive as to embrace *derivises*, although the statute of wills was not enacted until 32 Hen. VIII. (1 Spence's Eq. Jur. 463; 1 Lom. Dig. 208, 215; Gilb. Uses, 356, & n. (21).)

Under this statute there are two classes of conveyances to which its provisions apply, namely, (1), Conveyances operating *with actual transmutation of the possession*; and (2), Conveyances operating *without actual transmutation of the possession*;

W. C.

1<sup>st</sup>. Conveyances Operating *with Actual Transmutation of the Possession.*

Conveyances operating *with actual transmutation of the possession* are conveyances which operate, at common law, to transfer the estate to the trustee (*v. g.*, feoffment, fine, common recovery, etc.), and which declare at the same time the uses and trusts to which the trustee is to be seised. Thus, of this class is a feoffment, with livery, to the trustee and his heirs, *in trust for, or to the use of* (the form of the phrase is immaterial), the *cestui que use*, where the common law operates to transfer the estate to the trustee, and the statute then passes the *trustee's seisin* to the *cestui que use*.

This class of conveyances is used in marriage-settlements, and in other instances where it is desired to create *future uses*, in favor of persons not in being, or not ascertained. (1 Lom. Dig. 214-15; Gilb. Uses, 163, n. (5), 398, & n. (2).)

2<sup>nd</sup>. Conveyances Operating *without Actual Transmutation of the Possession.*

Conveyances operating *without actual transmutation of the possession*, are at common law *mere agreements*, operating no transfer of title or possession; but when founded on proper consideration (*i. e.*, a *valuable consideration*, or a consideration of *natural love and affection*), were sufficient before the statute to *raise a use* in the beneficiary, which use the statute executes, by transferring the *seisin* of the *bargainor or covenantor* to the *cestui que use*, for the *estate he had in the use*. To this class belong conveyances by *bargain and sale* (founded on *valuable consideration*), and by *covenant to stand seised*

(founded on consideration of *natural love and affection*).

(1 Lom. Dig. 214; Gillb. Uses, 187 & seq., 242 & seq.)

### 3°. The Circumstances Necessary to the Operation of the Statute 27 Hen. VIII.

The circumstances necessary to the operation of the statute of uses, 27 Hen. VIII., c. 10, are, (1), A person seised to a use; (2), *A cestui que use in esse*; and (3), A use *in esse*;

W. C.

#### 1°. A Person Seised to a Use.

This is required by the express words of the statute. All persons capable of being seised to uses before the statute, may be seised to uses under it, and none others. Hence, disseisors, abators and intruders cannot be seised to uses, nor, at common law, *aliens*, although it is otherwise in Virginia as to *alien friends*. And *as to the estate* of which a person may be seised to a use, it may be any *freehold*, as is imported by the word *seised*. But if the use is greater than the estate of the person seised, it will cease upon the determination of that estate, but will be good in the meantime. In respect to the *kinds of property* whereof a person may be seised to a use, the statute comprehends every species of real property, corporeal and incorporeal, in possession, remainder or reversion. Nothing, however, can be conveyed to uses but that of which a person is seised, or to which he is entitled at the time. (1 Lom. Dig. 209-10.)

It suffices, however, if at the time the *estate was created* there was a seisin in any one sufficient to *serve* all the uses declared, whatever may have become of that seisin since; so, that, in order that the statute may take effect, it is only needful to show (1), That a sufficient seisin existed *at first* to serve the future use, and (2), That such future use should come *into being* by the happening of the event upon which it is limited. Thus, if Black-acre be conveyed by feoffment to T, in fee-simple, to the use of A for life, remainder to the use of A's first and second sons *unborn*, for their respective lives, successively, remainder to the use of B, in fee-simple, the estate for life is immediately executed in A, remainder to B in fee, and then, when the sons of A successively come into being, the *original seisin* in T is not considered as exhausted of its effect, but is deemed sufficient by relation to execute or serve, not only the original uses in A and B, but also the contingent uses in A's sons. (Gillb. Uses (Sugden's ed.), 293 & seq., 297, n. (10); Sudg. Pow. (3d Am. ed.) 104, 105.)

This is Mr. Sugden's simple and rational exposition of the operation of the statute, in cases of *contingent uses*,

like those limited in the above example, to A's first and second sons *unborn*; and which he proposes in place of the former troublesome doctrine, known as the *scintilla juris*. Soon after the enactment of the statute of uses, the question was made in such cases as are above stated, namely, where a *feoffment* was made to T and his heirs to the use of A for life, remainder to the use of A's eldest son *unborn*, for life, remainder to the use of B and his heirs, as to whose seisin would serve or execute the contingent use in favor of A's *unborn son*, when he should come into being. The use in favor of A for life, with the remainder to B *in fee*, were thought to *exhaust T's seisin*, and as the statute requires that there should be some one *seised to the use*, at the time the use came into existence, there was not a little perplexity in determining how, in the case supposed, that requirement could be met and provided for. From the time of Brent's case, in 3 Dyer, 340 a, in 16 Eliz., the current explanation, until Mr. Sugden proposed his, had been that, although strictly speaking, the seisin of T was exhausted in executing the uses to A and B, yet *in contemplation of law*, there was still remaining in T a *scintilla juris*, a little spark of right, sufficient to serve the contingent use in favor of A's son, *as soon as he was born*. This subtle and not very satisfactory doctrine, is supported by a number of judicial *dicta*, but as Mr. Sugden has already shown, by no single direct *decision*. (Brent's Case, 3 Dyer, 340 a; S. C. 2 Leon. 14; Manning & Andrews' Case, 1 Leon. 256; Chudleigh's Case, 1 Co. 120; S. C. Anders. 309; Gilb. Uses, (Sugden's ed.) App'x iv. p. 521 & seq.; Id. 296; Wegg v. Villers, 2 Roll. Abr. 796, pl. 11-16; 22 Vin. Abr. 228, 229; 1 Sugd. Pow. (3d Am. ed.) 83-100.) And it is opposed, as Mr. Sugden observes, by the opinion of Lord Bacon, in his reading on the statute of uses, wherein he refers to the *purpose* of the statute, as expressed in the preamble, namely to *extirpate* the feoffment, and to convert the use of the beneficiary *clearly* into a *legal ownership*, as seeming "properly and directly to meet with the *conceit* of *scintilla juris*;" and also by the practical inconveniences which attend the doctrine in respect to the assurance of titles. For if there must be, in the person seised to the use, a *scintilla juris*, in order that the statute may operate, it will be needful in all cases of title traced through contingent uses, as happens in most cases of marriage settlements, to discover and prove whether the person so seised had not divested himself of his seisin by some direct act of conveyance, or whether he had not died without an heir, before the contingent uses came into

being; inquiries which would perplex all, and defeat many settlements. (1 Sugd. Pow. (3d Am. ed.) 100, 101.)

“As on the one hand,” says Mr. Sugden, “the legislature never intended to destroy contingent uses, and on the other, the judges determined that an estate in contingency was no estate till the contingency happened, it was necessary to support them by holding that the estates would open so as to let them in as they came *in esse*. Where, however, is the necessity for any *scintilla juris* in the *feoffees*? As we are compelled (that is, in the case as above supposed), to hold that the estate is executed in the remainderman, so as to exhaust the seisin of the feoffees until the rising of the (contingent) use, what is there in the act which should enforce us to say that the estates shall not open, and at once let in the contingent uses as they come *in esse*? The intention of the act was to divest the feoffee of every thing: he *was* seised to the use of the unborn *cestui que use*, and when he comes *in esse* the words of the statute are satisfied. The common law is, in a great measure, restored, which, it is agreed, was the intention of the act; and a fiction (*scintilla juris*) is got rid of, to the mischievous consequences of which we never advert; for no inquiry is ever made to meet the difficulties which arise from this doctrine. No one, for instance, taking an estate under the execution of a power, thinks of asking whether the releasee (or feoffee) to uses has died without an heir. It behooves us, therefore, not on slight grounds to sanction that which would introduce such serious consequences, and to the effect of which we never practically attend.” (1 Sugd. Pow. (3d Am. ed.) 105; Gilb. Uses, (Sugd. ed.) 296, n. (10).)

## 2<sup>d</sup>. A *Cestui Que Use in Esse*.

Hence, if a use be limited to a person not in being, or not ascertained, the statute can have no operation until a *cestui que use* comes into being, or is ascertained. Any person capable of taking lands by a common law conveyance (including a corporation), may be a *cestui que use*; and although a man cannot at common law convey to his wife (because they are one person), yet he may covenant with another to stand seised to her use, and the statute will transfer the possession to her. In general, the terms of the statute require that the *cestui que use* should be a different person from him who is seised; but if the use is in a manner different from the seisin, this principle is relaxed; and hence, if one seised in fee bargains for a valuable consideration to stand seised to the use of himself for life, remainder over in fee, a new estate is, by the statute, vested in himself. (1 Lom. Dig. 210-11; 1 Th. Co. Lit. 130.)



3<sup>d</sup>. A Use *in Esse*.

The use, whilst it must exist, may be in possession, reversion, or remainder, and may be created by *express* declaration, or may result to the original owner by *implication* of law. (1 Lom. Dig. 211.)

4<sup>o</sup>. The Modern Doctrine of Uses, under the Statute of 27 Henry VIII., c. 10; w. c.1<sup>st</sup>. The Words whereby Estates are *Limited* under the Statute.

The same technical words of limitation are required as at common law. (1 Lom. Dig. 212; Gilb. Uses, 143, n. (1); 2 Th. Co. Lit. 576, n. (A).)

2<sup>d</sup>. Uses Contingent, Revocable, Shifting and Springing.

As the statute of uses enacted that the estate of *cestui que use* in the lands should be "after such *quality, manner, form and condition*" as he had in the use, and as before the statute, a future use might be made to arise, *without any preceding estate* (in which case they were denominated *springing* uses), and might be made to *shift from one to another*, by matter *ex post facto* (when the use was styled a *shifting* use); or at the pleasure of the creator, existing uses *might be revoked*, and new ones limited, according to the stipulations of the instrument of creation: so limitations under the statute, extending to the lands themselves, were allowed a similar plasticity, although, at common law, the *freehold* was quite incapable of being so disposed of. And thus there may be created by means of the statute of uses estates of freehold or inheritance in *lands* which *spring* up at a future time, without any estate going before, or which may *shift* upon a *contingent* event from one owner to another, or which may be made *revocable* by the grantor. (1 Lom. Dig. 212-13; 3 Th. Co. Lit. 123-4; Id. 578, n. (A.); 2 Bl. Com. 334, & n. (51); Gilb. Uses, 152, &c.; Sugd. note (5).)

3<sup>d</sup>. Resulting Uses, and Uses by Implication.

These are uses which redound to the benefit of the *original owner* of the estate, in consequence of not being disposed of at all, or not being validly disposed of, to any one else. The former phrase is employed in case of conveyances operating *with transmutation* of the possession, and the latter in the other class of conveyances which operate *without transmutation* of possession, namely: by *bargain and sale*, and by *covenant to stand seised*. Thus, if the owner of lands *enfeoffs* T and his heirs, with livery of seisin, to the use of Z *for life*, the use as to the *inheritance results* to the feoffor; and if a bargainer bargains, for valuable consideration, to stand seised to the use of the heirs of T, the use during the *life of* T (for *nemo est heres viventis*), remains in the bargainer, and is called a

*use by implication.* (1 Lom. Dig. 215, 217; 1 Spence's Eq. Jur. 488.)

3<sup>d</sup>. The Virginia Statute of Uses: w. c.

1<sup>e</sup>. The Terms and Effect of the Virginia Statute of Uses.

The Virginia statute of uses enacts that, "By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seised to the use, or deed operating by way of covenant to stand seised to the use, the possession of the bargainor, releasor, or covenantor, shall be deemed transferred to the bargainee, releasee, or person entitled to the use, as perfectly as if the bargainee, releasee, or person entitled to the use had been *enfeoffed with livery of seisin* of the land intended to be conveyed by such deed or covenant." (V. C. 1873, ch. 112, § 14; *Post*, ch. XX.; V. C. 1887, ch. 107, § 2426.)

The effect of this enactment is to transfer the possession of him *who is seised* to him *who has the use*, for the estate or interest which he has in the use, as perfectly as if the *cestui que use* had been *enfeoffed with livery of seisin* of the land.

2<sup>e</sup>. The Conveyances to which the Statute is Applicable.

It is applicable to those only which operate *without transmutation of possession*, namely, *bargain and sale*, and *covenant to stand seised*; for although two others are also named, that is, *lease and release*, and deed operating *by way of covenant to stand seised*, yet the latter manifestly does not constitute a distinct class, and the lease and release are no more than a lease *by bargain and sale for a term*, say a year, and a *release* operating as at common law by way of enlargement. (V. C. 1873, ch. 112, § 14; V. C. 1887, ch. 107, § 2426; 2 Bl. Com. 139.)

w. c.

1<sup>st</sup>. Bargain and Sale.

This is no more than a *bargain* (which our statute of conveyances requires should be *under seal*, V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413), whereby, for *valuable* consideration, the owner of the *freehold* agrees to stand seised to the use of the intended grantee for such estate (whether for years, for life, or in fee-simple), as may be designated. The *use* thereby raised in the grantee is *executed by the statute*, so as to vest in him the possession of the lands for the estate or interest which he had *in the use*. (Gilb. Uses, 187 & seq.; 2 Bl. Com. 338.)

The learned author of Lomax's Digest does indeed take a very different view of the bargain and sale, regarding it as designed to operate *without reference to uses*, as a transfer, by the potent effect of the statute itself, of the legal title to the bargainee (1 Lom. Dig. 220, 576; 2 Do. 184), which construction, if the true one, would have

anticipated and rendered needless the subsequent statute of grants, and appears to the writer to be inadmissible. (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417.)

2<sup>d</sup>. Covenant to Stand Seised.

This differs from bargain and sale only in the *consideration*. Bargain and sale is *for value*, not necessarily *money*, as was formerly thought, but *anything of value*. Covenant to stand seised is in consideration of *natural love and affection*, *e. g.*, for child, brother, nephew, cousin or wife. It consists simply of a covenant (under seal necessarily in Virginia, V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, §§ 2413, 2414); in consideration of *natural love*, etc., to stand seised of the land to the use of the covenantee, which use the statute *executes* as before. (2 Bl. Com. 338; Gilb. Uses, 92 & seq., 243, &c.; 1 Lom. Dig. 200 & seq.)

3<sup>d</sup>. Lease and Release.

This, as already stated, is merely a modification of the bargain and sale, the *lease* taking effect under the statute, and the *release* operating at common law, by way of enlargement. (2 Bl. Com. 339; 2 Lom. Dig. 200 & seq.)

3<sup>e</sup>. The Circumstances Necessary to the Operation of the Virginia Statute.

The same as in the English statute, 27 Hen. VIII., c. 10. (*Ante*, p. 209, 3<sup>e</sup>); that is, there must be, (1), A person seised to an use; (2), A *vestui que use in esse*; and (3), An *use in esse*.

4<sup>e</sup>. Modern Doctrine of Uses under the Statute.

The modern doctrine of uses under the statute of uses in Virginia, is essentially the same as under the English statute, as explained, *Ante*, p. 212, 4<sup>e</sup>, except as to *shifting uses* where no part of the consideration proceeds from the person to whom the *shifting* use is limited. (Gilb. Uses, &c. (198) 398, &c. (2).)

2<sup>o</sup>. Trusts.

Let us advert to, (1), The origin and nature of trusts; (2), The definition of a trust-estate; (3), The several modes of creating trusts; and (4), The rules whereby trusts are governed.

W. C.

1<sup>d</sup>. Origin and Nature of Trusts, Prior to the Statute of Uses, 27 Hen. VIII., c. 10.

Trusts, it has been already stated (*Ante*, p. 204, 1<sup>d</sup>), have the same origin as uses, and are of a very similar nature, although they are not, as has been sometimes said, identical. Trusts, or as Lord Bacon denominates them, *special trusts*, was the name originally bestowed in those cases where the person *seised of the legal estate*, as trustee, was charged *with some discretionary power* touching the subject of the

confidence, so that a court of equity would not decree a conveyance to a *cestui que trust*, as it would in case of a use. Thus, when the confidence was to sell for the payment of debts and legacies, to pay the profits to a *farm-servant*, to make repairs, and the like, it being necessary that the estate and control should continue in the person seised, so as to enable him to accomplish the objects designed, the transaction was known as a *trust*. The principles and doctrines applicable to them were in general (with the exception noted), the same as in the case of uses. (2 Th. Co. Lit. 593, n. (C.); 1 Spence's Eq. Jur. 446, 448, 466; 1 Prest. Est. 144; 1 Steph. Com. 343.)

## 2<sup>d</sup>. Definition of a Trust-Estate.

A trust-estate is a right *in equity* to take the rents and profits of lands, whereof the legal estate is vested in some other person, called the *trustee*; and to compel such trustee (subject to the discretion which may be vested in him) to execute such conveyances of the land as the person entitled to the profits, who is called the *cestui que trust*, shall direct; the *cestui que trust*, when in possession, being considered, in a *court of law*, to be *tenant at will* to the trustee. (1 Lom. Dig. 223.)

## 3<sup>d</sup>. The Several Modes of Creating Trusts.

Trusts are either, (1), *Direct*, being in fact uses, unexecuted by the statute of uses; or (2), *Indirect*, being such as a court of equity derives from the apparent intention of the parties, or from the nature of the transaction:

W. C.

### 1<sup>o</sup>. Direct Trusts.

These are uses, which for various reasons, or without reason, have been held to be *not executed* by the statute of uses; and which, therefore, are still cognizable in *equity only*, as trusts. (1 Lom. Dig. 223; 2 Th. Co. Lit. 593, n. (C).)

The *intent* of the statute 27 Hen. VIII. was undoubtedly to do away *wholly* with the separation between the legal and the beneficial ownership of lands, and to abolish uses and trusts altogether, by transferring the possession of him who is seised to him who has the use, thus converting the *use* into the *legal title*; but some scruples purely technical, some founded upon considerations of general convenience, and others again growing, not unreasonably, out of the phraseology of the statute itself, led the judges to constructions which, instead of diminishing the power of the court of chancery over landed estates, tended rather to increase it. (2 Bl. Com. 335, and n. (52).)

The cases of *direct trusts* (being, as above explained, uses not executed by the statute of uses) are the following, namely: (1), A use upon a use; (2), Trusts where a special



discretion is reposed in the person seised to uses ; (3), Uses declared upon the possession of a term for years ; and in Virginia, (4), Uses declared by any other conveyance than a bargain and sale, covenant to stand seised, or lease and release ;

W. C.

### 1<sup>f</sup>. A Use upon a Use.

Thus, where A, for a valuable consideration, bargains to stand seised of land to the use of Z, *to the use of* W, the judges held, in Tyrrel's case, 2 Dy. 155 a, (4 and 5 Ph. & Mar.), about twenty years after the enactment of the statute, that, as before its enactment, no use could be *engendered of a use* (because it would be *repugnant*), so, under the statute, the courts of law were constrained to hold it void ; and thus it was left again to be cherished in equity. Another, if not a better reason for the doctrine, is assigned by Lord Bacon, namely : that the statute speaks of being "seised of *lands and tenements*" to the use of another ; and so the case of one seised *of an use* is not within its purview. (2 Washb. R. Prop. 161.)

This reasoning has not satisfied the legal world. It is said that the instant the first use was executed in Z, he must be considered, in pursuance of the statute, as seised *of the land*, to use of W, and that the latter use should thereupon be deemed executed as well as the first. But the contrary has been long settled,—that is, that a use cannot be limited on a use,—and thus, as was observed by Lord Hardwicke, in Hopkins v. Hopkins, 1 Atk. 591, "a statute introduced in a solemn and pompous manner (in order to abolish uses and trusts altogether), has had no other effect than to add, at most, *three words to a conveyance*." (2 Washb. R. Prop. 161 ; 1 Lom. Dig. 223.) That is, if, before the statute of uses, A had desired to create a use in B, cognizable only in equity, he would have expressed himself thus : "A bargains, for a valuable consideration, to stand seised *to the use of* B ;" whereas since the statute, the words, in order to create a use in B, would be, "A bargains, for a valuable consideration, to stand seised to *use of* Z, to the use of B."

### 2<sup>f</sup>. Trusts such as Before the Statute would have been deemed *Special Trusts*.

The same considerations which, before the statute, induced the courts of equity to decline to interfere with the possession of the person seised—namely, because such possession, in consequence of the discretionary power vested in the trustee, was requisite for the purpose of the transaction (*ante*, p. 214, 1<sup>d</sup>), led to the construction that *special trusts* were not executed by the statute, but re-

mained as before—*equitable estates only*. (1 Lom. Dig. 224-'5; 2 Bl. Com. 336, 335, n. (52).)

3<sup>d</sup>. Uses Declared upon the *Possession of a Term for Years*.

This exception to the operation of the statute arises from its phraseology, which with us *seems to contemplate*, and in England *expressly declares*, that the person in possession *shall be seised*, that is, possessed of a *freehold*. Hence, if A, possessed of a term for years, bargains, for a valuable consideration, to hold it *to the use of Z*, the statute does not transfer the possession to Z, because A is not *seised*, but only *possessed* of the term. (2 Bl. Com. 336 & n. (52); 2 Th. Co. Lit. 593, n. (C.); 1 Lom. Dig. 228, &c.; V. C. 1873, ch. 112, § 14; V. C. 1887, ch. 107, § 2426; *Ante*, p. 209.)

It should be observed, however, that this principle does not prevent the application of the statute to *create a term for years*, supposing the lessor to be *seised* of a freehold estate. Thus, A, seised in fee-simple, may bargain, for a *valuable consideration*, or covenant in consideration of *natural love and affection*, to stand *seised* of lands to the use of Z for a year, and the statute will immediately transfer A's possession to Z's use, so as to confer on Z an *estate for a year in the land*. (1 Bl. Com. 336, n. (52).)

4<sup>d</sup>. Uses Created by *any other Conveyance* (in Virginia) than the *Three Mentioned in the Statute*.

Thus, a use limited *upon a devise* by will (*e. g.*, devise to A, in fee-simple, for the use of Z, etc.), would not be *executed* by our statute, although it would be by statute 27 Hen. VIII., c. 10. So neither would a use limited upon a *feoffment*; in short, no use will be executed with us unless it be created by bargain and sale, covenant to stand seised, or lease and release. (V. C. 1873, ch. 112, § 14; V. C. 1887, ch. 107, § 2426; *Bass v. Scott*, 2 Leigh. 356; 1 Lom. Dig. 228; *Jones v. Tatum*, 19 Grat. 733.)

Uses belonging to either of these four classes of unexecuted uses are cognizable *only in equity*, but are still maintainable there, as all uses were prior to the statute 27 Hen. VIII.; but such *unexecuted uses*, as has been said, bear, since the statute, the name of *trusts*. They descend, are conveyed, and are liable to debts, like legal estates, and are closely assimilated to them in all particulars; only legal estates are cognizable nowhere else but in a *court of law*, and trusts in a *court of equity alone*. Hence (except in the case of *indirect trusts*, presently to be described), a conveyance to raise or to pass a *trust*, if it is of freehold, or inheritance, or for a term exceeding *five years*, must be *by deed*, by virtue of the statute of *conveyances*; and a contract whereby a *trust* is to arise at a future time, or whereby an existing trust is to be sold, or leased for a

term exceeding *one year*, must, by the statute of parol agreements, be in writing, signed by the party to be charged, or his agent. (V. C. 1873, ch. 112, § 1; Id. ch. 140, § 1, (cl. 6); V. C. 1887, ch. 107, §§ 2413, 2414; *Henderson v. Hudson*, 1 Munf. 510; *Delaney v. Hutchinson*, 2 Rand. 186; *Jarratt v. Johnson*, 11 Grat. 335. But see *Bank of United States v. Carrington & al.* 7 Leigh, 579, 580; 1 Lom. Dig. 230.)

## 2°. Indirect Trusts.

Trusts are said to be *indirect* when they arise from the evident *intention* of the parties, or the *nature of the transaction*, although without any *express declaration of trust*. They are divided into three classes, known as resulting, implied, and constructive trusts, all enforceable in equity, and are not within the English statute of frauds (29 Car. II., c. 3, § 7), requiring *declarations* of trust to be in writing, being, indeed, specially excepted by section eight of the same statute; and in Virginia also, it would seem (although we have no provision corresponding to these two sections), that such trusts may arise as in England, *without writing*. (1 Lom. Dig. 232; *Sprinkle v. Hayworth*, 26 Grat. 391 '2; *Phelps v. Suly*, 22 Grat. 589; *Borst v. Nalle*, 28 Grat. 435-437.)

Such trusts arise in all those cases where it would be contrary to the principles of equity and good conscience, that he in whom the legal seisin is vested should hold the property otherwise than as *trustee*; and they stand either upon the *presumed intention* of the parties, or independently of such intention, are *forced by operation of law upon the conscience* of the person seised, as in cases of meditated fraud, notice of an adverse equity, and the like. (1 Lom. Dig. 232; 2 Stor. Eq. § 1195.)

*Resulting* and *implied* trusts include such interests as arise from *presumed intention*, which allots a beneficial ownership to some party other than him in whom is vested the legal title. *Constructive* trusts, on the other hand, depend on *conclusions of law*, independently of contract or intent, are commonly imposed *in incitum*, and embrace every trust arising by operation of law, which is neither *implied* nor *resulting*. (1 Lom. Dig. 232-'3; 1 Spence's Eq. Jur. 508 & seq.; 2 Stor. Eq. §§ 1195 & seq.; *Cook v. Fountain*, 3 Swanst. 585.)

W. C.

## 1°. Resulting Trusts.

These are such trusts as, arising from the *presumed intention* of the parties, redound to the *benefit of the grantor*. They are the same in principle as *resulting uses* (1 Lom. Dig. 215), the general rule being, that wherever, upon any conveyance or devise, it appears that the grantee or

devisee was intended to take the *legal estate only*, the equitable interest, or so much as remains undisposed of, or in the sequel fails to take effect, will *result* to him from whom the estate proceeded, or to his heirs. (1 Spence's Eq. Jur. 510-11; 1 Lom. Dig. 233; Foulb. Eq. B. II., c. 5, § 1, n. (a).)

Parol evidence, it seems, is admissible to repel a resulting trust *arising by operation of law*, but not where the trust is collected from the *terms of the instrument itself*. Thus, parol evidence may be given to show that, although the equitable interest, or part of it, appears to be undisposed of on the face of the instrument, yet the donee was intended to take beneficially, unless the instrument itself discloses that he was to take *only as trustee*. (1 Spence's Eq. Jur. 511, 572; 2 Stor. Eq. § 1202.)

The instances of resulting trusts may be enumerated thus: (1), Where a conveyance is made of land (as by feoffment), *without any consideration*, or any declaration of uses; (2), Where a conveyance is made to a trustee, and a trust is declared *as to part*, the conveyance being silent as to the residue; (3), Where a conveyance is made upon *such trusts as shall be appointed*, and there is a default of appointment; (4), Where land is conveyed on trusts which *fail of taking effect*; and (5), Where a conveyance is made *leaving the purchase-money still unpaid*; w. c.

- 1<sup>st</sup>. Where a Conveyance is made of Land (*e. g.*, by Feoffment,) without *any Consideration*, or any *Declaration of Uses*.

Lord Coke treats the conclusion that a trust results to the grantor, or his heirs, as dictated by natural justice, and the principle has been universally conceded. Yet it seems not to have been known until the general introduction of uses. (2 Th. Co. Lit. 581; 2 Stor. Eq. §§ 1198, 1201; 1 Lom. Dig. 246.) But this conclusion would hardly be sustained in modern times, at least in the U. States. (1 Perry Trusts (4th ed.), §§ 161 & seq.)

- 2<sup>nd</sup>. Where a Conveyance is made of Land to a Trustee, and a Trust is *Declared as to Part*, the Conveyance being *Silent as to Residue*.

This is in exact conformity with the general idea of a *resulting trust*, already stated. (2 Stor. Eq. §§ 1199, 1200; 1 Lom. Dig. 246-7; Perry Trusts (4th ed.) §§ 152 & seq.)

- 3<sup>rd</sup>. Where a Conveyance of Land is made upon such Trusts as *shall be Appointed*, and there is a *Default of Appointment*.

This is essentially the same case as the preceding. (1 Lom. Dig. 245; Clere's Case, 6 Co. 17; 2 Stor. Eq. § 1199.)



4<sup>th</sup>. Where Land is Conveyed on Particular Trusts, which *Fail of Taking Effect*.

Thus, where a testator devises *lands* to trustees in trust to sell, and to apply the purchase-money in a particular manner, and such purpose cannot be effected, the fund, though it be now *in money*, will be considered *as land*, and will *result* to the heir at law. (1 Lom. Dig. 247-8; 2 Stor. Eq. § 1196; Ackroyd v. Smithson, 1 Br. C. C. 503.)

5<sup>th</sup>. Where a *Conveyance* has been made of Land, and the Purchase-Money *is still Unpaid*.

Equity regards the vendee as a *trustee for the vendor*, to the amount unpaid, and that whether there be any special agreement to that effect or not. It is competent, however, for the purchaser to show that, in any particular instance, the lien *was waived*, and such waiver may be either *actual or implied*. Taking a bond or note for the purchase money does not affect the vendor's lien; but a distinct and independant assurance, such as the vendee's bond *with security*, or a mortgage or deed of trust on the land sold, or part of it, will supersede such lien. (1 Lom. Dig. 264 & seq.; 2 Stor. Eq. §§ 1217 & seq.; Redford v. Gibson, 12 Leigh, 243; Duval v. Bibb, 4 H. & M. 113; Sharp v. Kerns, 2 Grat. 348; Wilson v. Brown, 5 Munf. 297; Little v. Crown, 2 Leigh, 352; Tayloe v. Adams, Gilm. 329.)

In Virginia the vendor's *implied* lien is abrogated by statute. None exists unless *expressly reserved* on the face of the conveyance. (V. C. 1873, ch. 115, § 1; V. C. 1887, ch. 110, § 2474.)

The case of the vendor's lien must be distinguished from the right of the vendor who has *retained the title*, to enforce a specific execution, by compelling the payment of the purchase-money, and to subject the land therefor; a right which is not affected by the statute above cited. The vendee, and persons claiming under him, can never compel a relinquishment of the legal title, unless they are *clothed with equity* by the payment of the purchase-money. (Yancey v. Mauck & als. 15 Grat. 307-8; Lewis v. Caperton's Ex'or, 8 Grat. 148; Hanna v. Wilson, 3 Grat. 243; Knisely v. Williams, 3 Grat. 265.)

2<sup>d</sup>. Implied Trusts.

When a trust arises from the *presumed intention* of the parties, and redounds to the benefit, not of the grantor, but of *third persons*, it is denominated an *implied trust*. This, it will be observed, is rather an artificial signification to attach to the phrase, since properly, every trust which grows out of the presumed intention of the parties, in-

cluding resulting trusts, might be so designated, and indeed most writers do style all such trusts *implied*. It is desirable, however, to discriminate, by a difference in name, between the cases where the trust, in pursuance of such presumed intention, redounds to the benefit of the grantor, and where it enures to the benefit of third persons. In the former case, as we have seen, it is said to be *resulting*, and in the latter *implied*. (1 Spence's Eq. Jur. 509; 1 Lom. Dig. 232 '3; Dyer v. Dyer, [2 Cox, 92], 1 Wh. & Tud. L. C. 175.)

Implied trusts are as follows: (1), Trusts arising out of the equitable conversion of land into money, and money into land; (2), Trusts arising where land is conveyed to one, whilst the consideration is paid by another; (3), Trusts arising from the conveyance of land to one partner, the lands having been paid for with partnership funds; and (4), Trusts arising from a joint-purchase and joint-conveyance by and to several, and the purchase-money is paid by one only, etc.;

W. C.

#### 1<sup>st</sup>. Trusts Arising Out of the *Equitable Conversion* of Land into Money, and Money into Land.

The doctrine of *equitable conversion* grows out of the principle that equity looks upon that which, in pursuance of contract, or of the directions of the owner, ought to be done, as actually done. Hence, if a contract is made for the sale of lands, the seller is immediately regarded *in equity* as trustee of the land for the purchaser, and the purchaser as a trustee of the money for the seller. The vendee's interest, although no conveyance has been made, is treated in equity as *real estate*, and is devisable and descendible accordingly; and the vendor's interest is *personalty*, and passes and is disposed of as such. (1 Lom. Dig. 234 & seq.; Vanmeter v. Vanmeter, 3 Grat. 148; Washington v. Abraham, 6 Grat. 65; 2 Stor. Eq. §§ 1212 & seq.; 3 Pomeroy's Eq. §§ 1159–1168.)

#### 2<sup>d</sup>. Trusts Arising where Land is *Conveyed to One* (A), whilst the *Consideration is Paid by Another* (B).

If it does not appear *by the deed itself*, that a third person, other than the grantee, paid the money, the fact may be proved *by parol*, and the trust will be *implied* in favor of the person who advanced the price. But the proof which is thus to create a trust which is to override the deed must be very clear, and mere parol evidence ought to be received with great caution. (Bank of U. S. v. Carrington, 7 Leigh, 581; Miller v. Blose, 30 Grat. 751.) The trust must arise, moreover, at the time of the execution of the conveyance, or not at all. Pay-

ment of the purchase-money by the alleged *cestui que trust*, before or at the time of the purchase is *indispensable*. A subsequent payment will not, by relation, attach a trust to the original purchase; for the trust arises out of the circumstance that the moneys of the real, and not of the nominal purchaser, formed *at the time* the consideration of the purchase, and became converted into land. (2 Pom. Eq. §§ 1037 & seq.; 1 Perry, Trusts (4th ed.), § 126; Dyer v. Dyer, [2 Cox, 92], 1 Wh. & Tud. L. C. 177; Botsford v. Burr, 2 Johns. Ch. (N. Y.) 409-'10, 415; Steere v. Steere, 5 Johns. Ch. 19, 20; Jackson v. Moore, 6 Cow. (N. Y.) 726; Foster v. Trustees of Atheneum, 3 Ala. 302, 309; Miller v. Blose, 30 Grat. 751-'2; Hannon v. Hounihan, 85 Va. 435.)

The presumption, however, that a trust was intended in favor of the party advancing the money, may be repelled, not only by showing it affirmatively, by declarations or otherwise, but also by deductions derived from the relations in which the parties stand to one another. Thus, if the person who supplies the money is a parent, or standing *in loco parentis* to the grantee, who is *an infant*, or if he is the grantee's *husband*, the supposition that the grantee was meant to be, *by implication*, only a trustee, is repelled, and supplanted by the contrary presumption that the design was to *make a provision* for the child or wife, unless it be made clearly to appear that in the particular case the presumption is misplaced. (1 Lom. Dig. 241 & seq.; 2 Stor. Eq. §§ 1201 & seq.; 2 Pom. Eq. §§ 1039 & seq.; 1 Perry, Trusts, §§ 143 & seq.; 1 Wh. & Tud. L. C. 167 & seq.; Bank of U. S. v. Carlington, 7 Leigh, 536; Irvine v. Greever, 32 Grat. 417-'18.)

### 3<sup>d</sup>. Trusts Arising from the Conveyance of Land to *One Partner*, the Land having been Paid for *with Partnership Funds*.

Here, upon like principles as in the preceding case, (2<sup>d</sup>), a trust *is implied* in favor of the partnership, the money having come from that source. And here, as in that case, it may be proved *by parol*, that the money belonged to the partnership, and parol evidence may be adduced also to repel the implied trust, by showing that the parties *did not design* that the partner to whom the conveyance was made should take *as trustee*, but for his own benefit. (1 Lom. Dig. 252 & seq.; 2 Stor. Eq. § 1207 & seq.; Brooke v. Washington, 8 Grat. 248.)

Whether the trust in favor of the partnership will be *partnership assets*, or will be the property of the partners as *joint-tenants*, or *tenants in common*, will depend on whether it was expressly or otherwise agreed that it

should be *partnership stock*. If *bought and used* for partnership purposes, with the *social funds*, it is scarcely possible to resist the inference that it is to be treated as partnership assets: but a similar implication does not conclusively arise from the purchase having been made with partnership money, or the property being used for partnership purposes, standing alone. When it has been once determined to be *partnership assets*, it is then, for all the purposes of the *partnership*, to be treated as *personalty* (except that it cannot be conveyed by *one partner*); and whilst, according to some opinions, it assumes the character of real property after the partnership debts have been paid, and the shares of the other partners have been provided for, that is, as to the widows, heirs, and individual creditors of the partners respectively, yet the better doctrine is believed to be that it is, to all purposes, *personalty*. (*Ante*, p. 140, and cases there cited: 1 Lom. Dig. 253 & seq.; Pierce v. Trigg, 10 Leigh, 426-7; Wheatley v. Calhoun, 12 Leigh, 265.)

4<sup>g</sup>. Trusts Arising from a *Joint-Purchase*, and *Joint-Conveyance* Made by and to Several Persons, and the Purchase-Money is *Paid by One Wholly*, or *Beyond his Proportion*.

The purchaser who thus pays *more than his ratable proportion*, will have a lien upon the land in his favor, *for the excess which he may have paid*. And upon like principles, when one of several joint-purchasers expends money in *repairs and improvements*, he has a lien on the land, and a trust is raised in his favor for the amount. (1 Lom. Dig. 274; Tompkins v. Mitchell, 2 Rand. 428; Hays v. Wood, 4 Rand. 272.)

### 3<sup>f</sup>. Constructive Trusts.

Constructive trusts arise, *independently of the intention* of the parties, by *construction of law*; being *fastened upon the conscience* of him who has the legal estate, in order to prevent what otherwise *would be a fraud*. They occur not only where property has been acquired by fraud or improper means, but also where it has been fairly and properly acquired: but it is contrary to the principles of equity that it should be retained, at least for the acquirer's own benefit. (1 Lom. Dig. 233; 2 Pom. Eq. §§ 1044 & seq.; 1 Spence's Eq. Jur. 511-12; Keech v. Sanford (2 Eq. Cas. Abr. 741), 1 Wh. & Tud. L. C. 48 & seq., 53 & seq.)

Constructive trusts occur in the following cases, amongst others, namely: (1), Where a conveyance is made to a trustee personally, but is paid for with trust-money; (2), Where a renewal of a lease is obtained in his own name by a trustee, or other person standing in a confidential



relation; (3), Where purchases of the trust estate, etc., are made by *trustees*, etc.; and (4), Where fraud has occurred in obtaining a conveyance;

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- 1<sup>g</sup>. Where a Conveyance of Land is made to One *who is a Trustee*, in his *Personal Capacity*, but the Land is paid for with the *Trust-Money*.

Parol evidence is admitted to prove that the land was paid for with the trust-money, although it was at one time doubted whether that did not conflict with the rule forbidding that a *writing* should be contradicted by *verbal* testimony, and also whether it was not adverse to the policy of the statute of frauds, 29 Car. II., c. 3, § 4. These difficulties, however, have been surmounted, in order to guard against the fraud, and abuse of trust, which would otherwise ensue, and whatever may have been the intention of the trustee, whether honest or otherwise, upon *clear proof* of the application of the trust-money to the purchase, a trust will be decreed. The proof, however, that the trust-money was employed must be *satisfactory*, and not merely sufficient to warrant a *vague conjecture*. (1 Lom. Dig. 250-51; 2 Stor. Eq. § 1210; 2 Pom. Eq. §§ 1048 & seq.; 3 Sugd. Vend. 189; Lane v. Dighton, 1 Ambl. 409 413; Lench v. Lench, 10 Ves. 517; Buckeridge v. Glasse, 1 Cr. & Phil. (18 Eng. Ch.) 134, &c.; Dyer v. Dyer, 1 Wh. & Tud. L. C. 172, 175, 178; Heth v. R., F. & P. R. R. Co. 4 Grat. 518 & seq.; Warwick v. Warwick, 31 Grat. 75-6; Cook v. Tullis, 18 Wal. 341.)

And where, by direction of a court of chancery, land was ordered to be conveyed to a husband in trust for his wife and children, but in fact it was conveyed to the husband *absolutely*, the mistake was corrected, and meanwhile the land was held not to be liable to the husband's debts; for even a judgment-creditor cannot occupy a higher ground than the debtor, nor subject more than the debtor's interest, which in this case was nothing. (Irvine v. Greever, 32 Grat. 415 & seq.; Mauzy v. Sellars, 26 Grat. 641.)

Where the trustee has employed his own money, *in part*, to buy the land, as well as the trust-money, the effect of the trust is to create a lien on the land for the amount of the trust-fund so expended, but it gives no further title; and, indeed, in all cases, the *cestui que trust* may elect to be repaid his money, and may claim a lien on the property purchased, in order to secure it, an election which, in the case of infants, will be made for them by the court, in the manner most advantageous for them. (1 Lom. Dig. 251-2; 2 Stor. Eq. § 1262; Turner v. Street, 2 Rand. 408.)

- 2\*. Where a *Renewal of Lease* is Obtained in *his own Name* by a Trustee or other Person Standing in a *Confidential Relation*.

The trustee's situation, in respect to the estate, gives him access to the landlord, and to allow him to use that advantage for his own benefit would tempt him to prejudice the interest committed to him. Whatever lease he obtains by *way of renewal*, therefore, although it purport to be a new lease to himself, is *contractually* for the benefit of *cestui que trust*. (1 Lom. Dig. 256-7 & seq.; Keech v. Sandford, 1 White & Tud. Lead. Cas. 48, 54.)

- 3\*. Where Purchases of *Outstanding Claims* upon an Estate, or of the Estate Itself, are made *by a Trustee*, or by some of the *Tenants thereof*, connected by Privity of Estate with Persons having an Interest Therein.

It is a general principle which will resolve most of the cases of this sort, that a trustee is not at liberty to act or contract *for his own benefit*, in regard to the subject of the trust. An independent interest therein would, in its very nature, be hostile to the *cestui que trust*, and therefore repugnant to the relation which the trustee has assumed. The trustee can occupy no such position, unless by the *special permission of a court of equity*, which of course will take due precautions to shield the *cestui que trust's* interests. But when the *cestui que trust* is *sui juris*, and has discharged the trustee from the trust, the disqualification of the latter to purchase the subject-matter, or to act concerning it, is so far modified that he is allowed to do so, provided there is no fraud, concealment, or advantage taken of information acquired as trustee, although the transaction is even then viewed with great suspicion. (1 Lom. Dig. 259 & seq.; Keech v. Sandford. 1 White & Tud. L. C. 53 & seq.; 1 Wh. & Tud. L. C. 126 & seq., 129, 145; 2 Stor. Eq. §§ 1261 & seq.)

Hence, if a trustee purchases claims or incumbrances against the trust-estate at a discount, the purchase shall enure *in equity* to the benefit of the *cestui que trust*, after reimbursing the trustee for his outlay; and so joint-tenants and co-parceners stand in such confidential relations in regard to one another's interest that one of them is not permitted in equity to acquire an interest in the property hostile to that of the other; and therefore, if one purchase an incumbrance on the joint estate, or an outstanding title thereto, it will enure at the election of the co-tenant within a reasonable time, to the *equal benefit of all*. And *agents* are emphatically within the same principle, being disabled in equity from dealing

with the matter of the agency for their own benefit. (1 White & Tud. L. Cas. 55 to 57; 1 Lom. Dig. 260-261; Segar v. Edwards, 11 Leigh, 213; Buckles v. Lafferty's Legatees, 2 Rob. 292; Wellford, &c. v. Chancellor, 5 Grat. 39; 1 Min. Insts. 244.)

4<sup>e</sup>. Where *Fraud has been Perpetrated* in Obtaining a Conveyance.

The grantee in the conveyance will be regarded as *constructively* a trustee for the person defrauded. Thus, where a person purchases of a trustee with notice of the trust, he is guilty of fraud (even though he pay a valuable consideration), and is trustee for the person entitled to the beneficial interest. So a fraudulent purchaser is only a trustee for the honest but deluded vendor; an heir preventing a devise of an estate to another, by promising to perform the same personally, is a trustee to the amount of the beneficial interest intended; and an agent who, being authorized to purchase an estate for another, buys it for himself, is a trustee for his principal. (1 Lom. Dig. 262 & seq.; 2 White & Tud. L. Cas. 593 (Pt. I); 2 Stor. Eq. § 1265; 2 Pom. Eq. §§ 1054 & seq.)

4<sup>d</sup>. Rules by which *Trust Estates are Governed*; w. c.

1<sup>o</sup>. Rules whereby Trust Estates of *Freehold* are Governed.

They are governed by *rules analogous to those which control legal estates of the same class, except only that a purchaser for valuable consideration, without notice of the trust, is not bound to execute it.* (1 Lom. Dig. 276 & seq.)

The rules applicable to these estates are as follows: (1), One who has an equitable freehold is competent to all functions requiring a freehold; (2), Trust estates are alienable, devisable, and descendible, like legal estates; (3), Trust estates of inheritance are, in Virginia, subject to dower and curtesy, like legal estates; (4), Trust estates are liable to escheat, like legal estates; (5), Trust estates are liable to debts and charges of *cestui que trust*, like legal estates; (6), Trust estates merge in legal; and (7), Trust estates will not, in general, support ejectment, nor can be relied on *at law* by way of defence thereto;

w. c.

1<sup>f</sup>. One who has an *Equitable Freehold* is Competent to all Functions *Requiring a Freehold*.

Thus, grand jurors being formerly required to be freeholders (although it is so no longer, V. C. 1873, ch. 200, § 2; V. C. 1887, ch. 195, § 3977), the requirement was satisfied by an *equitable* freehold. And so, when freeholders were required for an escheator's jury (V. C. 1873, ch. 109, § 5), an *equitable* freehold sufficed. (Carter's Case,

2 Va. Cas. 319; Reynolds' Case, 4 Leigh, 667; Moore's Case, 9 Leigh, 639; Burcher's Case, 3 Rob. 826.)

2<sup>d</sup>. Trust Estates are Alienable, Devisable, and Descendible, like *Legal Estates*.

See 1 Lom. Dig. 278; V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418.

3<sup>d</sup>. Trust Estates of Inheritance are, in Virginia, *Subject to Dower and Curtesy*, like *Legal Estates*.

See 1 Lom. Dig. 278; V. C. 1873, ch. 112, § 17; V. C. 1887, ch. 107, § 2429.

4<sup>d</sup>. Trust Estates are *Liable to Escheat*, like *Legal Estates*.

See 1 Lom. Dig. 279; V. C. 1873, ch. 109, § 25; V. C. 1887, ch. 105, § 2396.

5<sup>d</sup>. Trust Estates are *Liable to all Debts and Charges of Cestui Que Trust*, like *Legal Estates*.

But they are not always to be subjected by like proceedings. In general, a trust estate may be levied on *by execution*, and in all cases is subject to the *same lien* by judgment or execution as a legal estate; but it cannot be levied on if the trust is subject to any *indefiniteness*, which would probably occasion a sacrifice in the sale under execution. Recourse must then be had to a *court of equity*. This is the case with *equities of redemption*, or trusts to sell and pay debts, and with any *unascertained* equitable interest, none of which are capable of being levied on by execution, but must be reached in *equity*. (1 Lom. Dig. 280; Claytor v. Anthony, 6 Rand. 308; Coutts v. Walker, 2 Leigh, 280.)

These qualified trusts which creditors can subject, *if at all*, in equity alone, are of course liable to be almost infinitely varied, according to the requirements of domestic convenience, and sometimes they are so limited that they are not applicable to debts of *cestuis que trust*, except to a very modified extent. Thus, where property is settled for the *maintenance of a family*, the expenditure must not exceed the annual income, nor can any debts contracted by the head of the family (himself only one of the *cestuis que trust*), nor by the trustee (although the profits of the trust property be pledged for their payment), be charged on the *prospective profits* beyond the current income, so as to deprive the beneficiaries of the support provided for them. But where the trust is to permit the husband and wife, during their joint lives, to enjoy *all the interest and profits* of the property, the trust estate is liable to execution, without limitation, at the suit of creditors whose debts are for supplies furnished for the *proper support of the husband and wife*. In this latter case, the intent is simply to intercept the marital rights, and shield the property from the husband's



general creditors; in the former, the purpose is to protect the property against the improvidence and waste of the *cestuis que trust*, and to make that which, under their management, would have been dissipated in a short time a permanent fund, furnishing some support for the household for an indefinite period. Hence, no one of the *cestuis que trust* has any interest separable from the rest which can be charged or disposed of by him. The fund is provided for the *common support* of the family, and can only be enjoyed jointly. (Markham v. Guerrant, 4 Leigh, 279; Roanes v. Archer, 4 Leigh, 568; Munday v. Vawter, 3 Grat. 518, 547; Heath v. Richmond, F. & Pot. R. R. Co. 4. Grat. 482; Perkins v. Dickinson, 3 Grat. 335; Nickell & al. v. Hundley & als. 10 Grat. 336; Johnston v. Zane & als. 11 Grat. 570; Scott v. Gibbon, 5 Munf. 91; Scott v. Loraine, 6 Munf. 117; Roanes v. Archer, 4 Leigh, 550; 1 Lom. Dig. 280 & seq.)

6<sup>t</sup>. Trust Estates Merge in *Legal*.

Whenever the legal and trust estates come to the same persons, the *trust estate is merged in the legal*, for a man cannot be a *trustee for himself*, a proposition which, if not universal, is subject to no other exception than where the party has the whole legal estate, and only a partial equitable one, and the *merger* of the latter would be a disadvantage to him, in which case merger does not occur. (1 Lom. Dig. 283-4.)

7<sup>t</sup>. Trust Estates will not, in General, *Support an Action of Ejectment*, nor can be Relied on at Law by Way of *Defence* thereto.

The first branch of the proposition—viz., that trust estates will *not support an action of ejectment* for the land—is, strictly speaking, without exception; but lapse of time, and other circumstances, sometimes justify a *presumption* of the re-union of the legal title with the equitable ownership, in which case the action may be maintained, not on the equitable title, but on the *presumed legal one*. This presumption of re-conveyance of the legal title to the beneficial owner is said to be due, not so much to the *lapse of time*, as to the reasonable assumption, that *what ought to be done has been done*. Hence, when the *object of the trust is satisfied*, the conveyance of the legal estate may well be taken for granted, even after only a few years, unless from the nature and object of the original creation of the legal estate in the trustees, there is no inconsistency between the equitable ownership and the fact of the legal estate being suffered to remain outstanding; thus excluding such presumptions in case of trust terms *attendant upon the inheritance*. (1 Lom. Dig. 284-5; Hopkins v. Ward, 6 Munf. 41; Doe v. Plow-

man, 2 B. & Ad. 573; Doe v. Langdon, 12 Ad. & El. 64 E. C. L. 719 '20; Garrard v. Tuck, 8 Mann. Gr. & Scott, (65 E. C. L.) 248-'9.)

The *defence in ejectment* must, at common law, have also rested in like manner *upon a legal*, and not on an equitable title; but in Virginia, by statute, the defendant in ejectment is allowed to avail himself of an *equitable* title in *three cases*, namely: (1). Where, in an action *by vendor against vendee*, the defendant can show a contract of sale *in writing*, signed by the vendor or his agent, and such performance of the terms thereof, on the part of the vendee, as would *in equity* entitle him to an *unconditional conveyance* of the legal title; (2). Where, in an action by mortgagee against mortgagor, the defendant can prove the payment of the whole sum, or the accomplishment of the whole purpose, which the mortgage was made to secure or effect, so that he would *in equity* be entitled to a decree *revesting the legal title* in him unconditionally; and (3). Where, in an action by the grantee against the grantor, *in a deed of trust*, the same state of things exist. But in order to avail himself of these equitable defences, the defendant must *give notice* thereof in writing at least *ten days* before the trial; and at all events, whether he shall or shall not make or attempt such defence, he shall not be precluded from resorting to equity. (V. C. 1873, ch. 131, §§ 20 to 22; V. C. 1887, ch. 124, §§ 2741 to 2743; 1 Lom. Dig. 285 & seq.; Davis v. Teays, &c., 3 Grat. 283; Hale v. Horne & als. 21 Grat. 112; Suttle v. R. F. & P. R. R. Co. 76 Va. 284; Wilson v. Triplett, 81 Va. 286.)

## 2°. Rules by which *Trust Terms are Governed*.

See 1 Lom. Dig. 287 & seq.; 2 Stor. Eq. §§ 998 & seq.;

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### 1<sup>st</sup>. Trust Terms *in Gross*.

That is, terms vested in trustees for the use of persons *not entitled to the freehold or inheritance*. They *pass* to the personal representatives of the *cestui que trust*, are *alienable*, and are *subject to debts*, in the main, like *legal estates*. (1 Lom. Dig. 288-'9.)

### 2<sup>nd</sup>. Trust Terms *Attendant upon the Inheritance*.

The doctrine touching trust terms attendant upon the inheritance will lead us to observe, (1). The nature of terms attendant upon the inheritance; (2). The modes whereby they become so attendant; (3). The modes whereby terms once attendant become terms *in gross*; (4). The succession of terms attendant; (5). Their employment to protect innocent purchasers; (6). Presumption of their surrender; and (7). Changes in the law relating to them by 8 and 9 Vict. c. 112;

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1<sup>g</sup>. Nature of Terms *Attendant upon the Inheritance*.

They are long terms; *e. g.*, for five hundred years, *rested in trustees* for the purpose of raising children's portions, paying debts, etc., which, although *the objects* for which they were created *are satisfied*, yet continue outstanding *in the trustees or their personal representatives*; and being for the *benefit*, and *subject to the order* of the owner of the inheritance, they are said to be *attendant upon the inheritance*. They go, with the inheritance, to the heirs, or to purchasers thereof, and are kept alive under the direction of the court of equity (whose creature the whole doctrine of *attendant terms* is), in order to protect *innocent purchasers* for value against incumbrances. (1 Lom. Dig. 289 & seq.; 2 Stor. Eq. §§ 998 & seq.; Willoughby v. Willoughby, 1 T. R. 763; Maundrell v. Maundrell, 7 Ves. 582; S. C. 10 Ves. 270; *Ante*, pp. 166-'8.)

2<sup>g</sup>. Modes whereby Terms *Become Attendant* upon the Inheritance.

Terms may become *attendant* either by an *express declaration* of trust, made when a satisfied term *is assigned* to a trustee; or by *implication of law*, arising out of the equitable maxim that "that should have the satisfaction which has sustained the loss," so that, when a trust term is carved out of the inheritance for a special purpose, when that purpose is satisfied, the term becomes attendant on the inheritance. (1 Lom. Dig. 290 & seq.; 2 Stor. Eq. §§ 998, 1001; Fonbl. Eq. 414, n. (1).)

3<sup>g</sup>. Modes whereby Terms once Attendant Become *Terms in Gross*.

By the *indication of an intention* on the part of the owner of the inheritance (being also the owner of the term), to *separate the term* from the inheritance. It thus becomes a *term in gross*, and is treated as mere personalty, whilst as long as it remained *attendant*, it partook of the realty, and followed the fate of the inheritance. (2 Stor. Eq. § 1002; Fonbl. Eq. 414, n. (1); 1 Lom. Dig. 292 & seq.)

4<sup>g</sup>. The Succession of *Terms Attendant* upon the Inheritance.

As terms *attendant* are considered as absolutely annexed *to the inheritance*, and as constituting *a part of it*, they follow the descent to the heir, are alienable as the inheritance is, by deed or will, and constitute *real assets*. (1 Lom. Dig. 293; 2 Stor. Eq. §§ 998 & seq.)

5<sup>g</sup>. The Employment of *Terms Attendant* in Order to Protect *Innocent Purchasers for Value* against Incumbrances;

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1<sup>h</sup>. What Purchasers are thus Protected.

Purchasers *complete*, and in good faith, who have *paid the purchase-money* in full, and *taken a conveyance*, without notice of the incumbrance. (1 Lom. Dig. 294; 2 Stor. Eq. § 1502; Fonbl. Eq. 442, n.; Id. 444, n.\*)

2<sup>h</sup>. The Mode of Proceeding in Order to make the *Attendant Term Available*.

The purchaser (who must be an *innocent* purchaser, *for value*, and *without notice*), obtains an *assignment* of an *attendant term*, created *prior to the incumbrance*, to be made to *trustees for him*. (1 Lom. Dig. 294 & seq.; 4 Kent's Com. 89 & seq.; Wms. R. Prop. 384; Maundrell v. Maundrell, 7 Ves. 582; S. C. 10 Ves. 270.)

3<sup>h</sup>. The Principle on which the Assignment of the *Attendant Term* Affords Protection.

The principle is that the purchaser has *equal equity* with the *incumbrancer*; and having obtained the advantage by the assignment to *trustees for him*, of the legal estate, for the term embraced by it, a court of equity will not take that advantage from him in order to subserve *only an equal equity*. The maxim is, *when equity is equal, the law (i. e., the legal title) shall prevail*. (1 Lom. Dig. 294 & seq.; Fonbl. Eq. 442, 557, 561; Id. 413.)

4<sup>h</sup>. Instances of Incumbrances thus Guarded Against;  
w. c.1<sup>i</sup>. Mortgages and other Liens.

See Fonbl. Eq. 557, 561; 1 Lom. Dig. 294 & seq.

2<sup>i</sup>. Dower.

See 1 Lom. Dig. 295-'6; 4 Kent's Com. 87 & seq.; Wms. R. Prop. 384; 1 Bright's H. & Wife, 520 & seq.; 2 Th. Co. Lit. 601, n. (C.); Maundrell v. Maundrell, 7 Ves. 582; S. C. 10 Ves. 270; *Ante*, p. 166, 8<sup>g</sup>.

6<sup>g</sup>. Presumption of *Surrender of Terms Attendant* upon the Inheritance.

No surrender of terms once attendant upon the inheritance is to be presumed from *mere lapse of time*, nor without express evidence to warrant such presumption; for that would be to defeat the object intended by the assignment of such terms. There must have been a dealing with the estate, by the owner of it, in a way in which reasonable men, and men of business, would not have dealt with it, unless the term had been put an end to. (*Doe v. Plowman*, 2 B. & Ad. (23 E. C. L.) 573; *Doe v. Langdon*, 12 Ad. & El. N. S. (64 E. C. L.) 719;



(*Garrad v. Tuck*, 8 Man. Gr. & Scott (65 E. C. L.) 248; 1 Lom. Dig. 297.)

7<sup>g</sup>. Changes in the Law of *Attendant Terms* in England, Wrought by 8 and 9 Vict. c. 212, §§ 1, 2 (A. D. 1845).

See Wms. R. Prop. 387 :

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1<sup>h</sup>. *Attendant Terms* which were *Satisfied* on 31<sup>st</sup> December, 1845.

Every *satisfied term* which, either by *express declaration* or by *construction of law*, shall, on the 31<sup>st</sup> December, 1845, be attendant on the inheritance, shall, on that day, *absolutely cease* ; but notwithstanding, if then attendant by *express declaration*, it shall afford the same protection against incumbrances, etc., as if it had *continued to subsist*, but had not been assigned or dealt with, after 31<sup>st</sup> December, 1845. (§ 1.)

2<sup>h</sup>. *Attendant Terms* (then Subsisting or thereafter Created) which should *Become Satisfied* after 31<sup>st</sup> December, 1845.

If, after 31<sup>st</sup> December, 1845, terms shall become, by *express declaration* or by *construction of law*, attendant upon the inheritance, they shall, immediately upon becoming so attendant, *absolutely cease*. (§ 2.)

3<sup>e</sup>. Doctrine Touching the Estate of *Cestui Que Trust*, and the Estate, Liability and Duty of Trustees.

In unfolding this subject we are to contemplate, (1), The estate of the *cestui que trust* ; (2), The estate of the trustee ; (3), The trustee laboring under disabilities, difficulties and doubts ; (4), The obligation of a purchaser from the trustee to see to the application of the purchase-money ; (5), The doctrine touching the joint-action of several trustees ; (6), The doctrine forbidding the trustees to employ the trust for their private advantage ; (7), The obligation of the trustee to indemnify the *cestui que trust* for any breach of trust ; (8), Allowances to trustees ; (9), The obligation of the *cestui que trust* to indemnify the trustee ; (10), The purchase of the trust-subject by the trustee ; (11), Disclaimer of trust by trustee ; (12), Failure of trustee, by death, removal or otherwise ; (13), Recommendatory or precatory trusts ; (14), Vague and indefinite trusts ; (15), The local jurisdiction over trusts ; and (16), The duty of trustees ;

W. C.

1<sup>f</sup>. Estate of the *Cestui Que Trust* ; w. c.

1<sup>g</sup>. The Rights of *Cestui Que Trust*.

It is still held, in conformity to the old law of uses, that permanency (or enjoyment) of the profits, execution of estates as *cestui que trust* shall direct, and defence of the title, are the three great properties of a trust ; so

that the court of chancery will compel trustees, 1, To permit *cestui que trust* to receive the rents and profits of the land; 2, To execute such conveyances as *cestui que trust* shall direct; 3, To defend the title of the land in any court of law or equity. But *cestui que trust* is entitled to a conveyance only where the whole of the trust belongs to him; where the instrument creating the trust does not forbid; and where the trustee is clothed with no discretion in the management of the trust. (1 Lom. Dig. 300; 2 Stor. Eq. §§ 1275, 979.)

2<sup>g</sup>. How the *Cestui Que Trust* is affected by Acts of the Trustee.

No act or omission of the trustee will prejudice the *cestui que trust*, save only that, if the trustee is in actual possession of the estate (which seldom happens), and conveys it for a valuable consideration, or mortgages it to a person who has no notice of the trust, by registry or otherwise, such purchaser or mortgagee is entitled to hold against *cestui que trust*. (1 Lom. Dig. 300, 301; 2 Stor. Eq. § 977.)

3<sup>g</sup>. Liability of *Cestui Que Trust's* Estate for his Debts.

Estates of every kind, holden or possessed in trust, are subject to all the debts and charges of the *cestui que trust*, as if they were legal estates. (V. C. 1873, ch. 112, § 16; V. C. 1887, ch. 107, § 2428; *Ante*, p. 227, 51.)

4<sup>g</sup>. Relation to the Trust of one who Purchases from the Trustee, with Notice of the Trust.

Such purchaser, with notice, is himself a trustee, and will be constrained to execute the trust, however valuable the consideration he may have paid; and if he sells the subject to an innocent purchaser for value, without notice, whereby it is exempted from the trust, he is personally responsible to *cestui que trust* for the value of the property, just as, under corresponding circumstances, the original trustee is. (1 Lom. Dig. 301 '2; 2 Stor. Eq. § 1257; *Tompkins & al. v. Powell*, 6 Leigh. 580; *Heth v. Richmond, F. & P. R. R. Co.* 4 Grat. 518; *Munday v. Vawter & als.* 2 Grat. 546-'7; *Duncan v. Jaudon*, 15 Wal. 175.)

And so a sale of the trust-subject by the trustee, at a large sacrifice, to a purchaser, with full notice of the trust, constitutes such an improper dealing with and *destruction* of the subject of the trust as will render both trustee and purchaser *primæ facie* responsible therefor. And it is for them to show that the necessities of the trust required the sacrifice. (*Fisher v. Bassett*, 9 Leigh. 119; *Pinckard v. Woods*, 8 Grat. 144; *Coke & al. v. Minor*, 25 Grat. 254.)

Whilst the court of equity thus protects the *cestui que*

*trust* against the wrongful acts of the trustee, except the rights of an innocent purchaser *for value*, and *without notice*, intervene, the trustee's conveyance, however irregular, passes the legal title, so that in a court of law it is as complete and absolute at least as that of the trustee himself was. (1 Lom. Dig. 302; Taylor v. King, 6 Munf. 366.)

In order that a purchaser may be protected as an *innocent* purchaser, he must have paid a *valuable consideration*, and have become a *complete purchaser* by getting a conveyance of the legal title before he had *notice of the trust*. A valuable consideration is never mere love and affection, even for the nearest connections; but it must be a benefit to the grantor, or to a third person at his request, or some loss, trouble, or inconvenience, or the risk thereof to the grantee. A pre-existing debt is regarded in Virginia as constituting a valuable consideration for a deed of trust, or mortgage to provide for it, whether the debt be thereby *satisfied* or only *collaterally secured*; and the creditor secured by such deed of trust or mortgage is thenceforward regarded no longer as a *creditor*, but as a *purchaser*. (Tate v. Liggat, 2 Leigh, 104; Wickham v. Lewis Martin & Co. 13 Grat. 437.) The purchaser must also be a purchaser *without notice*, which may be either *direct* or *constructive*. *Direct notice* is an actual, positive knowledge of the prior incumbrance or trust, regularly communicated to the purchaser, or his agent, *during the transaction*, by some one interested in the subject, and therefore probably informed in relation to it. *Constructive notice* is no more than evidence of notice, where the presumption of it is satisfactorily warranted by the facts, or made needful by considerations of general policy. Thus, a man has constructive notice of the contents of the instrument under which his vendor claims to derive his power to sell, and of any deed or will therein referred to, and of any fact which might have been learned thence. So the possession of a tenant is constructive notice of the actual interest he may have, but not of his lessor's interest; nor, it seems, is being a witness to an instrument of itself notice of its contents, since, in practice, a witness is seldom privy to the contents of the writing. A purchaser with notice from one without, is protected as a part of what is due to the latter; and so also is a purchaser without notice from one with notice. (1 Lom. Dig. 510 & seq.; 4 Kent's Com. 179; Wickham & al. v. Lewis, Martin & Co. 13 Grat. 437; Swift v. Tyson, 16 Pet. 1; French v. Loyal Co. 5 Leigh, 655; Jackson v. Updegraffe & al. 1 Rob. 107; Spengler v. Snapp, 5 Leigh, 478; Burwell v.

Fauber, 29 Grat. 463; *Justis v. English*, 30 Grat. 575-576; *Morrison v. Bausemer*, 32 Grat. 229; *Duncan v. Jaudon*, 15 Wal. 175; *Cordova v. Hood*, 17 Wal. 1, 8; *Basset v. Nosworthy*, 2 Wh. & Tud. L. Cas. (Pt. 1), 77 & seq., 83 & seq., 106 '7; V. C. 1887, ch. 109, § 2472.)

The purchaser must also be, as we have seen, a *complete purchaser*; that is, he must have *paid all the purchase-money* (not merely secured it to be paid), and have actually *taken a conveyance* of the legal title (and not articles merely, to convey), before he received the notice. (1 *Lom. Dig.* 511; *Beverly v. Brooke & al.*, 2 Leigh, 426; *Doswell v. Buchanan's Ex'ors*, 3 Leigh, 355; *Basset v. Nosworthy*, 2 Wh. & Tud. L. Cas. (Pt. I.), 91 & seq.)

This doctrine as to who is a *complete purchaser*, entitled to the protection of the court of equity, received a severe shock from the case of *Preston v. Nash*, in which it was held that a complete purchaser is one who has paid the purchase-money, and who, although he has not received a conveyance of the legal title, is *entitled to call for it* (75 Va. 949, 958); and this modification of the doctrine finds much countenance in the Code of 1887, whereby it is provided that "such subsequent purchaser (for value) notwithstanding such deed or other writing be admitted to record before he becomes a *complete purchaser*, shall in equity, have a *lien on the property purchased* by him for so much of his purchase-money as he *may have paid before notice*." (V. C. 1887, ch. 109, § 2472; *Preston v. Nash*, 76 Va. 1; *Lamar v. Hale*, 79 Va. 147.)

## 5<sup>g</sup>. Liability of the Estate of *Cestui Que Trust* to Escheat.

It is liable to escheat like a legal estate, whether for lack of heirs, or because of the disability of alienage. The only difference is, that where the interest is equitable, the proceedings are not cognizable before the escheator and his jury, but must take place in a court of equity. (V. C. 1873, ch. 109, § 25; V. C. 1887, ch. 105, § 2396; *Hubbard v. Goodwin*, 3 Leigh, 492.)

## 2<sup>d</sup>. The Estate of the Trustee; w. c.

### 1<sup>g</sup>. The Liability of the Trustee's Estate *for His own Debts, etc.*

From an early period after the establishment of trusts, it has been the settled doctrine, that in equity the estate of the trustee shall not be subject to his specialty and judgment debts, which confer, at most, only a *general lien*, although it will be charged with a mortgage or other *specific lien*, made by him to secure a *bona fide* debt to a creditor *without notice* of the trust; nor is it



subject to the dower or curtesy of the trustee's consort. The legal estate, save only in case of a purchaser for value, and without notice, is exclusively for the benefit of the *cestui que trust*. (1 Lom. Dig. 299, 301; 2 Perry on Trusts (4th ed.), § 346; Gilb. Uses, 16, n.; Id. 18, n.)

2<sup>e</sup>. The Liability of the Trustee's Estate to Escheat.

The doctrine of the *common law* upon this point is not fully determined. The mere fact that the trustee *is an alien* seems to operate nothing, at least if the trust is a temporary one to provide for the payment of debts; but when the trustee *dies without heirs*, it seems to be the better opinion that the lord took the land *discharged of the trust*. (Gilb. Uses, 10, 367, 445; Ferguson v. Franklin, 6 Munf. 305.)

Whether this rigorous doctrine of the common law ever existed in Virginia, so that the commonwealth, in the case supposed, would take the lands discharged of the trust, has been gravely, and with good reason, doubted (1 Tuck. Com. 67, Pt. I.), but all doubt is removed by statute, which declares that an "estate vested in a person merely by way of mortgage, or in trust, *shall not escheat* or be forfeited to the commonwealth, by reason of the mortgagee or trustee being an alien, or dying without heirs." (V. C. 1873, ch. 109, § 25; V. C. 1887, ch. 105, § 2396.)

3<sup>d</sup>. Trustee Laboring Under *Disabilities, Difficulties, or Doubts*.

Trusts being peculiarly the subjects of equity-cognizance, and the court of equity being charged with the supervision and control of their execution in all cases, the trustee has always the privilege, and it is his duty to appeal to that court in any case of doubt or difficulty for instructions; and in case of disabilities, it is competent in general, to the chancellor, to supplement what may be wanting in the trustee, by the discretion and power of the court. Thus, if doubts arise as to the amount due under a deed of trust to secure debts, or as to the title to the property, or difficulties in respect to the relative priority of successive or conflicting incumbrances, or in relation to any other point connected with the trustee's duty, he ought not to proceed to carry the trust into execution, save under the advice and sanction of the court of equity; and if *he* does not apply to the court, any one else interested may do so. (Quarles v. Lacy, 4 Munf. 251; Lane v. Tidball, Gilb. 132; Wilkins v. Gordon, 11 Leigh, 547; Miller v. Trevillian, 2 Rob. 25; Rossett v. Fisher, 11 Grat. 492; 2 Stor. Eq. § 1267.)

And so where the trustee, to whom the land was con-

veyed, declined to act, and by order of the court upon motion, another was substituted who was insolvent, it was held that, at the instance of any party interested, a court of equity ought to compel the trustee to give bond and security, duly to account for the proceeds of the property sold by him, and also to oblige the trustee to do his duty by selling in the manner calculated to get the best price, as by dividing it into parcels, to be sold separately. (*Terry v. Fitzgerald*, 32 Grat. 847, &c.)

Special, although it would seem superfluous, provision is made by statute with us for the interposition of equity, where an infant, insane person, or married woman is entitled to or bound to renew *any lease*; but the jurisdiction can be exercised only by the *circuit or corporation* courts. (V. C. 1873, ch. 124, § 1; *Id.* ch. 154, § 38; V. C. 1887, ch. 117, § 2615; *Id.* ch. 147, § 3055; Va. Const. 1869, Art. VI., § 14.) And the same courts are also clothed with power to decree the sale of the estate of any minor, or insane person, whenever it shall appear *clearly* to be for his interest, at the instance of the guardian, committee, or trustee, or of any beneficiary interested therein, the proceeds to be invested under the direction of the court. And if the insane person or infant be a *husband*, the relinquishment of the wife's dower in his lands, or of her own estate, may also be made under the direction of the court. And so also where the wife is *insane* (but not where she is *an infant*), the same courts, upon the application of the husband, may in their discretion, direct a release of her dower in the lands proposed to be sold, to be executed by a commissioner appointed for the purpose, the court taking due care to secure her interests. (V. C. 1873, ch. 124, §§ 2 to 11; *Id.* ch. 154; §§ 4 to 7; V. C. 1887, ch. 117, §§ 2616 to 2626; *Id.* ch. 147, §§ 3048, 3055.)

Provision is likewise made with us for the sale, under the direction of the circuit and corporation courts, of *contingent interests*, limited to persons not in being, or not ascertained, with a view to the investment of the proceeds of sale in some more eligible way, for the benefit of the parties who are interested, whether immediately or contingently; due precaution being taken to guard the interests of persons who are not *in jure*, and of those not in being, or not ascertained. (V. C. 1873, ch. 112, §§ 20 to 24; V. C. 1887, ch. 107, §§ 2432 to 2436.) And this statute is believed to be applicable as well where the limitation originated before its enactment as where it originated since. Even *private* acts of legislation providing for such conversion and re-investment, supposing them to be obtained and used fairly and in good faith,

are not liable to objection. (Clark v. Van Surley, 15 Wend. (N. Y.) 436; Cochran v. Same, 20 Wend. 365; Williamson v. Berry, 8 How. 537; Williamson v. Irish Presb. Cong., Id. 565; Williamson v. Ball, Id. 568; Florentine v. Barton, 2 Wal. 216, 217; Williamson v. Suydam 6 Wal. 737-'8; Stanley v. Colt, 5 Wal. 169-'70; Rice v. Parkman, 16 Mass. 331; Cooper v. Hepburn, 15 Grat. 563, 558; Cool. Const. Lim. 98, &c.) "This species of legislation," says Judge Cooley, "may perhaps be properly called *prerogative remedial legislation*. It hears and determines no rights; it deprives no one of his property. It simply authorizes one's real estate *to be* turned into personal, on the application of the person *representing* his interest, and under such circumstances that the consent of the owner, if (he were) capable of giving it, would be presumed. It is in the nature of the grant of a privilege to one person, which at the same time affects injuriously the rights of no other." (Cool. Const. Lim. 103; Dwarr. Stat. (Potter,) 487, &c.)

It seems, indeed, that, independently of the Virginia statute last cited, or of any special statute, whenever the court of chancery has power to decree the conversion of real estate into personal, it may do so notwithstanding the contingent interests of some of the parties who are not yet in being, or not ascertained, provided all the parties are brought before the court that can be brought before it, and especially where the rights of the non-existent, or as yet unascertained, parties will be *represented* and sufficiently defended by the persons who are made parties, and who have motives of self-interest and affection to make such defence. And this is styled the doctrine of the *representation* of parties. (Stor. Eq. Pl. §§ 145, 792; Coop. Eq. Pl. 36, 77 to 83; Mitf. Eq. Pl. 140-'41; Leonard v. Ld. Sussex, 2 Vern. 527; Allen v. Papworth, 1 Ves. Sr. 163; Finch v. Finch, 2 Ves. Sr. 491; Gaskell v. Gaskell, 6 Sim. (9 Eng. Ch.) 448; Giffard v. Hort, 1 Sch. & Lef. 409; Baylor v. De Jarnette, 13 Grat. 166 & seq.; Faulkner v. Davis, 18 Grat. 684 & seq., 691-'2.)

In case of *disabilities* on the part of the trustee, a wholesome provision has been made by statute in Virginia, declaring that "a court of equity, in a suit in which it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same, and had executed it." (V. C. 1873, ch. 174, § 7; V. C. 1887, ch. 167, § 3418.) And a like prudent provision is

made to facilitate the substitution of a new trustee, where the former one has died, removed from the State, declines to accept, or resigns the trust. Not only may a court of equity make the substitution, as it might independently of statute, but by statute, the circuit, county or corporation court of any county or corporation in which the *deed or will is recorded*, may appoint a new trustee, *on motion*, after reasonable notice to the other parties in interest. But this provision shall not apply to trustees for church-congregations provided for by § 1423. (V. C. 1873, ch. 174, §§ 8, 9; V. C. 1887, ch. 167, § 3419.)

4<sup>d</sup>. Obligation of One who Purchases from the Trustee to see to the *Application of the Purchase-Money*;

W. C.

1<sup>e</sup>. Circumstances Generally Requisite to *Charge the Purchaser with the Application of the Purchase-Money*;

W. C.

1<sup>h</sup>. Notice of Trust *to the Purchaser*.

Of course a knowledge of the trust must be brought home to him, at least if he is a *purchaser for value*. (1 Lom. Dig. 301-'2; 2 Stor. Eq. §§ 1124-'5; Potter v. Gardner, 12 Wheat. 498; Hughes v. Tabb, 78 Va. 313.)

2<sup>h</sup>. No *Certain Hand Designated to Receive the Money*.

Hence, in an ordinary deed of trust to secure the payment of debts, where *power is given to sell*, there is implied (if not expressed) a power to *receive the proceeds*, and therefore, in such a case, the purchaser is not liable for the application of the purchase-money by the trustee, notwithstanding the debts may be *scheduled*. (V. C. 1873, ch. 113, § 6; V. C. 1887, ch. 108, § 2442; 1 Lom. Dig. 309-'10; Potter v. Gardner, 12 Wheat. 498; Yerby v. Grigsby, 9 Leigh, 787.)

3<sup>h</sup>. The Trust of a *Defined and Limited Nature*.

See 1 Lom. Dig. 302; 2 Stor. Eq. § 1127.

W. C.

1<sup>i</sup>. Instances of Trusts *so Defined and Limited* as to *Charge the Purchaser with the Application of the Purchase-Money*;

W. C.

1<sup>k</sup>. Trusts to Pay Legacies, Annuities, or *Scheduled Debts*.

In all these cases, the person and amount to be paid *are ascertained*, and therefore, supposing that there is no hand designated to receive the money, and to grant an acquittance, the persons entitled to the proceeds of sale, and they only, are in equity authorized to do so, and so the purchaser is responsible for the application of the money to the destined



trusts: and it makes no difference whether the lands are given *to be sold*, or only *charged* with the payment of debts. (1 Lom. Dig. 302 & seq. 308; 2 Stor. Eq. § 1131; Elliott v. Merriman, Barnardiston's C. R. 78; 1 Wh. & Tud. L. Cas. 58, 62, & seq.)

- 2<sup>k</sup>. Trusts to Accomplish any *Specific or Defined* Object, as to *Build a House*.

The purchaser, unless the trustee is empowered to grant an acquittance for the money, is bound to see to its application to the purposes of the trust; for if they were not fulfilled by the trustee, the land in the hands of the purchaser will still be liable to them. (1 Lom. Dig. 303; Cottrell v. Hampton, 2 Vern. 5.)

- 2<sup>i</sup>. Instances of Trusts *so Undefined*, or of *such Long Continuance*, that Purchaser *is not Charged* with the Application of the *Purchase-Money*.

Wherever the trust is *general and unlimited* in its nature, or likely to be of *long continuance*, it cannot be presumed that the person creating it expected so unreasonable a thing as that the purchaser should undertake it, and therefore it is implied that he intended that the trustee's receipt for the purchase-money should be a valid discharge. (1 Wh. & Tud. L. Cas. 63 & seq.; 1 Lom. Dig. 303-4, 308; 2 Stor. Eq. § 1130 & seq.; Meeks v. Thompson, 8 Grat. 137);

W. C.

- 1<sup>k</sup>. Trusts to Pay Debts *not Scheduled*, or to *Pay Debts and Legacies*.

This depends upon the general principles already stated. If the debts are *not scheduled*, it would be too unreasonable to expect that the purchaser should undertake to see to the application of the proceeds, and to demand it of him would seriously impair the salableness of the property; and so if the trust is to pay *debts and legacies*, as the debts are to be paid first, supposing them *unscheduled*, the same objection exists as before, notwithstanding the *legacies* are definitely ascertained. (3 Hargr. Co. Lit. 290 b; Butler's note; 1 Lom. Dig. 304, &c.; 1 Wh. & Tud. L. Cas. 63 & seq.)

- 2<sup>k</sup>. Trusts to Invest Money for Several Subjects, *More or Less Distant*.

This case may be exemplified by a trust directing the money arising from the sale of lands to be invested in a *prescribed manner*, and the accruing proceeds to be applied, from time to time, to sundry purposes. The doctrine applicable to it seems to be that the purchaser's obligation extends no further

than to see that the purchase-money is *invested as directed*. And even that obligation of the purchaser depends on whether the trust contemplates the *immediate* re-investment of the purchase-money, with a view to which the sale is made, or whether the re-investment is a distinct act from the sale, to be made as opportunity offers, and *requiring time and discretion*. The disposition of the proceeds after re-investment, he is not bound to look after, nor even the re-investment, unless the acts of sale and re-investment are intended to be in immediate proximity the one to the other, because he who created the trust could not reasonably have expected from any purchaser (without prejudicing the sale of the subject) any further degree of care than during the time that the transaction for the purchase was carrying on; and, therefore, he must be supposed to have placed his whole confidence in the trustees. (1 Lom. Dig. 303; 2 Stor. Eq. §§ 1131-1134; 3 Sugd. Vend. (6th Am. ed.) 153 & seq. (bottom); Taliaferro v. Minor, 1 Call, 532; Wormley v. Wormley, 8 Wheat. 421; Potter v. Gardner, 12 Wheat. 498; Hughes v. Tabb, 78 Va. 325 & seq.; Balfour v. Welland, 16 Ves. 156.)

3<sup>k</sup>. Trusts Expected to be of *Long Continuance*; *e. g.*, for *Infants yet Unborn*.

This case is like the preceding. The settler or testator must have intended to confer upon the trustees the power to give final acquittances, for otherwise, as few purchasers would be willing to take such an obligation upon themselves, it would tend to depreciate the subject-matter. (1 Lom. Dig. 304; Broadus v. Rosson & als. 3 Leigh, 28; 2 Stor. Eq. §§ 1133-'4.)

But even in these cases of *undefined trusts*, a breach of trust by the trustee, *actually or constructively known* to the purchaser, will charge him, if he, in any manner, co-operates therein. (1 Lom. Dig. 306; Wormley v. Wormley, 1 Brock. 330; S. C. 8 Wheat. 421; Broadus v. Rosson & als. 3 Leigh, 12.)

2<sup>g</sup>. Trusts Contrasted with *Powers to Sell*, as to the Responsibility of the Purchaser.

In case of a mere power to sell, the purchaser must, at his peril, ascertain if the case contemplated by the power exists. (1 Lom. Dig. 306.)

3<sup>g</sup>. The Sale by the Trustee of too much of the Trust-Subject.

This does not compromise an *innocent purchaser* for value. (1 Lom. Dig. 306.)

4<sup>g</sup>. Collusion of Purchaser with Trustee in the Breach of Trust.

If the land be sold so as manifestly to defeat or evade the trust, and the purchaser *colludes in the design*, he is himself a trustee, and becomes chargeable for the proper application of the money. (1 Lom. Dig. 308; Hill Trustees (4th Am. ed.) 506, 510, 164-'5; Garnett v. Macon, 6 Call, 308; Potter v. Gardner, 12 Wheat. 499; Duncan v. Jaudon, 15 Wal. 175.)

5<sup>g</sup>. Purchasers of Leaseholds, and *other Chattels*, from *Executors*, etc.

The chattel property is a fund in the hands of the personal representative to pay *all debts*, and, therefore, the purchaser of such property, because of the indefiniteness of the trust, is never liable for the application of the purchase-money thereof, unless he is guilty of collusion with the fiduciary in a fraudulent breach of trust. (1 Lom. Dig. 313; Elliott v. Merryman, 1 Wh. & Tud. 58, 62 & seq.)

5<sup>f</sup>. Doctrine Touching *Joint Action* of Several Trustees; w. c.

1<sup>g</sup>. Joint Sale and Conveyance.

It is a fundamental principle that joint trustees have *all equal power, interest and authority*, and cannot act separately, but must *all join*, both in conveyance and in receipts. (1 Lom. Dig. 311; 2 Stor. Eq. § 1280; Hill Trustees (4th Am. ed.) 305 & 307; Miller v. Holcombe's Ex'or, &c., 9 Grat. 672.)

2<sup>g</sup>. Joint Receipts for the Purchase-Money.

But where one trustee only receives and controls the money, without involving *culpable negligence* on the part of another, the mere fact of having *formally united* in the receipt does not subject the latter to liability. The doctrine as to receipts of co-executors depends on the same *general principle*, but varied somewhat in its application, because co-executors are not *obliged to join*, and the fact of their joining is therefore stronger *prima facie evidence* that the money was received by them jointly. (Townley v. Sherborne, Bridgm. Rep. 35; Brice v. Stokes, 11 Ves. 319; 2 Wh. & Tud. L. Cas. (Pt. II.), 281 & seq.; 304, 397-'8; Graham v. Austin, 2 Grat. 273; Boyd v. Boyd, 3 Grat. 114; Griffin's Ex'or v. Macaulay's Adm'r, 7 Grat. 476; Miller v. Holcombe's Ex'or, 9 Grat. 665; Hill Trustees (4th Am. ed.) 312-'13; 2 Stor. Eq. § 1280; 1 Lom. Dig. 311.)

6<sup>f</sup>. Trustees are not to Employ the Trust for their *Private Advantage*, but all Profit is to Redound to the Advantage of the Trust.

Hence, if the trustee compounds a debt due from the trust fund, or buys it for less than its nominal amount, the benefit accrues not to himself personally, but to the fund. And whenever the trustee is chargeable with such

an accession, he is also chargeable with *interest thereon*; just as, whenever he is liable for any loss sustained by the trust-subject, he must in general account for interest on the amount. This interest is the legal rate, in Virginia, of six per cent., and in general it is *simple* interest. Compound interest, however, is allowed in cases of *gross delinquency*, as where the trustee has violated the express directions of a will, or where he *will not disclose* the profits he has made by his use of the trust funds. It has sometimes been said that where the profit omitted to be made by the trustee, or the losses incurred by him, consist of *conjectural* elements, such as rents and hires not realized, no interest is to be allowed thereon; but that doctrine, if it ever truly prevailed, is overruled, and interest is to be charged even on such *estimated profits*, whenever it was the *duty of the trustee* to have made them. (1 Lom. Dig. 316-17; V. C. 1873, ch. 132, § 6; V. C. 1887, ch. 125, § 2765; 2 Stor. Eq. §§ 1277, 1261; Robinson v. Pett, 2 Wh. & Tud. L. Cas. (Pt. I.), 347-8; Fonbl. Eq. 474, &c. (B. II., c. vii., § 6), n's (p) & \*; Miller v. Holcombe's Ex'or, &c. 9 Grat. 665; Munday v. Vawter, 3 Grat. 518; Rosser v. Depriest, 5 Grat. 6; Cross v. Cross' Legatees, 4 Grat. 257.)

The obligation of the trustee to pay interest seems to be essentially the same as in case of other debtors. If the debtor and creditor, in time of war, reside on the *same side* of the belligerent lines, the debt bears interest during the war, just as in peace. (Ambler v. Mason, 4 Call, 605; Hawkins v. Minor, 5 Call, 118; Crenshaw v. Seigfried, 24 Grat. 272; Roberts v. Cocke, 28 Grat. 213; Coltrane v. Worrell, 30 Grat. 446.) But when the debtor and creditor are alien-enemies, or on opposite sides of hostile lines, no interest accrues; for war suspends all intercourse between enemies and makes it unlawful for the debtor to pay the debt, and so he is not liable to pay interest during the continuance of the prohibition. (1 Rob. Pr. (1st. ed.) 363, 364; 2 do. 205-6; McCall v. Turner, 1 Call, 139-40; Brewer v. Hastie, 3 Call, 24; Walker v. Beauchler, 27 Grat. 511; Fred v. Dixon, Id. 541; Roberts v. Cocke, 28 Grat. 212; Coltrane v. Worrell, 30 Grat. 446; Hoare v. Allen, 2 Dal. 102; Brown v. Hiatts, 15 Wal. 185.) But where a trustee held in his hands securities for the benefit of the *cestui que trust*, and might and ought to have collected the interest thereon, the debtor being on the same side of the belligerent lines as himself, he was held to account for such interest, although the *cestui que trust* was on the other side of the belligerent line. The trustee is bound to execute the trust for the benefit of the *cestui que trust*, whether the



latter live at home or abroad, or the trust is to be executed in peace or in war; and to that end he may always claim the advice and aid of a court of equity. (Coltrane v Worrell, 30 Grat. 446-'7; *Ante*, pp. 236-'7.)

7<sup>d</sup>. Obligation of Trustee to Indemnify *Cestui Que Trust* for any *Breach of Trust*.

The obligation to re-imburse the *cestui que trust* exists alike, whether the loss is occasioned by a direct breach of trust, or by the trustee's neglect, or improper conduct; and it is worthy of notice that the demand against the trustee is in all cases a *simple contract debt*, unless he makes it otherwise by an acknowledgment under *his seal*. (1 Lom. Dig. 317; 2 Stor. Eq. §§ 1268, 1285, &c.; Fonbl. Eq. 458 & seq. (B. II., c. vii., § 1), n's (a) & (b).)

Hence, if the trustee sell the property to an *innocent purchaser*, for value; or if he only *conceal the misconduct* of his co-trustee, equity (where alone the *cestui que trust's* rights are in general protected) will constrain him to compensate the *cestui que trust* for the loss thereby incurred. (1 Lom. Dig. 317; Townley v. Sherborne, &c. 2 Wh. & Tud. L. Cas. (Pt. II.), 292 & seq.)

A trustee, however, is only answerable for actual or constructive negligence, or for wilful misconduct, so that he is not responsible for losses not occasioned by his own wrong or default. It would seem, therefore, that a clause sometimes inserted in deeds, creating trusts, exempting the trustee from liability for any loss or damage which does not arise from his default, is superfluous; and certainly he would be answerable for damage growing out of his misconduct, even if there were an express stipulation to the contrary. (1 Lom. Dig. 317; Townley v. Sherborne, &c. 2 Wh. & Tud. L. Cas. (Pt. II.), 304 & seq.; Taylor v. Barham, 5 How. 233.)

It may be observed also, that in the payment of a decedent's debts, it is directed by statute, that the assets applicable to debts shall be applied, *first*, to claims of physicians, not exceeding \$50, for services rendered the deceased during *his last illness*, and of druggists, not exceeding \$50, for articles furnished during the same period; *secondly*, to debts due to the United States; *thirdly*, to taxes and levies assessed upon the decedent previous to his death; *fourthly*, to debts due from him as personal representative, *trustee* for persons *under disabilities*, guardian, etc., etc.; *fifthly*, to all other demands except those in the next class; and *sixthly*, to voluntary obligations. (V. C. 1873, ch. 126, § 25; V. C. 1887, ch. 119, § 2660.) The trustee contemplated is only an *express* trustee, and not one charged by construction or implication of law. (Brown v. Lambert, 33 Grat. 256.)

But if a trustee *de facto*, although acting without authority, at the time, yet if afterwards he receive authority, he is within the purview of the statute. (S. C.; see *Price v. Harrison*, 31 Grat. 114.)

8<sup>f</sup>. Allowances to Trustees; w. c.

1<sup>g</sup>. Doctrine in England; w. c.

1<sup>h</sup>. Allowance of Expenses of Trustee.

Wherever a trustee's conduct has been unobjectionable, his reasonable expenses actually incurred, will be allowed. (1 Lom. Dig. 318; *Robinson v. Pett*, 2 Wh. & Tud. (Pt. I.), 351; Fonbl. Eq. 465, (B. II., c. vii., § 3) & n. (e); 2 Perry, Trusts (4th ed.), §§ 910 & seq.)

2<sup>h</sup>. Allowance of Compensation.

The established rule in England is to allow a trustee *no remuneration* for his personal trouble, unless in pursuance of *fair stipulation*. Trusts, says Lord Hardwicke, (in *Ayliffe v. Murray*, 2 Atk. 60), are looked upon "as honorary, and a burden upon the honor and conscience of the person entrusted, and not undertaken upon mercenary views; and there is a strong reason, too, against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a *cestui que trust*." (1 Lom. Dig. 317, &c.; *Robinson v. Pett*, 2 Wh. & Tud. L. Cas. (Pt. I.), 351; Fonbl. Eq. 464, &c. (B. II., c. vii., § 3), & n's (e) & \*; 1 Perry, Trusts (4th ed.), § 432; 2 Do. 916 & seq.)

2<sup>g</sup>. Doctrine in Virginia Touching Allowances to Trustees; w. c.

1<sup>h</sup>. Allowance of Expenses to Trustee.

The doctrine is the same as in England. (1 Lom. Dig. 318; *Supra*, 1<sup>h</sup>.)

2<sup>h</sup>. Allowance of Compensation.

A *reasonable compensation* is with us allowed a trustee for his personal trouble, upon the scriptural and common-sense principle that "the laborer is worthy of his hire," it being supposed that amongst us, however it may be in England, a diligent and faithful performance of duty on the part of trustees is more likely to be induced by giving a fair remuneration, than by making the function merely honorary. (1 Lom. Dig. 318; 2 Stor. Eq. § 1268; *Robinson v. Pett*, 2 Wh. & Tud. L. Cas. (Pt. I.) 353 & seq.; *Lomax v. Pendleton*, 3 Call. 358; *Beverley v. Miller*, 6 Munf. 99; *Boyd v. Boyd*, 3 Grat. 115; *Jones v. Lackland*, 2 Grat. 87; *Smith v. Wash. Va. Midl. & Great S. R. R. Co.* 33 Grat. 617; V. C. 1873, ch. 113, § 6; V. C. 1887, ch. 108, § 2442; 2 Perry, Trusts (4th ed.), §§ 916 & seq.)

9<sup>f</sup>. Trustee to be Indemnified by *Cestui Que Trust*.

Whatever loss or damage may result to the trustee in

the proper execution of the trust, the *cestui que trust* must indemnify him for, and therefore the trustee is entitled to be re-imbursed for all moneys honestly laid out with due discretion for the purpose of accomplishing the objects of the trust. (1 Lom. Dig. 318-'19.)

#### 10<sup>f</sup>. Purchase of Trust-Subject by Trustee; w. c.

##### 1<sup>g</sup>. The General Doctrine.

As a general principle, it is well settled that trustees, agents, auctioneers, and all persons acting in a *confidential character*, are disqualified from purchasing the subject committed to them. The functions of *buyer and seller* are incompatible, and cannot be exercised by the same person, without great danger of fraud. Such transactions are *constructively fraudulent*, and are therefore *voidable*, at the *instance of the beneficiary*, although, if he chooses to recognize them, they are binding upon the trustee, etc. (2 Rob. Pr. (1st ed.) 85; 1 Lom. Dig. 319 & seq.; Id. 325; Carter v. Harris, 4 Rand. 204; Segar v. Edwards, 11 Leigh, 213; Buckles v. Lafferty, 2 Rob. 300, 302, Reporter's note; Bailey's Adm'x v. Robinsons, 1 Grat. 4, 9, 10; Howery v. Helms & als. 20 Grat. 1, 7, &c.; Marsh v. Whitmore, 21 Wal. 183 '4; Fox v. Mackreth, 1 Wh. & Tud. 105, 126 & seq.; 1 Perry, Trusts (4th ed.) §§ 194 & seq.)

##### 2<sup>g</sup>. Qualifications of the General Doctrine.

It is admitted that a trustee can legally purchase the trust-subject of a *cestui que trust*, who is *sui juris*, and has *discharged him* from the relation of trustee, although, even then the transaction will be scrutinized with guarded jealousy. So, in like manner, he may purchase when he has, from the beginning, *disclaimed the trust*, and never acted in it. And, finally, a trustee may buy the trust-subject by *leave of the court of equity*. (Fox v. Mackreth, 1 Wh. & Tud. L. Cas. 128-'9; 1 Lom. Dig. 325; 2 Pom. Eq. §§ 956 & seq., 1075.)

##### 3<sup>g</sup>. Measure of Relief to be Afforded to *Cestui Que Trust*.

The *cestui que trust*, if he wishes it, can insist upon a *re-conveyance* of the estate from the trustee who purchased it, if it still remains in his hands, or from one who has purchased from him with notice; but it can be only on condition of the *cestui que trust* repaying the purchase-money with interest, together with the sums expended in repairs and permanent improvements, the purchaser accounting for any deterioration proceeding from his acts, also for rents and profits. (1 Lom Dig. 326; Fox v. Mackreth, 1 Wh. & Tud. L. Case. 135.)

If, however, the *cestui que trust* does not desire a reconveyance, he is entitled to have the property *re-sold at public auction*. For that purpose it is, generally, to

be offered at what is called an *up-set* price, ascertained thus: The purchaser is to be debited with the price to be paid for the land and with the profits since his purchase, and to be credited by his payments, with interest thereon, together with his permanent improvements, and the balance, with reasonable commissions and charges of re-sale, is the *up-set price*, at which the land is to be *set up* on a credit of six, twelve, and eighteen months. If it brings *no more* than the up-set price, the sale is confirmed. Otherwise, the sale to the trustee is vacated, and the proceeds of the new sale are applied, after paying the charges thereof, to reimburse the first purchaser the balance due him, and the residue is paid to the *cestui que trust*. (Buckles v. Lafferty, 2 Rob. 294; Bailey's Adm'x v. Robinsons, 1 Grat. 4, 9; Howery v. Helms, 20 Grat. 1, 7; 1 Lom. Dig. 322 & seq.; Fox v. Mackreth, 1 Wh. & Tud. L. Cas. 135.)

#### 4<sup>g</sup>. Confirmation of Purchase by *Cestui Que Trust*.

The equity of the *cestui que trust* is to have the option of confirming the purchase, and holding the trustee to it, or of setting it aside, and having the property resold. If he confirms it deliberately, with full knowledge of the circumstances, and of the effect of his conduct, neither he nor any one claiming under him can afterwards object to it. Nor can a stranger, at any time, object. (1 Lom. Dig. 325 '6; Marsh v. Whitmore, 21 Wal. 183-'4.)

#### 11<sup>f</sup>. Disclaimer of Trust by the Trustee.

If the trustee does not design to act, he ought, in due form, to *disclaim* the legal title vested in him. If it be a trust of freehold or inheritance, or for a term exceeding five years, the *disclaimer* must be *by deed*, in pursuance of the statute of conveyances. (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.)

#### 12<sup>f</sup>. Failure of Trustee, by Death, Removal, or Otherwise: W. C.

##### 1<sup>g</sup>. The General Doctrine of Equity.

That a trust shall never fail in equity *for want of a trustee*, and therefore equity will supply a trustee whenever the needs of the trust require it. (1 Lom. Dig. 327-'8; 1 Stor. Eq. §§ 1287, 1059.)

##### 2<sup>g</sup>. Statutory Provisions in Virginia.

These provisions are applicable in the several cases of the *death* of a sole trustee, or of one or all of several trustees, or of his or their *removal from the State, declining to accept* the trust, or, after accepting, *resigning* it. (V. C. 1873, ch. 174, § 8; V. C. 1887, ch. 167, § 3419.)

W. C.

##### 1<sup>h</sup>. A New Trustee may be Appointed in any *Suit in Equity*.



If it appears that the trustee *has died*, although his heirs be not parties to the suit, yet, if his personal representative and the other persons interested be parties, the court may appoint another trustee in place of him who has died, to act either alone, or in conjunction with any surviving trustee, as the case may require; all of which is a mere affirmation of the pre-existing law. (V. C. 1873, ch. 174, § 8; V. C. 1887, ch. 167, § 3419; *Dunscomb v. Dunscomb*, 2 H. & M. 11, 12; *Pate v. McClure*, 4 Rand. 174; *Nichols v. Campbell*, 10 Grat. 560.)

As a general rule the jurisdiction of a court of equity to appoint new trustees can only be called into exercise by means of a bill filed by and against all *proper parties*, and praying for the desired relief; the proper parties being all persons who are beneficially interested in the administration of the trust. (Hill, Trustees, 309, 310; *In re Smyth*, 2 DeGex & Smith, 781. See *Hawley v. Ross*, 7 Pai. (N. Y.) 103; *Hunter v. Gibson*, 16 Sim. (39 Eng. Ch.) 158; *Marshall v. Sladden*, 7 Hare, (27 Eng. Ch.) 428.) There is, however, a relaxation of this general rule, in what is known as the principle of *virtual representation*, where the substantial interests of remoter parties are represented by persons who have similar and more immediate interests, the object being to limit the number of parties as far as is consistent with a due protection of all. Thus, a single creditor may file a bill against the personal representative for the settlement of a decedent's estate, in behalf of himself and such other creditors as may choose to join in the suit, and the decree will be binding upon all the creditors. So one of several *legatees* may proceed in like manner, in behalf of himself and such others as may unite with him, the decree having a like effect; unless, indeed, they are *residuary legatees*, in which case a general legatee, not having the same interest, cannot give the requisite protection to the residuary bequests, and therefore the residuary legatees must be all before the court. (*Wiser v. Blackly*, 1 Johns. C. (N. Y.) 438; *Brown v. Ricketts*, 3 Johns. C. 554 & seq.; *Davour v. Fanning*, 4 Johns. C. 202; *Newland v. Champion*, 1 Ves. Sen. 106; *Peacock v. Monk*, Id. 131; *Cockburn v. Thompson*, 16 Ves. 327, 328; *Osborne v. Taylor*, 12 Grat. 133.)

Upon this principle of *virtual representation*, it is in general not necessary to make parties of persons entitled to any limitation coming *after the first estate of inheritance*, and yet such parties are *bound by the decree*. (*Baylor v. De Jarnette*, 13 Grat. 166 & seq.;

Reynoldson v. Perkins, 2 Ambl. 564; Lloyd v. Learning, 6 Ves. 773 a, and Mr. Sumner's note, in; Lloyd v. Holmes, 9 Ves. 37, 56; Cockburn v. Thompson, 16 Ves. 321, 326, 330, and Mr. Sumner's note; Giffard v. Hort, 1 Sch. & Lefroy, 407-8; Stor. Eq. Pl. § 145 & seq.) And where all the parties are brought before the court, that it is possible to bring, that is, all then *in being*, persons who afterwards come into being *will be heard*, although the representative party be only *tenant for life*. (Baylor v. De Jarnette, 13 Grat. 166 & seq.; Leonard v. Id. Sussex, 2 Vern. 527; Allen v. Papworth, 1 Ves. Sr. 163; Finch v. Finch, 2 Ves. Sr. 491; Giffard v. Hort, 1 Sch. & Lefroy, 407-8; Gaskell v. Gaskell, 6 Sim. (9 Eng. Ch.) 643.) But it is neither necessary nor proper to make those persons parties, even though they be in life, who are entitled only to future, uncertain and contingent interests. (Pelham v. Gregory, 1 Eden, 518; Devonshar v. Newenham, 2 Sch. & Lefroy, 209 & seq.; Baylor v. De Jarnette, 13 Grat. 169-70.)

Lastly, upon this point of *proper parties*, it is to be observed that this principle of *virtual representation* is held not to apply where the person seised immediately of the inheritance is liable to have that seisin *defeated* by a shifting use, or a conditional limitation, or an executory devise; for in such cases the interests of the persons entitled by virtue of those future limitations, are not sufficiently identical with that of the tenant of the first estate of inheritance to be represented by him; but the persons entitled to such future interests, if they are *in being*, must be made parties. (Stor. Eq. Pl. § 147; 4 Min. Inst. 1149-50; Goodless v. Williams, 3 Yo. & Col. Ch. (21 Eng. Ch.) 595; Sherritt v. Birch, 3 Bro. C. C. 228.)

2<sup>b</sup>. A New Trustee may be Appointed by the *Circuit, County or Corporation Court* of any County or Corporation in which the *Deed of Trust, Will, or other Writing Creating the Trust is Recorded*.

When a trustee, or if there are several, all of the trustees, in any deed of trust, will, or writing, creating the trust, shall have died, or removed beyond the limits of the State, or shall decline to accept the trust, or with the assent of the court shall resign it, any person interested may apply, *by motion*, to either of the courts above-named, which may appoint a trustee, or trustees, in place of those named in the deed, &c., and the trustee or trustees so substituted shall have the rights, powers, duties, and responsibilities of the trustee named in the deed. The motion shall be after reason-

able notice to all persons interested in the execution of such trust other than the plaintiff in such motion. But this provision does not apply to any case provided for by section 1423, touching trusts for literary and educational purposes. (V. C. 1873, ch. 174, § 8; V. C. 1873, ch. 163; §§ 1, 2, 4; V. C. 1887, ch. 167, § 3419; Id. ch. 156, §§ 3207, 3208. *Hughes v. Caldwell*, 11 Leigh, 349; Wash. Alex. & G. T. R. R. Co. v. Alex. & Wash. R. R. Co. 19 Grat. 592.)

3<sup>h</sup>. The *Personal Representative* of a Sole or Surviving Trustee shall Execute the Trust.

Such personal representative shall execute the trust, or so much as remains unexecuted (whether the trust-subject be *real or personal* estate), unless the instrument creating the trust *otherwise direct, or some other trustee be appointed* for the purpose, by a *court of chancery* having jurisdiction. (V. C. 1873, ch. 174, § 9; *Hughes v. Caldwell*, 11 Leigh, 349.) This provision, allowing the trustee's personal representative to execute the trust, is omitted in the Code of 1887.

13<sup>f</sup>. *Recommendatory or Precatory Trusts.*

These arise by implication, or construction of the court of equity, from mere words of recommendation, hope, or entreaty, contained in wills, being founded on that cardinal rule in the construction of wills, that the testator's intent, when ascertained, is to be carried out, by whatever words conveyed. Thus, if the testator recommends, or requests, or expresses a hope, or declares that he has no doubt that such and such a disposition of his estate, or any part of it, will be made, if the *objects contemplated*, and the *subjects given* are *certain*, the words are considered *imperative*, and create a trust, unless it *clearly* appears that his expressed recommendation, etc., is to be *controlled* by the party expected to carry it into effect, and that he has an *option to defeat it*. Hence, if it be the intent that the person to whom the property is given shall take it, *not beneficially*, but only to carry into effect the expressed wish or recommendation, even if the object fails; or is contrary to the policy of the law; or is too vaguely worded to be carried into execution; yet the necessary legal consequence is that there is a *resulting trust* for the testator's next of kin. (2 Stor. Eq. §§ 1068 & seq.; 1 Perry, Trusts (4th ed.) §§ 112 & seq.; 2 Lom. Ex'ors. 17 & seq.; 2 Rop. Leg. 1417 & seq.; *Harrison v. Harrison's Adm'x*, 2 Grat. 14.)

There has been considerable fluctuation of judicial opinion of late years as to the doctrine of implying a trust from words of recommendation, entreaty, hope, etc., (Hill, Trustees (4th Am. ed.) 110 & seq., 112, n. 2). Ac-

cording to Mr. Hill's text, the decided tendency of the modern authorities is to give the words of recommendation, etc., their *natural and ordinary effect*, unless it be *clear* that they are intended to be used in a *preemptory sense*. And the former American editors of the work, Messrs. Troubat and Wharton, express the opinion that such was the drift of the more recent English decisions, and that the result of the American and English adjudications, at the date of their note, was expressed in Ellis, v. Ellis, 15 Ala. 296, that it was the "true rule of interpretation to give such recommendatory expressions their natural and ordinary and familiar sense, and having arrived at the true intention of the testator, to let that intention, if lawful, be the rule of decision in the particular case." (Hill, Trustees, (4th Am. ed.) n. 2, pp. 112, 115.)

Mr. Bispham, the editor of the 4th American edition of the work in question, conceives that the current of the latest English decisions seem rather in favor of construing words of recommendation to create a trust, and submits the following rules as the result:

"1. Precatory words in a will, equally with direct fiduciary expressions, will create a trust. The wish of a testator, like the request of a sovereign, is equivalent to a command.

"2. Discretionary expressions, which leave the application or non-application of the subject of the devise to the objects contemplated by the testator entirely to the *caprice* of the devisee, will prevent a trust from attaching; but a *mere discretion* in regard to the *method* of application of the subject, or the *selection* of the object, will not be inconsistent with a trust.

"3. Precatory words will not be construed to confer an absolute gift on the first taker, merely because of failure or uncertainty in the object or subject of the devise.

"4. But failure or uncertainty will be an element to guide the court in construing words of doubtful significance adversely to a trust." (Hill, Trustees, (4th Am. ed.) 116, n. 2.)

#### 14<sup>f</sup>. Vague and Indefinite Trusts are Void.

In order that a court of equity may carry trusts into effect, they must be *certain and definite* in respect to the *objects* or persons who are to take, and also in respect to the *subject-matter* thereof. Where they are vague and indefinite in either of these particulars, therefore, they are void, and consequently a trust *results* to the donor. A gift of £2,000, to be by the donee distributed amongst those of the *donor's family* whom she should deem the *most deserving*, is void for vagueness of the *persons* or



*object*; and so also is a gift of the residue of the testator's estate to the executors for such uses and purposes as they *shall think fit*. So in case of a bequest of all the residue of the personal estate to the testator's wife, what is *left at her death* to go to his two grand-children, the latter disposition is void for repugnance to the first interest created, and also for the *uncertainty of the property* to which it shall attach, as *what is left* depends on the wife's uncontrolled will, so that the wife takes not for her life only, but in fee-simple. (2 Stor. Eq. §§ 989 a, 1073; May v. Joynes, 20 Grat. 692; Missionary Society v. Calvert, 32 Grat. 363-'4; Post, pp. 933-'4, 1092; 2 Redf. Wills, 408 & seq.; Stubbs v. Sargon, 3 My. & Cr. (14 Eng. Ch.) 513-'14; Stonestreet v. Doyle, 75 Va. 364 & seq.)

A general description of the persons by *classes* may often be as sufficient a designation as to *name them* individually, as "sons," "children," etc., and even "family" and "relations," where the context fixes clearly the particular persons who are to take. (2 Stor. Eq. § 1071; 1 Rop. Leg. 30 & seq.; 2 Lom. Ex'ors, 22 & seq.)

The trusts most frequently obnoxious to the objection of uncertainty and indefiniteness, are those for *charitable* purposes, where it often happens that both the *person*, or beneficiary, and the *object*, or design, are so vaguely described as to render it impossible to give effect satisfactorily to the contemplated disposition of the property. The uncertainty of the beneficiary has in many cases arisen from the fact that the intended object of benefit is an *unincorporated association*, having no legal existence, such as a religious congregation, or other voluntary society. Thus, a trust in favor of "the Baptist Association that for common meets at Philadelphia;" of "needy, poor and respectable widows;" of "the Roman Catholic congregation residing in Richmond;" of "the trade of the town of Alexandria;" are all void, the first three because the *persons* designed to be benefitted are unascertained, and the last because the *purpose and design* are uncertain. (Baptist Assoc'n v. Hart's Ex'ors, 4 Wheat. 1; Gallego's Ex'ors v. Atto. General, 3 Leigh, 450, 461-462; Wheeler v. Smith, 9 How. 80; 2 Lom. Ex'ors, 4 & seq.; Brooke v. Shacklett, 13 Grat. 309-'10; Seaburn v. Seaburn, 15 Grat. 425-'6; Roy's Ex'ors v. Rowzie, 25 Grat. 599.)

A trust which, without an act of the legislature, would be illegal, may by such an act be rendered valid, supposing the creator of the trust, whether by deed or will, to have contemplated the obtaining of such an act, and have limited the time for its enactment, so as not to transcend the period prescribed by law (in order to prevent *per-*

*petuities*), for the taking effect of all future limitations, namely, a life or lives in being, and in some instances the time of gestation, from nine to ten months, and twenty-one years afterwards. (*Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 99; *Lit. Fund v. Dawson*, 10 Leigh, 147; *Lit. Fund v. Dawson's Ex'or*, 1 Rob. 402; *Kimball v. Miller*, 25 Grat. 120 & seq.; *Stonestreet v. Doyle*, 75 Va. 365, 367.)

It would seem that, at common law, somewhat more of uncertainty was tolerated in *charities* than in gifts to individuals; but in that respect the common law was greatly aided by the statute 43 Eliz. c. 4. Indeed, when the cases first above cited were decided, and the doctrine settled in Virginia, it was supposed that the indulgence shown to vague charities *arose mainly, if not wholly*, out of the statute 43 Eliz. (which had been expressly repealed in Virginia in 1792); nor was the general judicial mind of England and America disabused of that impression until the discovery and publication by the record commissioners, of the "proceedings in chancery," as contained in the ancient records deposited in the Tower of London. Many cases occur in these proceedings anterior to 43 Eliz., where uncertain charities were enforced in chancery. It was therefore considered in *Vidal v. Girard's Ex'ors*, 2 How. 196, that by the *common law*, cases of charities, although *general and indefinite*, were familiarly known to and enforced in equity. In Virginia, however, the doctrine stands as already stated, that indefinite charities, like other indefinite dispositions of property, are in general void. (*Wheeler v. Smith*, 9 How. 80; 2 Stor. Eq. § 1154; *Brooke v. Shacklett*, 13 Grat. 309-10 & seq.; *Seaburn v. Seaburn*, 15 Grat. 426; *Roy v. Rowzie*, 25 Grat. 607-'8 & seq. But see *P. Ep. Ed. Soc. v. Churchman*, 80 Va. 718-'19, 765 & seq.)

As to trusts for the use or benefit of a religious congregation, see *V. C.* 1873, ch. 76, §§ 8-12; *V. C.* 1860, ch. 77, §§ 8, &c.; *V. C.* 1887, ch. 64, §§ 1398 to 1406; *Brooke v. Shacklett*, 13 Grat. 309 & seq.; *Hoskinson v. Pusey*, 32 Grat. 431 & seq. *Allen v. Paul*, 24 Grat. 332 & seq.; 1 Min. Insts. 539 & seq.

Trusts for educational purposes (*i. e.*, to create and endow schools not *already in existence*, under a charter of incorporation), which had been previously held void as belonging to the class of indefinite charities, (*Janey's Ex'or v. Latane & als.* 4 Leigh. 327; *Lit. Fund v. Dawson*, 10 Leigh. 147), are now made valid in Virginia by statute, which enacts that every gift, grant, devise, or bequest which, since 2d April, 1839, has been, or there-  
after shall be made for literary purposes, or for the edu-

cation of *white persons*, and every such gift, etc., since 10th April, 1865, for the education of *colored persons*, within the State (other than for the use of a theological seminary), whether made to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, etc. (V. C. 1873, ch. 77, § 2; V. C. 1887, ch. 65, § 1420; *Virginia v. Levy & als.* 23 Grat, 40; *Kelly v. Love*, 20 Grat. 129 & seq.; *Kinnaird v. Miller*, 25 Grat. 113 & seq.; *Roy v. Rowzie*, 25 Grat. 599.)

It will be observed that the statute cited in the last paragraph simply forbears to make valid a gift, grant, devise or bequest to a theological seminary, *as yet unincorporated*. It in no wise affects a disposition of property in favor of such a seminary *already incorporated*, which is as competent as any other corporation to take what may be given to it, whether by deed or will. (*Roy v. Rowzie*, 25 Grat. 607 & seq., 610 & seq.)

The same statute also provides that when such gift, etc., is to the board of the literary fund, or any other corporation, or to any county or natural person, the subject shall be taken and held by them respectively; or if they refuse, by trustees to be appointed by the circuit court of the county, in the manner directed, for the uses prescribed by the donor or testator. (V. C. 1873, ch. 77, §§ 3 to 6; V. C. 1887, ch. 65, §§ 1421 to 1424.)

#### 15<sup>t</sup>. The Local Jurisdiction over Trusts.

The jurisdiction of courts of equity over trusts, as well as other things, is not confined to cases where the *subject-matter* is within the absolute reach of the process of the court. If the *proper parties* can be reached by the court's process, it will be sufficient to justify the assertion of full jurisdiction over the subject. The court acts primarily *in personam*, and only collaterally *in rem*; but the possession of either the person or the subject will, for the most part, enable it to administer complete justice. There are, however, some qualifications to this general doctrine. If the *person* is in the power of the court, any decree may be made which that party can personally perform, *e. g.* to convey land though in another jurisdiction, or to render an account of its profits, etc.; but it is not competent to the court to decree, touching the foreign subject, what can only be done by an authority *operating territorially*, where the subject is, *e. g.*, a partition of lands abroad, as between joint-tenants, or co-heirs. (2 Stor. Eq. §§ 1290 & seq. 1298; *Id.* §§ 743, 744; *Newl. Conts.* 305, ch. xvi.; *Arglesse v. Muschamp*. 1 Vern. 75; *Penn v. Ld. Baltimore*, 1 Ves. Sr. 444; *Massie v. Watts* 6 Cr. 158 & seq.; *Meade v. Merritt*, 2 Paige (N. Y.), 404; *Ward*



v. Arredondo 1 Hopk. ch. (N. Y.), 213; S. C. 14 Am. Dec. 545.)

## 16<sup>f</sup>. The Duty of Trustees; w. c.

### 1<sup>g</sup>. The General Principles of a Trustee's Duty.

A trustee is bound, in general, to do whatever may be necessary and proper for the due execution of the trust; to defend the title at law, and if it be useful and practicable, to give notice of any suit affecting the title to his *cestui que trust*; to prevent waste or injury to the trust property; to keep regular accounts; to obtain, if possible, and to afford the *cestui que trust* accurate information touching the trust-subject; to act with reasonable diligence; in case of a *joint-trust*, to exercise due caution and vigilance touching the approval of and acquiescence in the acts of his co-trustees; and if the instrument creating the trust contains any *special directions*, to observe them with diligence and fidelity, exercising in all things, in respect to his *cestui que trust*, the most transparent good faith. (2 Stor. Eq. §§ 1268, 1275, 1276; Knight v. Earl of Plymouth, 3 Atk. 380; Wilkinson v. Stafford, 1 Ves. Jr. 32; Vigo v. Emery, 5 Ves. 141; Thompson v. Brown, 4 Johns. C. R. (N. Y.) 619, 628; Taylor, &c. v. Benham, 5 How. 233; Davis v. Harman & als. 21 Grat. 200, 201.)

The measure of the diligence and care required of him is said to have some analogy to that required of a *bailee*; that is, if, as in England, his services are gratuitous, he should be liable like a *gratuitous bailee*, only for *gross negligence*, whilst with us, as he is always entitled to a reasonable compensation, he should, according to this rule, be answerable for *ordinary neglect*. These, however, are not, in point of fact, always the limits to his responsibility in equity. But nothing more is, in general, required than that he should act in good faith, and with the same prudence and discretion that a prudent man exercises in his own affairs. If more than this were exacted, it would tend to the disadvantage of persons interested in trusts in general, because it would discourage competent persons from accepting the administration of trusts. (2 Stor. Eq. § 1268; Elliott v. Carter, 9 Grat. 557-8; Davis v. Harman & als. 21 Grat. 200; Myers' Ex'or v. Zetelle, 21 Grat. 751.)

### 2<sup>g</sup>. The Duty of a Trustee in Respect to the Preservation and Care of the Trust Property.

The trustee is to keep the trust property as he *keeps his own*, or rather as a man of *ordinary prudence* keeps his own. If, therefore, it be lost by a violent robbery or otherwise, without his own default or neglect, he is not chargeable. And where he acts by other hands,



either from necessity, or conformably to common usage, he is not answerable for losses, if he exercises due care in selecting his agents. But it is to be observed, that if he places money in the hands of a banker, he should take care to *keep it separate*, and not mix it with his own in a common account, which last would be deemed treating the whole as his own, and would render him liable for any loss sustained by the banker's insolvency. (2 Stor. Eq. §§ 1269, 1270.)

### 3<sup>g</sup>. The Trustee's Duty in Respect to Investments.

The trustee cannot safely invest in any other stocks or subjects than such as the court of equity has sanctioned by the usage of itself investing therein; nor in mere personal securities, however solvent they may appear to be. He must either secure the fund on real estate, or on some other thing of permanent value. Nay, more than this, in cases of personal securities taken by a trustee, he is made responsible for all deficiencies, and is also chargeable for all profits, if any are made. (2 Stor. Eq. §§ 1273-4.) But this doctrine must be applied with some modification in times of political revolution, as during the late civil war. A trustee or agent who acts *within his power*, in good faith, in the exercise of a fair discretion, and in the same manner as he probably would have acted if the subject had been his own, ought not to be held responsible for any loss accruing in the management of the trust-fund. Pre-eminent knowledge and uncommon foresight are not required, but only common skill, common prudence, and common caution. (Myers' Ex'or, v. Zetelle & als. 21 Grat. 751 & seq.) However, like all other fiduciaries, being, by the common law, allowed to demand the advice and instructions of the court of chancery, and being safe in acting under such instructions in whatever concerns his duty touching the trust (a doctrine which applies as well to the case of *investments* of the funds committed to him as in respect to other subjects), a trustee is very ill advised who, in all matters of importance which are attended with the least doubt or intricacy, does not invoke the direction of the court of equity, whereby he is exonerated from all responsibility, supposing that there is no collusion nor bad faith in the transaction. (Whitehead v. Whitehead, 23 Grat. 381; 2 Stor. Eq. §§ 1273 & seq.) But the authority thus to instruct the fiduciary is, at common law, reposed in the *court* in term, and not in the *judge in vacation*; and as the exigencies of the late civil war would not always admit of even a short postponement of such action until the next term of the court; and as, moreover, in some districts of the State

the courts were held irregularly, fiduciaries were in danger of great embarrassments and losses.

The Richmond legislature, therefore, anticipating trouble from cases of this sort, provided for them by act of March 5th, 1863, which, as the law prescribed by the *de facto* government of the commonwealth for the time being, regulates the cases which come properly within its terms as long as that government subsisted—that is, until the 10th of April, 1865. The act provides that “whenever any guardian, curator, committee, or other fiduciary or trustee, may have *in his hands* moneys received *in the due exercise of his trust*, belonging to the estate held by him as fiduciary or trustee, which moneys any such fiduciary or trustee may, from the nature of his trust, or from any cause whatever, *be unable to pay over* to the *cestui que trust*, or parties entitled thereto, it shall be lawful for such fiduciary or trustee to apply, by motion or petition to *any judge* of a circuit court *in vacation* for leave to invest the whole or any portion of such moneys in the interest-bearing bonds or certificates of the Confederate States, or of the State of Virginia, or any other sufficient bonds or securities of or within the said State; and the said judge may, in his discretion, grant such leave; . . . and whenever such investment shall be made, such fiduciary or trustee shall be released from responsibility for the moneys thus invested; but it shall be his duty to preserve the bonds thus taken, and to exercise due diligence in collecting the interest accruing thereon, and in making a proper application thereof, provided that nothing herein contained shall authorize said fiduciary to *change the character of an existing investment*, made under the provisions of this law, until authorized by the *decree of a circuit court* of competent jurisdiction: and provided further, that the provisions of the foregoing section shall not be so construed as to *interfere with the powers now exercised by courts of chancery over the subject.*” (Acts 1862-’3, of Richm. Leg. p. 81, c. 46.)

In order that this act may be applicable, three conditions are indispensable, namely:

(1), The money must be *actually in the hands* of the fiduciary, and not merely *to come to his hands at a future time*.

(2), It must have been received *in the due exercise of his trust*; and,

(3), He must, for some cause, *be unable to pay it over to the party entitled*; and if, in any instance, these three conditions do not concur, the direction of the *judge* affords no protection to the fiduciary.

These principles having been again and again reiterated, must be regarded as now fully established. (Campbell v. Campbell, 22 Grat. 684; Crickard v. Crickard, 25 Grat. 421; Kirby v. Goody Koontz, 26 Grat. 302.)

Investments in Confederate securities, during the war, where the fiduciary was directed or authorized by the instrument creating the trust to sell the lands, or other subject, and to retain the proceeds in his hands, or to loan it until a designated period, constitute a legitimate exercise of the fiduciary's discretion (supposing him to have acted in good faith), and expose him to no liability in consequence of the loss of the fund. (Fugate v. Honaker, 22 Grat. 412-'13.) This is, indeed, nothing more than the application of an old principle, which has long governed trusts of all sorts, namely, that nothing more should be required of a trustee than to act in good faith, and with the same discretion that a prudent man is accustomed to exercise in the management of his own affairs; for to demand more is to discourage the most competent and suitable men from undertaking the office of trustee. (2 Stor. Eq. §§ 1271, 1272; Knight v. Earl of Plymouth, 3 Atk. 480; Wilkinson v. Stafford, 1 Ves. Jr. 32; Vego v. Emery, 5 Ves. 141; Hart v. Ten Eyck, 2 Johns. C. R. (N. Y.) 62; Thompson v. Brown, 4 Johns. C. R. 619. 628-'9; Taylor v. Benham, 5 How. 233; Elliott v. Carter, 9 Grat. 541, 559, 560; Myers v. Zetelle, 21 Grat. 758; Davis v. Harman, 21 Grat. 200 & seq.; Fugate v. Honaker, 22 Grat. 412-'13.) And so, by parity of reason, if property is *properly sold* (as under the directions of the instrument creating the trust, or of a competent court), for Confederate money, it is not wrong in the fiduciary to receive such money. (Staples v. Staples, 24 Grat. 242.)

A fiduciary cannot be justified for receiving any depreciated currency, for a debt or demand *payable in gold*, except under peculiar circumstances, which have been enumerated thus:

- (1), When the *necessities of the trust require it*;
- (2), When it can be used to discharge, at par, lawful demands against the trust;
- (3), When the parties to whom the trust money is payable *consent to receive it*;
- (4), When the security is of *such doubtful availability*, that it is better to take the depreciated currency than the risk of *total loss*; and
- (5), When authority to receive such currency has been conferred by the instrument creating the trust, and the trustee acts in good faith, and with reasonable prudence.

See *Campbell v. Campbell*, 22 Grat. 686; *Moss v. Moorman*, 24 Grat. 97; *Williams v. Skinker*, 25 Grat. 507, 519, 524; *Hannah v. Boyd*, 25 Grat. 701 '2; *Ammon v. Wolf*, 26 Grat. 627; *Coltrane v. Worrell*, 30 Grat. 444; 1 Min. Insts. 478.

If the trustee has occasion to sell the trust property on credit, it is his duty to take security for the price, however wealthy the purchaser may be; and if he omit to do so, and the purchaser becomes insolvent, he is personally responsible for the amount. (*Miller v. Holcombe's Ex'or*, 9 Grat. 665.)

#### 4<sup>g</sup>. The Trustee's Duty in Respect of Sales under Deeds of Trust for Payment of Debts; w. c.

##### 1<sup>h</sup>. The Trustee's Duty Independently of Statute.

In respect to such sales, the trustee is the *agent of both parties*, and is bound, therefore, to disregard the suggestions of either inconsistent with that relation. He must also see to it that *all impediments* to the fair execution of the trust *are removed*, such for instance, as may arise from a *cloud resting on the title*, which must prevent a fair and advantageous sale; from the *uncertainty of the amount to be raised*; or from the *existence of previous incumbrances*. In all cases of this kind it is his duty, as has been seen, before proceeding to sell, to solicit the aid of a court of equity to clear up the title, to ascertain the amount really due, or to remove whatever other impediments exist to the proper execution of the trust; and if he fails to do it, it is the right of the debtor to stay his proceedings by injunction, until these objects can be effected. (*Quarles v. Lacy*, 4 Munf. 251; *Lane v. Tidball*, Gilb. 130; *Gay v. Hancock*, 1 Rand. 72; *Wilkins v. Gordon &c.* 11 Leigh. 547; *Miller v. Trevillian*, 2 Rob. 25; *Rossett v. Fisher*, 11 Grat. 492; *Terry v. Fitzgerald*, 32 Grat. 843, 850 & seq.; 1 Tuck. Com. 105 '6, B. II.)

There are other occasions also, when, independently of statute (and some notwithstanding the statute), the interposition of a court of equity is requisite to give effect to a deed of trust. Thus, where the *trustee dies*, the legal title descends to his heirs, whilst the trust was personal to himself; and the heirs, moreover, may be numerous, dispersed, and laboring under disabilities of infancy, coverture, etc.; and so where the trustee becomes a creditor under the deed of trust, either by the purchase of the debt secured by the deed or by being made the personal representative of the creditor; and lastly, where the trustee refuses to perform the trust; in these, and other like cases, application is to be



made to equity to cause the trust to be executed. (1 Tuck. Com. 106-7.)

2<sup>b</sup>. The Trustee's Duty in respect to Sales under a Deed of Trust *by Statute* in Virginia; w. c.

1<sup>i</sup>. Provision of the Statute touching Sales, etc.

The trustee in a deed of trust, to secure debts or indemnify sureties, unless it is therein otherwise provided, whenever requested by any *cestui que trust*, after the debt secured has become payable and default in the payment has occurred, shall sell the trust property, or *so much thereof as may be necessary*, at public auction for cash, having first given reasonable notice of the time and place of sale; and shall apply the proceeds, first to the payment of expenses attending the execution of the trust, including a commission to the trustee of five per cent. on the first \$300, and two per cent. on the residue *of the proceeds*, and then *pro rata* or in the order of priority, if any, prescribed by the deed), to the payment of the debts secured, etc., and shall pay the surplus, if any, to the grantor, etc. (V. C. 1873, ch. 113, § 6; V. C. 1887, ch. 108, § 2442; *Michie v. Jeffries*, 21 Grat. 347.)

Before this statute, a *reasonable* compensation was in all cases allowed a trustee; and by the general usage, with some judicial sanction, that compensation was fixed, *in general*, at a commission of *five per cent.* on whatever moneys properly came to his hands by virtue of the trust. That allowance was for risk, trouble, and such expenses about the trust as were incurred in the course of the trustee's *own business*; but if he were taken out of that course, he was allowed his *reasonable expenses* besides. And this is understood to be still the rule, except in the case of *trusts for the payment of debts*. (*Miller v. Beverleys*, 4 H. & M. 420; 1 Tuck. Com. 108, B. II; *Ante*, p. 245, 2<sup>b</sup>.)

2<sup>i</sup>. Provisions of the Statute Touching the Filing of an *Account of Sales*, etc., by Trustee.

When a sale is made under any deed of trust, otherwise than under a decree, there shall, within four months after the sale, be returned by the trustee to the *commissioner of accounts* of the court wherein the said deed may have been first recorded, an inventory of the property sold, and an account of the sales, under penalty of the forfeiture of commissions. Every trustee is also required to exhibit a statement of all the money which he has received or become chargeable with, or has disbursed, within a year from the date of the trust, or within any succeeding year, together with the vouch-

ers for the disbursements, before such commissioner of accounts of the court of the county or corporation wherein the instrument creating the trust was first recorded. To omit to render such statement subjects the trustee to a forfeiture of his compensation for the transactions of the period omitted; and it is made the commissioner's duty, upon the informal complaint of any one interested, to compel him to comply with the requirement. (V. C. 1873, ch. 128, §§ 5, 8, 9, 10; V. C. 1887, ch. 121, §§ 2674, 2675, 2678, 2679.)

### 3<sup>c</sup>. Conditions.

Let us take notice of, (1), The nature of conditions; (2), The several sorts of conditions; and (3), Estates on condition, which are securities for money;

W. C.

#### 1<sup>d</sup>. The Nature of Conditions.

A condition is a qualification annexed to any estate, whereby it is to *arise* (in which case it is called a *condition precedent*, *i. e.*, *precedent to the arising* of the estate), or is to be *defeated* (when it is styled a *condition subsequent*, *i. e.*, *subsequent to the arising* of the estate). (2 Th. Co. Lit. 2; Bac. Abr. Conditions; 1 Lom. Dig. 331.)

It must be created and annexed to the estate *at the time* the latter is made, and not afterwards, and is usually contained in the same instrument as that which creates the estate, although it may be contained in a separate instrument, if sealed and delivered at the same time with the principal deed. If contained in a different instrument, however, it is usually, and more properly, denominated a *defeasance*. (2 Th. Co. Lit. 122-3, & n. (P. 3); 2 Bl. Com. 151, n. (2).)

#### 2<sup>d</sup>. The Several Sorts of Conditions.

The several sorts of conditions may be regarded, (1), As they relate to the arising of the estate; and (2), As they are express or implied;

W. C.

#### 1<sup>c</sup>. The Several Sorts of Conditions as they Relate to the *Arising of the Estate*.

In this aspect, conditions are either *precedent* or *subsequent*. These, as we have seen, are *relative terms*, and have relation to the *arising or vesting of the estate*. *Precedent* conditions are such as must happen, or be performed, before the estate can vest; *subsequent* are such by the failure or non-performance of which an estate already vested may be defeated. (2 Bl. Com. 154; 2 Th. Co. Lit. 1, n. (A.), 10, 19, n. (K).)

#### 2<sup>c</sup>. The Several Sorts of Conditions, as *Express* or *Implied*;

W. C.

##### 1<sup>f</sup>. Estates on Condition *Implied*.

These occur in certain instances where the law tacitly *implies* a condition which is not expressed in words. (2 Bl. Com. 152; 2 Th. Co. Lit. 2, 3, 113 & seq.)

The most conspicuous instances of conditions implied are in the cases of, (1), The grant of offices; (2), The grant of franchises; and (3), The grant of particular estates for life or years;

W. C.

### 1<sup>st</sup>. Condition Implied in the Grant of Offices.

The law impliedly annexes to every grant of an office, public or private, that the grantee shall duly execute it, neither abusing nor misusing it, nor yet forbearing to exercise it on proper occasions. (2 Bl. Com. 152-'3; 2 Th. Co. Lit. 114 & seq.)

W. C.

#### 1<sup>h</sup>. Non-User or Neglect of Office.

In public offices which concern the administration of justice, or the commonwealth, *non-user* is of itself a direct and immediate cause of forfeiture, since it cannot but be productive of mischief: but *non-user* of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby, private offices not requiring so regular and unremitted a service. (2 Bl. Com. 153; 1 Th. Co. Lit. 237-'8; Bac. Abr. Offices, (M).)

#### 2<sup>h</sup>. Mis-User, or Abuse.

Thus, if a judge take a bribe, or any public officer make sale of his office, or of the deputation thereof, it is a cause of forfeiture; a doctrine now without exception, although as the law formerly was, an exception was made as to the deputation in the case of the sheriff; but this exception is done away with by the Code of 1887. (2 Bl. Com. 153; 1 Th. Co. Lit. 239; Bac. Abr. Offices, (M.); V. C. 1873, ch. 11, §§ 5, 6; V. C. 1887, ch. 12, § 166.)

Acceptance of any post of trust or emolument under the government of the United States, or receiving in any way from the United States any emolument, (save in two or three excepted cases); acceptance of any incompatible office; and conviction of felony by any court in the United States, also produce a forfeiture of office in Virginia; as does also being in any wise concerned in a duel. (V. C. 1873, ch. 11, §§ 2 to 4; Id. ch. 48, § 12; V. C. 1887, ch. 12, §§ 163 to 166; Id. ch. 44, § 1020; 1 Th. Co. Lit. 239 (K. 1); *Ante*, pp. 33-'4, 1<sup>h</sup>.)

### 2<sup>nd</sup>. Conditions Implied in the Grant of Franchises.

Franchises, which are portions of the prerogative of the commonwealth in the hands of a subject, are granted

on the same implied condition of making a *proper use* of them; and therefore they may be forfeited like offices, either by *abuse* or by *neglect*. (2 Bl. Com. 153; Bac. Abr. Scire Facias (C.) 3; Peter v. Kendal, 6 B. & Cr. (13 E. C. L.) 703.)

3<sup>g</sup>. Conditions Implied in the Grant of *Particular Estates* for Life or Years.

These embrace such acts as are incompatible with the estates, being calculated to prejudice the interests of the owner of the reversion or remainder. These acts are (1), Attempt to convey by *tortious conveyance*, a larger estate than the tenant has a right to convey; (2), Claim by tenant in a *court of record* of a greater estate than he is entitled to; and (3), Disclaimer by the tenant in a *court of record* of holding of his landlord; to which may be added in England, but not with us; (4), The commission by the tenant of *waste*. (2 Bl. Com. 153; *Ante*, pp. 112 & seq.)

It is said by Mr. Fearne, that “*forfeiture* (by breach of these conditions) is one of the regular modes of determination incident to an estate for life (or years), and to which its nature is subject in its original limitation.” (Fearne’s Rem. 16.) And hence a remainder may be limited upon such a determination of an estate for life or years. (Fearne’s Rem. 16, 217, 218, 347; *Ante*, p. 173; Duncomb v. Duncomb, 3 Lev. 437; Hooker v. Hooker, Rep. Temp. Hardwicke, 17.)

W. C.

1<sup>h</sup>. Attempt to Convey by *Tortious Conveyance* (Feoffment with Livery, Fine or Recovery), a Larger Estate than the Tenant has a Right to Convey.

At common law such a *tortious conveyance* converted the reversioner’s or remainderman’s *right of entry*, when the particular estate should come to an end, into a mere *right of action*, and for that reason, as being injurious to the reversioner or remainderman, was esteemed a violation of the *implied* condition annexed to the estate, and so produced a forfeiture, for which the reversioner or remainderman might enter immediately. (2 Bl. Com. 274-’5; *Ante*, p. 112.)

In Virginia it is otherwise. No conveyance can pass more than the grantor has a right to convey, and therefore, since no conveyance can in this particular prejudice the reversioner or remainderman, it is justly concluded that no forfeiture ensues. (V. C. 1873, ch. 112, § 7; V. C. 1887, ch. 107, § 2419; 1 Com. Dig. 458-’9.)

2<sup>h</sup>. Claim by Tenant in a *Court of Record* of a Greater Estate than he is Entitled to; W. C.



- 1<sup>i</sup>. Joining the *Misc* (the General Issue in a Writ of Right), on the *Mere Right*.

No one can properly join the *misc* save those who have a *fee-simple*, so that to do so implies a claim to that highest estate in the law. (3 Th. Co. Lit. 228-9; 2 Do. 208; *Ante*, p. 112, 3<sup>i</sup>.)

- 2<sup>i</sup>. Tenant for Life or Years, Claiming *the Fee*, in a Court of Record, in any Other Way.

*e. g.*, If tenant *for years* do lose in a *præcipe*, and will bring a writ of error for error in the process, which none but tenant of the *freehold* ought to do. (2 Th. Co. Lit. 208, & n. (E); *Ante*, p. 112, 3<sup>i</sup>.)

- 3<sup>h</sup>. Disclaimer by Tenant, in a *Court of Record*, of Holding of his Landlord.

*e. g.*, By taking upon himself, when rent is demanded of him, to deny that he *holds of his lord*. (2 Bl. Com. 275-6; 1 Lom. Dig. 821; *Ante*, p. 112, 2<sup>i</sup>.)

- 4<sup>h</sup>. Committing Waste; *w. c.*

- 1<sup>i</sup>. Doctrine Touching Waste in England.

We have already seen that waste is any permanent injury to the *inheritance*, not wrought by the act of God, or of the public enemy; and that whilst at common law it was punishable by *single damages* only, and that only in those tenants who came to their estates by *act of law* (*e. g.*, tenant in *dower*), it was by the statute of Marlebridge (52 Hen. III., c. 23), made punishable in all tenants *for life or years*, and by the statute of Gloucester (6 Ed. I., c. 5), the punishment was made forfeiture of the *place wasted*, and *treble damages*. (3 Bl. Com. 223 & seq.; *Ante*, p. 112, 4<sup>h</sup>.)

- 2<sup>i</sup>. Doctrine in Virginia Touching Waste.

Waste is now punishable in *all tenants*, by single damages, or if it be "*wanton*," by *treble damages*, but *not in any case by forfeiture of the place wasted*. (V. C. 1873, ch. 133, §§ 1 to 4; V. C. 1887, ch. 126, §§ 2775 to 2778.)

- 2<sup>h</sup>. Estates on Condition *Express*.

In connection with this topic we are to have regard to, (1), The nature of conditions express; (2), Words which create conditions; (3), To what estates conditions may be annexed; (4), The right of entry in consequence of the non-observance of conditions; (5), To what parties a condition extends; (6), The performance of conditions; (7), The effect of conditions; and (8), Relief in equity against forfeitures by breach of condition;

*w. c.*

- 1<sup>h</sup>. The Nature of Conditions *Express*.

An estate on condition expressed in the grant itself, is where an estate is granted either in *fee-simple* or otherwise, with an *express qualification* annexed, where-

by the estate granted shall either commence, be enlarged, (which is essentially the commencement of a *new estate*), or be defeated upon performance or breach of such qualification or condition: instances of which most frequently arising in practice are those contained in *leases for years*, providing for the lessor's re-entry in case of a breach of any of the covenants of the lease, as by non-payment of rent, by failing to repair, by assignment, etc., or in case of the lessee's becoming *bankrupt or insolvent*. (2 Bl. Com. 154, and n. 65; *Duppa v. Mayo*, 1 Wms. Saund. 287 & seq., n. (16) and an.)

A very infelicitous division of express conditions is made, and that by no less an authority than Littleton, into, (1), Conditions *in deed*; and (2), Conditions *in law*. The latter are, in fact, as we shall presently see, not conditions at all, but, more properly, *limitations*, which mark the ultimate duration of the estate. And to these two divisions a third may be properly added, namely, (3), Conditional limitations;

W. C.

#### 1<sup>h</sup>. Conditions *in Deed*.

Conditions *in deed* are created by such words as "on condition," "provided that," "so that," etc., which of themselves may make a condition; and by other less direct phrases, such as "if it happen," and many others, which do not of themselves constitute a condition, without a *clause of re-entry*, or other words of explanation, without which, indeed, the sentence is incomplete. (2 Bl. Com. 151, n. (2); 2 Th. Co. Lit. 4 & seq.) They are either precedent or subsequent;

W. C.

#### 1<sup>1</sup>. Conditions Precedent.

The nature of conditions *precedent* has been explained. It is an invariable principle of the common law, that they *must in all cases be performed* or complied with before the estate can vest. If, therefore, the condition be or become *impossible*, although by the act of God, or of the grantor himself, yet no estate shall arise. And so, if the condition be *illegal*, even though it be complied with, no estate will arise, the law being concerned to offer no encouragement to the violation of its policy. But of this more will be seen hereafter. (2 Th. Co. Lit. 18, 22 '3, and n. N.; 2 Bl. Com. 154.)

There are no precise technical words in wills, nor even in deeds, to make a stipulation a condition precedent or subsequent; neither does it depend on the prior or posterior collocation of the clause. It is to be construed according to the *intention*, as gathered from

the whole instrument. If the thing is to happen before the estate is to vest, it is a condition precedent; if after, it is a condition subsequent. Thus, if an estate be limited to A on condition that he marry Z, the marriage is a *precedent* condition, and till that takes place no estate is vested in A. Or if A grant W land for a term of two years, upon condition that if he pay the lessor within two years \$400, he shall have the fee; this also is a condition *precedent*, and the fee-simple passeth not till the \$400 be paid. On the other hand, if A grant W certain land in fee upon condition that W and his heirs pay yearly therefor a rent of \$100 for ever, that is a condition *subsequent*. The estate vests in W immediately, subject to be defeated if the rent be not paid. (2 Th. Co. Lit. 19, n. (K.), 10, 4; 2 Bl. Com. 154, n. (6).)

In the case secondly above mentioned, illustrative of a condition precedent, an existing estate is to be *enlarged*, upon the happening of the condition. This does not essentially differ from an ordinary condition precedent; but four incidents, and by some writers five, are mentioned as required to concur, in order that the enlargement may take effect, for which see 2 Th. Co. Lit. 18, n. (I.); 2 Bl. Com. 152, n. (3); Fearne Cont. Rem. 420, 422. These incidents are as follows, viz.: (1), There must be a *particular estate* as a foundation for the *increase*; (2), The particular estate must continue in the *grantee*, until the *increase happens*; (3), The increase must take effect immediately *upon the performance of the condition*; (4), The particular estate and the increase must derive their effect *from the same instrument*; and (5), The condition on which the increase is to take effect must be *possible and lawful*.

## 2<sup>d</sup>. Conditions Subsequent.

It has been said that a condition *subsequent* is one which is to be performed or fulfilled *after the vesting* of the estate, and the intent of which is to *defeat it*. Thus, if A leases land to W for twenty years, on condition (or "*provided that*" or "*so that,*" etc.) that W pay an annual rent of £100 during the term, this is a condition subsequent to the vesting of W's estate, and if it be not observed, will go to defeat it. It should be observed that, because the effect of conditions subsequent is to *defeat estates*, they are to be construed *strictly*, whilst conditions precedent, which are to *create estates*, are to receive a liberal construction; and if performed *substantially*, and as near to the intent as possible, it will be sufficient. (2 Th. Co. Lit. 1, n. (A.), 4, 5, 59, 58; 1 Lom. Dig. 343-4.)

The reason thus assigned by the text-writers for this diversity in the construction of conditions *precedent* and *subsequent*, respectively, is not satisfactory; and it has been suggested that a better reason is the general principle of construction that the words of the *grantor* are always to be construed *most favorably to the grantee*.  
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### 1<sup>k</sup>. The Re-entry of the Grantor, or his Heirs.

The mere occurrence of the event which constitutes the condition does not, at *common law*, of itself, defeat the estate, supposing it to be a *freehold*, because as a freehold can at common law only be created by the *notoriety of livery of seisin*, there is needed a *corresponding notoriety* in order to determine it. This corresponding notoriety is the *re-entry* of the grantor, or his heirs, supposing the grant to be a private one; but when the grant is a public grant, it is by a judicial inquiry, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the legal consequence. (U. S. v. Repentigny, 5 Wal. 267-'8; Schulenberg v. Harriman, 21 Wal. 63.) If the estate be only *for years* it is otherwise. No entry (unless it be stipulated) is necessary to determine it, for as a term for years may begin without ceremony, so it may end without ceremony. (2 Bl. Com. 155; 2 Th. Co. Lit. 3, 4, 87-'8, 95 to 97; Duppa v. Mayo, 1 Wms. Saund. 287 d, n. (16); Pennant's Case, 3 Co. 65 a; Lampet's Case, 10 Co. 48 b; 1 Lom. Dig. 338; Schulenberg v. Harriman, 21 Wal. 63.)

### 2<sup>k</sup>. Manner in which the Grantor or his Heirs are Seised when they *have Re-entered*.

The grantor or his heirs, when they have re-entered, are seised just as they were *before the grant*. "He that entereth for a condition broken," says Lord Coke, "shall be *seised of that estate which he had at the time of the estate made upon condition*." And although in respect of impossibility, and of necessity, and as to some collateral qualities, there are occasional extraordinary exceptions to this principle, yet such, notwithstanding, is the *general doctrine*, and practically the well nigh universal law. (2 Th. Co. Lit. 97-'8, 99, n. (W. 2), 768, Butler's Note, H.; Bac. Abr. Conditions, (O.) 4.)

Let it be observed, however, that this principle, that the grantor or his heirs, upon re-entry, are seised as of the estate which they had at the time of the grant, is applicable only in the case of conditions *express*. In the case of conditions *implied*, the grantor,



upon re-entry, claims *under the grantee*, and not paramount to his title, and therefore he is subject to all the grantee's charges and incumbrances. (1 Th. Co. Lit. 469; 2 Do. 117; *Ante*, pp. 55, 131, 172, 263.)

- 3<sup>k</sup>. Effect at *Common Law* of the Re-entry of the Grantor, or his Heirs, in Respect of any *Subsequent Estate* Limited to take Effect in Default of Observance of the Condition.

The re-entry destroys as well the subsequent limitation as it does the immediate estate on which the entry is made, for else the grantor or his heirs, who thus re-enter, could not be *seised as before the grant*. Hence, there was no device at common law whereby an estate of *freehold*, once vested, could be *defeated*, that is, determined before its regular expiration, and the land be passed to a stranger. For, as a remainder, the limitation to the stranger was void, being in derogation of the preceding estate; and, as a consequence of the condition, it was void, because no one but the grantor or his heirs could enter for the condition broken; and that entry unavoidably defeated the subsequent limitation, as well as the preceding estate. (2 Th. Co. Lit. 99, n. (W, 2), 768, Butler's Note, II.) But here again is to be noted the distinction just adverted to between conditions *express* and conditions *implied*. Upon the basis of that distinction, it seems a remainder may be limited to take effect upon the determination of the preceding particular estate by the latter class of conditions. (*Ante*, pp. 171, 263.)

- 2<sup>h</sup>. Conditions *in Law*, or Limitations.

By conditions *in law*, in the ordinary use of language, would be meant conditions *implied by the law*, which have already been treated of (*Ante*, p. 257-'8, 1<sup>f</sup>). The conditions in the cases there mentioned are naturally and properly said to be implied, or tacitly annexed to the estates to which they belong; but in the instance now under consideration, no condition can, without some violence, be considered as implied or tacitly annexed, and it tends to confusion of thought to treat it as a condition at all. The case contemplated is where an estate is limited to one *until* a certain event happens; or *whilst* a certain state of things continues; or *during* an indeterminate period. Hence, although it is Littleton who denominates it a *condition in law*, it is deemed a more correct designation to style it a *limitation*, for which there is much sanction of authority. (2 Bl. Com. 155; 2 Th. Co. Lit. 87, n. (L. 2), 120 & seq.)

*Limitations* are created by such words as "*dum*," "*dummodo*," "*quousque*," "*quamdiu*," "*dumtaxat*," "*durante*," "*usque ad*," "*tamdiu*," etc. Thus a grant to A until (*quousque*) Z returns from abroad.—to a woman, *dum sola et casta viveret*,—to W, *quamdiu* = *boni gesserit*,—to X, *durante viduitate*,—to Y, *dummodo solveret talem redditum*; all these are *limitations*. (2 Bl. Com. 155 '6; 2 Th. Co. Lit. 121, 87, n. (L. 2).)

Limitations differ from conditions in this: A limitation marks the *almost time of continuance* of an estate, a condition marks some event, which, if it happens in the course of that time, is to *defeat the estate*. Thus, in case of a grant to Z *until* W is married, the estate may endure until that event, but no longer; and then it terminates of itself, without any entry on the part of the grantor or his heirs; and the words appointing this to be the time of continuance are called *the limitation*, from their ascertaining the boundary of the estate. But if the grant were to Z for life, *provided that*, if W married, Z's estate should cease, Z's *freehold* is not prematurely determined before his death by the mere occurrence of W's marriage; but there must be, as we have seen, also an entry by the grantor or his heirs, in order to defeat Z's estate. It is manifest, therefore, that whilst there can be no limitation over in the last case of the *condition*, in the case of the *limitation*, a remainder may be limited to take effect after the first estate comes to an end. That is, a grant to Z *until* W is married, with remainder to R, is good; but a grant to Z for life, *provided that*, if W marry, Z's estate shall cease and be void, and then remainder to R, is of none effect in respect of R's remainder, which will be defeated by the entry of the grantor or his heirs, in order to determine Z's estate. (2 Th. Co. Lit. 87, n. (L. 2).)

### 3<sup>d</sup>. Conditional Limitations.

A conditional limitation is a future estate of freehold to take effect upon the happening or not happening of a condition or contingency, and can arise only by a conveyance under the statutes of Wills, of Uses or of Grants, whereby *actual livery of seisin is dispensed with*. (Ferne Remainders, 353, n. (a).)

Such limitation partakes of the nature both of an estate on condition and a remainder, the first estate even though an estate of freehold, being liable to determine, without entry by the grantor or his heirs, upon the happening or not happening of the event indicated, and the subsequent estate taking its place, *i. e.*, a *derive*, or *grant*, etc., to A and his heirs, but if A die without having married W, then to Z in fee. (2 Bl.

Com. 155; 2 Th. Co. Lit. 87, n. (L. 2), 768, Butler's Note, II.);

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- 1<sup>i</sup>. By what Class of Conveyances Conditional Limitations are Created.

Conditional limitations could not exist at common law. They arise only out of certain conveyances owing their existence to statutes, the effect of which is to dispense with *livery of seisin*. These conveyances are those growing out of the statutes of wills, of uses, and of grants. (8 & 9 Vict. c. 106; 2 Th. Co. Lit. 768, Butler's Note, II.; V. C. 1873, ch. 118, § 2; Id. ch. 112, § 14; Id. ch. 112, § 4; V. C. 1887, ch. 112, § 2572; Id. ch. 107, §§ 2426, 2417.)

- 2<sup>i</sup>. Reasons why Conditional Limitations are not Good at Common Law, and why they are Valid under the Statutes Named; W. C.

- 1<sup>k</sup>. Reasons why the Subsequent Estate, Limited to Take Effect in Default of Observance of the Condition, is Void at Common Law.

It has already been stated (*ante*, p. 268, 3<sup>k</sup>), that the reason is because, at common law, in order to give effect to the condition, the grantor, or his heirs, *must re-enter*, and thus being restored to his or their *original estate and seisin*, will avoid as much the subsequent limitation as the immediate estate. (2 Th. Co. Lit. 97, 99, n. (W. 2), 768, Butler's Note, II.)

Thus, in case of a *feoffment* to A and his heirs, on condition that if A does not marry Z in ten years, then the land shall go to W, the only way in which A's estate can, at common law, be terminated in case of a breach of the condition, is by the re-entry of the feoffor or his heirs, who, upon entering, would be seised of the same estate as they had before the feoffment, which, of course, could not be without destroying the limitation to W, as well as the estate of A. (*Supra*, p. 267, 2<sup>k</sup>.)

- 2<sup>k</sup>. Reason why the Subsequent Estate is *Void as a Remainder*.

The subsequent estate is void *as a remainder*, because, by the definitive idea of a remainder, it must not take effect *in derogation* of the preceding estate, but *must await its regular expiration*. (2 Th. Co. Lit. 136, n. (F).)

- 3<sup>k</sup>. Reason why the Subsequent Estate, although Void at Common Law, is Valid under the above-named Statutes of Wills, Uses, and of Grants.

The subsequent estate is valid in conveyances under the statutes named because, under those stat-

utes, no actual *livery of seisin* is required to create a freehold, and, therefore, no *corresponding natiety* of entry is necessary to determine it. Consequently the first estate is determined by the mere happening of the event, and no entry of the grantor or his heirs being requisite, there is no reason why the interest thereupon limited to the subsequent party may not take effect. Thus, in a devise by will to A and his heirs, on condition that, if A does not marry Z within ten years, the land shall go to W and his heirs, upon A's failure to marry Z according to the condition, his estate in fee is immediately terminated, without any entry on the part of the devisors' heirs, and the subsequent limitation in favor of W in fee forthwith takes effect. (2 Th. Co. Lit. 87, n. (L. 2) 768, Butler's Note, II.)

- 3<sup>l</sup>. Principle Adopted in Conditional Limitations, in Order to Prevent Perpetuities, by an Indefinite Succession of such Contingencies.

No limitation designed to take effect *in futuro* is good unless it be so limited that it *must necessarily vest*, if at all, within the period of a life or lives in being, and ten months (the utmost period of gestation), and twenty-one years afterwards. Indeed, the limit, after the expiration of the life or lives in being, is twenty-one years, the period of gestation being allowed in those cases only in which gestation exists as an element. (2 Th. Co. Lit. 578, and n. (A.); 2 Lom. Dig. 311; 2 Washb. R. Prop. 357; 2 Bl. Com. 174, n. (21); Cadell v. Palmer, 10 Bingh. (25 E. C. L.) 140.) W. C.

- 1<sup>k</sup>. The Reason in Policy why the Law does not Favor Perpetuities.

It is plain that, without some rule of restriction, these limitations might be multiplied indefinitely in succession one after another, even in favor of persons yet unborn; and experience proves that to tie up property from alienation, and thus render it incapable of being freely used as the interest and convenience of the owner may prompt, is extremely prejudicial to individuals, by dwarfing and trammeling their spirit of enterprise and of industry, and, therefore, is mischievous to the community. Such remote limitations tend to gratify the pride of him who prescribes them, and occasionally avail to save a prodigal from the natural consequences of his folly; but to tolerate them beyond certain limits is to subordinate the substantial interest of the many to the pride and recklessness of the few. As soon, therefore, as



it was observed that the statutes in question gave rise to dispositions so novel, the courts immediately addressed themselves to find some reasonable restriction whereby they might keep them within the limits of convenience and of the public good; and after various trials, all founded, however, upon the same general principle, they have at length, for many years past, adopted the "rule against perpetuities," above stated (*supra*, 3<sup>d</sup>), and first enunciated and enforced by Lord Nottingham, in the Duke of Norfolk's case. (2 Lom. Dig. 311 & seq.; 2 Washb. R. Prop. 358 & seq.; Howard v. Duke of Norfolk, 2 Swanst. 454.)

2<sup>k</sup>. The Consideration which led to the Adoption of the Period above stated.

The period was adopted by analogy to the utmost period during which, at common law, land could be kept inalienable, by way of *remainder*. Thus, in marriage settlements (usually the strictest limitations known), the estate may be limited to H and W during their joint lives, remainder to the survivor for life, remainder to the first and other sons of the marriage in tail, remainder to the daughters in tail, remainder in fee to H's heirs generally, and until the first one of those to whom a remainder in tail is limited comes of age, the land is inalienable, at least in fee-simple. The person thus entitled to the remainder in tail may, at the death of H, be *en rentre sa mere*; and in that event, the longest period of inalienability will be in the case supposed, a life or lives *in being*, the period of gestation (nine to ten months), and twenty-one years afterwards. And in conformity to that rule, the courts allowed executory limitations to be good. (Long v. Blackall & als. 7 T. R. 101; 2 Bl. Com. 174, n. (21); 2 Lom. Dig. 311.)

2<sup>l</sup>. Words which Create Conditions; w. c.

1<sup>h</sup>. Words which Create Conditions of Themselves.

They are such words and phrases as "*sub conditione*," "*on condition*," "*proviso*," "*provided that*," "*ita quod*," "*so that*," etc., although some of these words sometimes import something else than a condition. (2 Th. Co. Lit. 4 & seq.; 2 Lom. Dig. 315 & seq.; 2 Bl. Com. 151, n. (2).)

2<sup>h</sup>. Words which Create Conditions only by the Help of other Words, *Declaring Forfeiture*, etc., if the Conditions be not Observed.

They may be any words whatsoever, expressive of *the intention*, but especially such words as "*quod si*

*contingat*," "if it happen," "*si*," "if," "*causa*," "in consideration," etc. (2 Th. Co. Lit. 6, &c.; 2 Lom. 315; 2 Bl. Com. 151, n. (2); Vannester v. Vannester, 3 Grat. 148; Crawford's Ex'or v. Patterson, 11 Grat. 364.)

Thus, a "grant to A and his heirs, *on condition that* (or *provided that*, or *so that*), he pay annually on Christmas day a rent of \$500," is a complete condition; and upon failure to pay, the grantor or his heirs may re-enter. But with the last-mentioned class of words (*if it happen*, etc.), words authorizing a re-entry, or at least some words to complete the sentence, are needed to make a condition. Indeed, those, or some corresponding words, are required in order to complete the sense in any manner. "A grant to B in fee, reserving an annual rent of \$500, payable at Christmas; but *if it happen* the aforesaid rent be not paid," conveys no complete meaning, until some other words are added, such as "that then it shall be lawful for the grantor or his heirs to re-enter," etc. (2 Th. Co. Lit. 5, 6, 44.)

### 3<sup>d</sup>. To what Estates Conditions may be Annexed.

Conditions may be annexed to estates of every quantity of interest, whether in fee, for life, or for a term of years. (2 Bl. Com. 152.)

### 4<sup>th</sup>. The Right of Re-entry in Consequence of the Non-Observance of Conditions.

We have seen that, in the case of *freehold estates*, the non-observance of the condition does not of itself determine the estate in conveyances operating at common law, because, as a freehold is created only by the notoriety of livery of seisin in such conveyances, so it can only be terminated by the corresponding notoriety of *entry* by the grantor or his heirs.

Let us observe, then, (1), Who may exercise the right of re-entry; (2), The effect of re-entry when made; and (3), The mode of making a re-entry;

W. C.

#### 1<sup>st</sup>. Who may Exercise the Right of Re-entry.

We must here distinguish between the *original reservation* of the right of re-entry, and the right in case of the *assignment of the reversion*;

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#### 1<sup>st</sup> To whom the Right of Re-entry must be *Originally Reserved*.

It must be reserved by the terms of the conveyance, to the *grantor or his heirs* (or in the case of personalty, to the grantor or his *personal representatives*), and to none else; "and the reason hereof," says Lord Coke,

"is for the avoiding of maintenance, oppression of right, and stirring up of suits; and therefore nothing in action, entry, or re-entry, can be granted over; for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth." 2 Th. Co. Lit. 84-5; 1 Leon. Dig. 333.

In equity, however, a condition intended for the benefit of a third person will often be regarded as a *trust*, and be enforced in his favor as a charge upon the land, or upon the person holding the land, to which it is attached. Thus, a father having conveyed lands to his son, on condition that he should pay his debts, a court of equity, at the instance of the creditors, will charge the debts as a *trust* on the lands in the hands of the grantee, or of the father's heir, if he has entered for the breach. (*Jackson v. Topping*, 1 Wend. 388; *Dunbar's Case*, 1 Smith's L. Cas. 91; *Vannester v. Vannester*, 3 Gratt. 148; *Crawford's Ex'or v. Patterson*, 11 Gratt. 364. See *Pownall v. Taylor*, 10 Leigh, 172.)

2. The Right of Re-entry in Case of Assignment of the Reversion: *W. v.*

1<sup>o</sup>. Doctrine at Common Law.

For a like reason as in the preceding case, namely, to prevent litigation and the stirring up of suits, the assignee of the reversion cannot, at common law, re-enter upon the land, although he was allowed to *distress pro the rent*, which was deemed an incident to the reversion. Upon the dissolution of the monasteries by Henry VIII., most of their lands having been let on leases, with conditions and stipulations secured by clauses of re-entry, this principle gave rise to much trouble. The king and other assignees of the monastery lands could not enforce, by re-entry the conditions and stipulations set forth in the leases, nor would the tenants enforce against the assignees the covenants in their favor. (2 Th. Co. Lit. 85 & seq.; 83 & seq.)

2<sup>o</sup>. Doctrine Introduced by Statute of 31 & 32 Hen. VIII.

The first provision to meet the case was made by 31 Hen. VIII., c. 13, which gave the *king* all advantages, whether of covenants, conditions, or the like, as the lessor would have had; and by statute 32 Hen. VIII., c. 34, this was extended to the *grantees of the king*, and further to make this equitable remedy universal, mutual redress was given in all

cases of landlord and tenant, where the former granted *his reversion* to another. (2 Th. Co. Lit. 89 & n. (M. 2); 1 Lom. Dig. 364; 3 Reeve's Hist. E. L. 234-5.)

### 3<sup>k</sup>. Doctrine by Statute in Virginia.

Our statute is moulded essentially after the similitude of 32 Hen. VIII., c. 34. In favor of *assignees of the reversion* (but not of the *heirs* of such assignees, although heirs were included by the Stat. 32 Hen. VIII., c. 34, and by the Virginia statute, as contained in 1 R. C. 1819, p. 452), it is provided that "a grantee or assignee of any land let to lease, or of the reversion thereof, and his personal representative or assigns, shall enjoy against the lessee, his heirs (the word *heirs* is in the statute of Virginia, but inadvertently, for there can be no heirs to an estate for *life or years only*), personal representative or assigns, the like advantage *by action or entry*, for any forfeiture, or *by action* upon any covenant or promise in the lease, which the grantor, assignors, or his heirs, might have enjoyed." And reciprocally, in favor of the tenant, it is enacted, that "a lessee, his personal representative or assigns, may have against the grantee or alienee of the reversion, or of any part thereof, his heirs or assigns, the like benefit of any condition, covenant, or promise in the lease, as he could have had against the lessors themselves, and their heirs or assigns; except the benefit of any warranty, in deed or law." This statute is applicable only to conditions attached to estates *for life* and *for years*, for to them only are *reversions* incident. (V. C. 1873, ch. 134, §§ 1, 2; V. C. 1887, ch. 127, §§ 2781, 2782; 1 Lom. Dig. 364-5; 2 Th. Co. Lit. 89 & seq.; Dummer's Case, 1 Smith's L. Cas. 87; Spencer's Case (5 Co. 16; 1 Smith's L. C. 92, 96 & seq.)

### 2<sup>b</sup>. The Effect of Re-entry when Made.

Re-entry, in the case of conditions *express*, invest the grantor or his heirs *with their original estate*, and therefore defeats all rights and incidents annexed to the estate which is determined by the re-entry, such as dower and curtesy, and all charges and incumbrances created by the grantee during his possession. For upon the re-entry of the grantor, he becomes seised of an estate paramount to that which was liable to those charges. (2 Th. Co. Lit. 97, 99, n. (W. 2).) But in the case of conditions *implied*, as we have seen, the grantor or his heirs, upon re-entry, claim under, and not paramount to, the grantee, and consequently none of the latter's charges and incumbrances are avoided by the



re-entry, but the grantor or his heirs take subject to them. (1 Th. Co. Lit. 469; 2 Do. 117; *Ante*, pp. 55, 131, 172, 263.)

3<sup>b</sup>. The Mode of Making a Re-entry; w. c.

1<sup>i</sup>. The Doctrine at Common Law.

At common law, the grantor or his heirs are bound to enter for the condition broken, in order to re-vest the estate; and until such entry *no action was originally maintainable* to recover the land, the *right of possession* and the *right of property* still continuing uninterrupted in the grantee. Hence it is not properly called a *right*, but a *title of entry* in the grantor. (2 Th. Co. Lit. 95; 3 Do. 59–60, & n. (D. 1); Gilb. Ten. 26.)

But whilst this doctrine was never seriously questioned, the modern decisions relieve the grantor from the burden of making an *actual entry* by holding to be sufficient for the purpose the *constructive one* implied in an action of ejectment, wherein the tenant, under the old *consent-rule*, confessed the lease, *entry* and ouster supposed. Even where the estate to be avoided is a *freehold*, such constructive entry is held to be sufficient. (Little v. Heaton, 2 Ld. Raym. 750; Goodright v. Cator, 3 Dougl. 477; Doe v. Masters, 2 B. & Cr. (9 E. C. L.) 490.)

2<sup>i</sup>. The Doctrine by Statute in Virginia; w. c.

1<sup>k</sup>. The Doctrine Touching Actual Re-entry by the Grantor, etc.

By the abolition of the *consent-rule* in ejectment, by the Code of 1849, and that of 1887. (V. C. 1873, ch. 131, § 14; V. C. 1887, ch. 124, § 2735); the *constructive entry*, confessed by the consent-rule, which had for more than a century been allowed to suffice, instead of an actual entry, to determine the grantee's estate after condition broken, and to sustain the action of ejectment, might, in the absence of any provision upon the subject, have ceased to have that effect, so that grantors would have been under the necessity, in such cases, of assuming the burden of an actual entry. The Code, however, has itself removed all doubt, by specially providing that ejectment may be maintained *without actual re-entry*, whilst at the same time liberal allowance is made for the exercise of the privilege of redemption, or of relief against the forfeiture, in equity. (V. C. 1873, ch. 134, §§ 16 & seq.; V. C. 1887, ch. 127, §§ 2796 & seq.)

It is enacted that a person having a right of entry into lands, by reason of any rent being in arrear, or

by reason of the breach of any covenant or condition, may proceed in ejectment, the service of the notice in which, in the manner prescribed, shall be in lieu at once of a *demand and a re-entry*; and upon proof that the rent was due, and that no sufficient distress was upon the premises, or that the covenant or condition was broken before the service of the declaration, and that the plaintiff had *power thereupon to re-enter*, he shall recover judgment, and have execution for the lands. (V. C. 1873, ch. 134, § 16; V. C. 1887, ch. 127, § 2796; *Johnston v. Hargrove*, 81 Va. 118.)

2<sup>k</sup>. The Doctrine Touching the Right to Redeem, and to Obtain Relief against the Forfeiture.

It is provided that the defendant, or any mortgagee or trustee of the lands, may pay the rent in arrear, with interest and costs, or file a bill in equity for relief against the forfeiture, within *twelve months* after execution executed, otherwise such party is barred of all right, in law or equity, to the premises in question. (V. C. 1873, ch. 134, §§ 17, 18, 19; V. C. 1887, ch. 127, §§ 2797 to 2800.) If the party claiming a right to the lands shall, before the trial in ejectment, pay all arrears of rent, with interest and costs, further proceedings in the action shall cease. And if, upon his bill in equity, he be relieved, he shall hold the land as before. (V. C. 1873, ch. 134, § 20; V. C. 1887, ch. 127, § 2800.)

3<sup>k</sup>. The Doctrine in Virginia Touching the Mode of *Actual Re-entry*.

Provision is made, by *implication*, that the sheriff or other officer may enter on behalf of the party, and *expressly* for having the "written act of re-entry" sworn to, returned to the clerk of the county or corporation wherein the lands lie, to be by him registered, and the certificate thereof published in a newspaper once a week for two months successively. The person claiming the premises at the time of re-entry may pay the rent, with interest and costs, *within one year* from the first day of such publication, and thereby re-instate himself in possession, or else shall be for ever barred from all right, in law or equity, to the lands. (V. C. 1873, ch. 134, §§ 22 to 24; V. C. 1887, ch. 127, §§ 2802 to 2804.)

5<sup>e</sup>. To what Parties a Condition Extends.

See 2 Th. Co. Lit. 38 & seq.; 1 Lom. Dig. 345 & seq.

W. C.

1<sup>b</sup>. Who are *Bound* to Perform Conditions.

The person who takes possession of the land, in pur-

suance of the grant, *is bound* to perform the conditions, and bound *personally*, although it may be accompanied by *ruinous loss* to him. He takes the estates *cum onere*. His *assignees*, who succeed to the possession of the property, however, are liable *only to the extent of its value*. (2 Th. Co. Lit. 99, n. (W. 2); 1 Lom. Dig. 348; Vanneter v. Vanneter, 3 Grat. 148; Crawford's Ex'or v. Patterson, 11 Grat. 364.)

## 2<sup>h</sup>. Who *May Perform* Conditions.

The general doctrine is, that all persons may perform, or offer to perform the conditions, who *have an interest to do so*; that is, who have an interest in the condition on the one side, or in the land on the other. Hence, upon a grant with condition to be void upon the payment of money upon a *day named*, the grantor's heir, or personal representatives, in case of his death before the day, although neither of them be named, may pay or tender the money, and so fulfil the condition, and defeat the grantee's estate. So also upon a grant with condition to be void unless the *grantee* shall pay a certain sum by a *day named*, if the grantee alien the property before the day, either he or the alienee may, at the day, perform the condition, by paying or tendering the money; he because he has an interest as party and privy in the *condition*, and the alienee, because he has an interest in the *land*. (2 Th. Co. Lit. 38 & seq.; 1 Lom. Dig. 345.)

If no day *be named* for performance of the condition, the time (unless the contrary be expressed), is limited always *to the life* of him who is to perform it, and in some cases, where that latitude would be productive of injustice, is restricted to a *reasonable time*. This consideration will sometimes modify the doctrine above stated. Thus, if no day be named for the payment of the money by the *grantor*, in the first case, the time to perform the condition expires *with his life*, unless the contrary appear, and then, of course, payment cannot be made or tendered by his heir or personal representatives, unless they be *expressly named*. So in the second case, if no day for the payment be appointed, the *grantee* has not during his life to make it, since it would be unjust that, having the land, he should retain the money also; but he or his alienee must pay within a *reasonable time*, and if he omits to do so, the condition is broken, and neither he nor his alienee can afterwards save it by a tender of the money. (2 Th. Co. Lit. 45, and n. (E. 1).)

A *stranger* cannot, in general, intrude himself into the business, and a tender of payment by such a one may be denied and disregarded, as not being a performance of the condition. To this principle there seem to be but two exceptions, namely, where a stranger tenders in the name and on behalf *of an infant, or idiot*, and where he tenders in the name and on behalf of the proper party, and the payment is

accepted by him to whom it is tendered, and *afterwards ratified* by the person who might have made it, for *sanis ratihabitio retro trahitur et mandato equiparatur.* (2 Th. Co. Lit. 43.)

### 3<sup>d</sup>. Who may take Advantage of the Breach of Condition.

It is settled law that no one can take advantage of the non-performance of a condition annexed to an estate of freehold, but the grantor or his heirs; and if they do not see fit to assert the right to enforce a forfeiture on that ground the title remains unimpaired in the grantee. (Sheph. Touchst. 149; *Schulenberg v. Harriman*, 21 Wal. 63.) But it may be a trust, as we have seen, and as such be enforced in equity. (*Ante*, p. 274.)

## 6<sup>e</sup>. The Performance of Conditions.

See 2 Th. Co. Lit. 38 & seq.; 1 Lom. Dig. 343 & seq.

In discussing the doctrine relating to the performance of conditions, we must note, (1), The several kinds of conditions in respect of performance; (2), The doctrine touching strictness in performance of conditions; (3), The *time* within which conditions are to be performed; and (4), The *place* at which they are to be performed;

W. C.

### 1<sup>h</sup>. The several Kinds of Conditions in Respect of Performance.

The several kinds of conditions in respect of performance are, (1), Impossible conditions; (2), Illegal conditions; and (3), Repugnant conditions;

W. C.

#### 1<sup>i</sup>. Impossible Conditions.

See 2 Bl. Com. 156 '7; 2 Th. Co. Lit. 21 & seq., & n. (L.); 1 Lom. Dig. 348 '9.

Impossible conditions are either, (1), Annexed to *estates*; or (2), Annexed to *bonds*;

W. C.

#### 1<sup>k</sup>. Impossible Conditions Annexed to Estates.

Impossible conditions annexed to *estates* may be (1), Precedent; or (2), Subsequent;

W. C.

#### 1<sup>l</sup>. Precedent Conditions Impossible.

We have seen (*Ante*, p. 265, 1<sup>h</sup>), that it is an invariable principle of the common law, that conditions *precedent* must be performed before the estate can vest. It follows, therefore, that if such condition becomes *impossible*, at whatsoever time, or by whatsoever means, even though it be by the act or default of *the grantor*, yet *no estate can arise.* (2 Th. Co. Lit. 18, & n. (K.), 22 '3, & n. (N.); 1 Lom. Dig. 349.)

It may be added further, that if the condition *precedent* is *uncertain*, so that it cannot be *ascertained* to have



been fulfilled, no estate can arise. Thus, in case of a grant to A in fee, on condition that he shall be married *before* Z (a woman), and they *adhere* together, no estate arises for the uncertainty. (2 Th. Co. Lit. 18.)

2<sup>d</sup>. Subsequent Conditions Impossible.

Subsequent conditions which are impossible may be,

- (1), Such as are impossible when they are created; or
- (2), Such as become impossible after creation;

(a.)

1<sup>m</sup>. Conditions Subsequent, Impossible *when Created*.

As the performance of the condition is to defeat the estate, the impossibility of performance, when the condition was created, makes the grantee's estate absolute, which must have been the intent of the grantor from the beginning. Hence, in a grant with condition to be void if the grantor shall go from New York to London in an hour, the condition being (at least, *at present*;) impossible, is void, and the grantee's estate is absolute. (2 Th. Co. Lit. 22, 3; 1 Lam. Dig. 349; Bac. Abr. Conditions, (M.))

The impossibility contemplated is that which is inherent and permanent, not merely improbable, or out of the power of that party, or out of human power to control. Thus, a condition that "a married man shall marry such a woman; that "the Pope shall be in London within a day;" that "it shall rain to-morrow," are none of them *impossible*. (2 Th. Co. Lit. 23, n. (O).)

2<sup>m</sup>. Conditions Subsequent, which *become Impossible After Creation*.

Conditions subsequent, which become impossible after creation, may be such as become impossible, (1), By the act of God, or of the grantor; or (2), By the act of the grantee;

(a.)

1<sup>o</sup>. Conditions Impossible by the *Act of God, or of the Grantor*.

If a condition annexed to lands be possible at the making of the condition, and afterwards become impossible by the act of God, or of the grantor, yet the estate of the grantee shall not be avoided. Thus, if a man make a grant on condition that the grantor shall, within one year, go to Europe about the affairs of the grantee, and within a year the grantor die, or commit a felony for which he is kept in close prison, so that in one event it is impossible by the act of God, and in the other by the act of the grantor himself, that the condition should be performed, yet the estate of the grantee is absolute; for if the land should by construction of law be taken from the grantee, this would be, in the

one case, for the condition which was made for the grantee's benefit to work a damage to him; and in the other, for the grantor, who was the cause of the impossibility of the condition being performed, to take advantage of the non-performance, that is, of his own wrong. (2 Th. Co. Lit. 19, 21-2; 1 Lom. Dig. 348-9.)

2<sup>n</sup>. Conditions Impossible by the *Act of the Grantee*.

If the condition is made impossible by the act of the grantee, as no man is to be allowed to take advantage of his own wrong, the condition is looked upon as performed, and the grantee's estate is defeated. (2 Th. Co. Lit. 50; 1 Lom. Dig. 351.)

2<sup>k</sup>. Impossible Conditions *Annexed to Bonds*.

The doctrine touching the effect of impossible conditions annexed to bonds will best be understood by observing the effect where, (1), The condition was impossible when the bond was made; and (2), Where the condition became impossible after the bond was made;

w. c.

1<sup>l</sup>. Conditions Impossible when the *Bond was Made*.

The obligation is *single*, that is, it is *absolute and without condition*, for such must have been the intention of the obligor. (2 Th. Co. Lit. 22; Bac. Abr. Conditions, (N.).)

2<sup>l</sup>. Conditions which Become Impossible *After the Bond was Made*; w. c.

1<sup>m</sup>. Conditions which Become Impossible by the Act of *God*, of the *Law*, or of the *Obligee*.

The obligation in this case is saved, for the bond being executory, no advantage can properly be taken of it, until there be a *default in the obligor*; and no default can be imputed to him for not performing a condition which has become impossible in the manner supposed. Thus, if one becomes bound by bond that Z shall appear at the next term in such a court, and before the day Z dies, the obligation is saved. (2 Th. Co. Lit. 22; Bac. Abr. Conditions, (N.).)

2<sup>m</sup>. Conditions which Become Impossible *by Act of the Obligor*.

The bond is single, and without condition. The obligor may not take advantage of his own wrong. (Bac. Abr. Conditions, (N.).)

2<sup>i</sup>. Illegal Conditions.

See 2 Th. Co. Lit. 23-4 & n. (P.); 1 Lom. Dig. 334, 338 & seq.; 2 Bl. Com. 156-7.

The principles which relate to illegal conditions may be presented under the heads following, namely: (1), The general doctrine touching illegal conditions; (2), The several instances of illegal conditions; (3), The principal classes of

cases governed by the doctrine touching illegal conditions; and (4), The effect of illegal conditions;

W. c.

### 17. The General Doctrine Touching Illegal Conditions.

In all cases of illegal conditions, the law being concerned to remove all temptations and inducements to crime, so directs its policy as shall be best calculated to discourage what it condemns. Thus, if the illegal condition be annexed *to a bond*, the bond *is void*, because thereby the wrong is most effectually rebuked and prevented, whilst if annexed *to an estate*, its effect (always with the *same design*) depends on whether the condition be precedent or subsequent. If precedent, the estate *is void*; if subsequent, it *is voidable*. (2 Th. Co. Lit. 23, 4; Mitchell v. Reynolds, 1 P. Wms. 182.)

### 28. The Several Instances of Illegal Conditions.

See 2 Th. Co. Lit. 24 n. (B.); 1 Lom. Dig. 334.

W. c.

1. Conditions *to do* Something against Law, either *Malum in Se*, or *Malum Prohibitum*.
  2. Conditions *to Omit the Doing* of Something that is a Duty.
  3. Conditions Tending to Encourage such Crimes and Omissions.
- ### 37. The Principal Classes of Cases Governed by the Doctrine Touching Illegal Conditions; W. c.
1. Conditions *pro Turpi Causa*.

Thus, where the condition of a bond was that the obligee and obligor should live together, in illicit cohabitation, *the bond* was held to be void, the condition being *pro turpi causa*. If it were given *in consideration of past cohabitation* with an *unmarried* woman, it would not be liable to the same objection, and would be good, because it shall be intended as a compensation for the wrong done. If, however, either party were married, and that fact were known to the other at the time, the obligation is tainted with incurable illegality, whether the consideration were *past* or *future* cohabitation. (2 Th. Co. Lit. 24, n. (P).)

In discussing the subject of *illegal conditions*, the cognate topic of *illegal considerations* inevitably presents itself, and the principles applicable to both are so identical that it will not be needful to discriminate between them.

### 29. Conditions in *Restraint of Trade*.

The general doctrine is, that all restraints of trade (which the law much favors), if nothing more appear, are *void*. But this general doctrine is not without exceptions. For example, if the restraint have reference to a limited space, more or less extended, according to the

nature of the business, or is to endure for a *reasonable* and limited time only, it is not illegal. (2 Th. Co. Lit. 24, n. (P.); 2 Pars. Cont. 253 & seq.)

### 3<sup>d</sup>. Conditions Involving Considerations Declared Illegal by Statute.

As, for example, in cases of *gaming* (V. C. 1873, ch. 139, § 2; V. C. 1887, ch. 132, § 2836), and of *usury* (V. C. 1873, ch. 137, §§ 4, 5; V. C. 1887, ch. 130, §§ 2817, 2818; Bailey v. Pizzini, 77 Va. 492; Christian v. Worsham, 78 Va. 100; White v. Freeman, 79 Va. 597.) (2 Th. Co. Lit. 24, n. (P.); 2 Lom. Dig. 399 to 401; 1 Do. 477 & seq.)

### 4<sup>th</sup>. Conditions Affecting the Freedom of Marriage.

Conditions affecting the freedom of marriage, the validity and effect of which are now to be inquired into, are either (1), Marriage-brochage conditions; or (2), Conditions in restraint of marriage, annexed to legacies, devises, etc.

See 2 Th. Co. Lit. 24, n. (P.); Id. 19, n. (K.); 1 Lom. Dig. 338 & seq;

W. C.

### 1<sup>st</sup>. Marriage-Brochage Conditions.

Conditions stipulating for the *procuring of marriages* are justly regarded as of ruinous consequences in general, to the happiness of one or both of the parties, and as tending to delude persons of fortune. Such conditions, therefore, invariably invalidate all bonds to which they are annexed, and if annexed to estates, when *precedent*, the estate cannot take effect, and when *subsequent*, the estate cannot be defeated. Nor is it material whether the procurement of a marriage is the past *consideration*, or future *condition* of the transaction. Such attorneyship is alike frowned upon under all circumstances. And upon like principles, any private arrangement infringing the open and public agreement on the marriage, is held to be fraudulent and void. (2 Th. Co. Lit. 24, n. (P.); 1 Pars. Cont. 556.)

### 2<sup>nd</sup>. Conditions in Restraint of Marriage, Annexed to Legacies, Devises, &c.

Marriage is an institution of such importance to the well-being and happiness, and even to the continuance of society, that it is impossible for any system of law to regard restraints tending materially to affect its freedom, without disapprobation. The civil and canon law deem any clogs whatsoever upon the perfect freedom of marriage inexpedient, and invalidate all conditions which restrict it *in any manner*. The common law, on the other hand, holds it to be illegal to *prohibit marriage* altogether, or even to impose restrictions upon it for an *unreasonable period*, or subject to *unreasonable*



*terms*, but it does not condemn conditions whereby marriage is moderately and reasonably restrained in respect of time, place, person, consent of guardian, etc.

The blending of these discordant views of policy, in a very inharmonious and irregular manner, has made a strange patch-work of the law, as administered in the English courts and our own, touching the subject of the annexation to legacies of conditions restraining marriage. Legacies payable out of the personalty only were originally cognizable in England in the *ecclesiastical courts alone*, which, being regulated by the principles of the civil and canon law, esteemed *all conditions* in restraint of marriage to be opposed to the well-being of society, and *void*. Hence, when the court of chancery, at a later period, assumed a concurrent jurisdiction to enforce the payment of legacies, upon the ground of the *trust* involved, it adopted *for the most part*, but *not wholly*, the doctrines and rules it found prevailing upon the subject in the ecclesiastical courts, it being manifestly undesirable that the subject should have a different measure of justice, according as he happened to sue in one or the other tribunal. The ecclesiastical courts, however, never possessed any jurisdiction over the *devises of lands*, nor over legacies charged to be paid, in whole or in part, out of the *proceeds of lands*, these subjects having been, from their origin, in the statute of wills (32 and 34 Hen. VIII.), cognizable exclusively in the court of chancery. As to *devises*, therefore, and legacies charged wholly or in part *on lands*, the court of chancery (so far as related to the lands) was free to adopt, and did adopt, its own (that is, the *common law*) maxims touching conditions in restraint of marriage, holding such as prohibited marriage altogether, or restricted it unreasonably (as to devises of lands, and legacies charged on lands), to be void, whilst those which imposed only wholesome restraints in respect of time, place, person, and consent of guardians, etc., were deemed valid.

The doctrines of the court of chancery, therefore, in respect to such conditions, when annexed to devises, and to legacies charged on lands, are uniform, and easily intelligible. The complexity is in respect of legacies charged on personalty alone; and in them it grows out of the fact that the court of chancery did not, as to them, *adopt wholly* the rules which it found prevailing in the ecclesiastical courts, nor without a certain regard to the principles of the common law. On the contrary, whenever it discovered that the testator's intention *was fixed* to make the condition respecting marriage indispensable to the enjoyment of his bounty, and that otherwise he

designed the gift to *go over to some one else*, the condition prevailed, unless it was entirely prohibitory or unreasonably restrictive of marriage, when the common law held it to be void.

Hence, in all cases of legacies given upon conditions affecting liberty of marriage, the most important inquiry is, whether the legacy be payable *out of the real*, or out of the *personal estate*; and the next most important point to be observed is whether it is *given over to some one else* if the conditions be not complied with.

See 1 Lom. Dig. 338 & seq.; 1 Stor. Eq. § 283 & seq.; Maddox v. Maddox, 11 Grat. 804; Scott v. Tyler, 2 Bro. C. C. 431; S. C. 2 Wh. & Tud. L. Cas. (Pt. I.), 266 & seq.; Garbut v. Hilton, 1 Atk. 381.

W. C.

### 1<sup>n</sup>. Diversity between Conditions in Restraint of Marriage, and *Limitations*.

A *limitation* (that is, a grant or devise *until marriage*), marking, as it does, the *term of duration* of the estate, beyond which it cannot last, is *never void*. A condition, on the other hand, which in the event of marriage cuts the estate short, and prematurely determines it, is valid or void according to the principles above indicated. Thus, a “devise to A *until she marries*, and then the land to pass to Z,” is a *limitation*, and good; whilst a “devise to A *for life*, on condition that if she marries, the land *shall pass to Z*,” is a condition, and because it absolutely prohibits marriage, is *void*. (1 Lom. Dig. 340; Scott v. Tyler, 2 Wh. & Tud. (Pt. I.), 321; Seldon v. Keen, 27 Grat. 582 & seq.)

### 2<sup>n</sup>. Diversity in Case of Persons *who have been Married*.

Conditions restraining *persons widowed* from marrying again, are sustained as valid by the current of authority. (1 Lom. Dig. 432, n. \*; 1 Stor. Eq. § 285; 2 Jarm. Wills, (5th ed.) 44 & n. 2; Scott v. Tyler, 2 Bro. C. C. 488; 1 Rop. Leg. 832.)

### 3<sup>n</sup>. General Doctrine as to the Validity of Conditions in *Restraint of Marriage*; W. C.

#### 1<sup>o</sup>. Conditions in Restraint of Marriage Annexed to *Devisees of Lands*, and to *Legacies Charged on Lands*; W. C.

##### 1<sup>p</sup>. Condition *Precedent*.

The condition, however restrictive, of marriage *must be complied with*, or the estate cannot vest. (1 Lom. Dig. 338, 341; 1 Th. Co. Lit. 19, n. (K.); Scott v. Tyler, 2 Wh. & Tud. L. Cas. (Pt. I.), 318; *Ante*, p. 265, 1<sup>l</sup>.)

##### 2<sup>p</sup>. Conditions *Subsequent*.

The validity of a condition *subsequent* depends on

whether it is *unreasonably restrictive* of marriage or not, according to the principles of the common law. Thus, where a testator gave certain property to his daughter, but declared that as, in consequence of a nervous debility, she was unfit for the control of herself, his will was that she should not marry, and that if she did, the gift should be void, the condition was held to be invalid, and the estate absolute. (*Morley v. Rennoldson*, 2 Hare, (24 Eng. Ch.) 570, 579; *Maddox v. Maddox*, 11 Grat. 804; *Scott v. Tyler*, (2 Bro. C. C. 131), 2 Wh. & Tud. L. Cas. (Pt. I.), 319; 1 Th. Co. Lit. 19, n. (K.); 1 Stor. Eq. § 288.)

2. Conditions in Restraint of Marriage Annexed to Legacies *Charged on Personalty*; w. c.

1°. When in Default of the Observance of the Condition, the Legacy is *Given Over* to Some One Else.

The condition whether precedent or subsequent, must be complied with, unless it be *unreasonably restrictive* of marriage, in which case it is *wholly void*, and the *legacy is absolute*. The student will observe what a mingling is here of the principles of the civil and common law. The civil law, alone considered, would have disregarded the condition under all circumstances, and have held the legacy *always absolute*. The common law, considered alone, would have pronounced the condition, whether precedent or subsequent, necessary to be observed, unless it were *unreasonably restrictive* of marriage, in which event it would have disregarded the condition *subsequent as void*, so making the legacy absolute; but in the case of the condition *precedent*, it would not have suffered the legacy to vest until the condition had been performed. The court of chancery, therefore, has adopted the civil law only in allowing the legacy to vest in the case of the precedent condition in the last instance, *notwithstanding its non-performance*. In all other particulars it has followed its own doctrines; that is, those of the common law. (1 Th. Co. Lit. 19, n. (K.); *Scott v. Tyler*, 2 Wh. & Tud. L. Cas. (Pt. I.), 320-21; 1 Lam. Dig. 341.)

The reason for allowing such an effect to the bequest *over* is differently stated. Some treat it as an emphatic manifestation of the testator's intent, while others consider that it is the *interest of the legatee*—one who takes by way of conditional limitation—which makes the difference. And this latter view seems the better founded. (*Scott v. Tyler*, 2 Wh. & Tud. L. Cas. (Pt. I.) 320-21; 1 Lam. Dig. 231; *Lloyd v. Houston*, 3 Meriv. 117.)

2<sup>p</sup>. When in Default of the Observance of the Condition, the Legacy *is not Given Over*; w. c.

1<sup>a</sup>. Where the Condition is *Precedent*.

If unreasonably restrictive of marriage, the *condition is void*, and the *legacy is absolute*; otherwise, the condition *must be observed*. (2 Th. Co. Lit. 19, n. (K.); Garbut v. Hilton, 1 Atk. 381; Scott v. Tyler, 1 Bro. C. C. 431; S. C. 2 Wh. & Tud. L. Cas. 266, 318-'19; 1 Stor. Eq. § 290.)

2<sup>a</sup>. Where the Condition is *Subsequent*.

The condition is *inoperative* in any event to defeat the legacy; for if unreasonably restrictive of marriage, *it is void*, and if not, it is deemed merely *in terrorem*. (1 Lom. Dig. 341-'2; 2 Th. Co. Lit. 19, n. (K.); 1 Stor. Eq. § 288; Scott v. Tyler, 2 Wh. & Tud. L. Cas. (Pt. I.) 319-'20; Maddox v. Maddox, 11 Grat. 804, 810.)

4<sup>k</sup>. Effect of Illegal Conditions; w. c.

1<sup>l</sup>. Effect of Illegal Conditions *Precedent*.

The estate cannot vest, at common law, as we have seen, in any case of condition *precedent*, unless the condition be complied with; and when the condition is illegal, public policy will not permit one to derive a benefit from an illegal act, so that even though the condition were performed, still the estate could not take effect. It is therefore void, whether the condition is or is not fulfilled. (2 Th. Co. Lit. 22; Id. 24, n. (P.); 1 Lom. Dig. 334; *Ante*, p. 282, 1<sup>k</sup>.)

2<sup>l</sup>. Effect of Illegal Conditions *Subsequent*.

The estate *remains unimpaired*, and would be so even though the conditions were performed, for the reasons just stated, *supra*, 1<sup>l</sup>. (2 Th. Co. Lit. 21, and n. (N.); Id. 24, and n. (P.); *Ante*, 282, 1<sup>k</sup>.)

3<sup>l</sup>. Repugnant Conditions.

See 2 Bl. Com. 156-'7; 1 Lom. Dig. 334 & seq.; 2 Th. Co. Lit. 25 & seq.; Bac. Abr. Conditions, (L.).

w. c.

1<sup>k</sup>. The Nature of *Repugnant Conditions*.

Repugnant conditions are conditions incompatible with the *legal nature and incidents* of the estate to which they are annexed. (2 Th. Co. Lit. 26 & seq.; 1 Lom. Dig. 334 & seq.)

2<sup>k</sup>. Several Instances of Repugnancy.

The most usual instance of repugnancy is a condition annexed to an estate (most frequently an estate *in fee-simple*), *not to alien*. (2 Th. Co. Lit. 25 & seq.; 1 Lom. Dig. 334 & seq.)

w. c.

1<sup>l</sup>. Condition not to Aliene Annexed to an *Estate in Fee-Simple*.



It will be remembered that amongst the incidents which the law generally attaches to fee-simple estates was mentioned (*Ante*, p. 86, 1<sup>st</sup>) *unlimited power of alienation*. A condition *not to aliene* is repugnant to this incident or quality, and for that reason, as a general rule, *is void*. (1 *Lom. Dig.* 335; 4 *Kent's Com.* (12th ed.) 131; 2 *Jarm. Wills* (Bagshaw's ed.) 13 & seq.; 2 *Th. Co. Lit.* 25-27.) And not only is such a condition repugnant to the incident of unlimited power of alienation belonging to an estate in fee-simple, but, as *Ld. Coke* observes, it is "absurd and repugnant to reason, that he that hath *no possibility to have the land revert to him* should restrain his freedom in fee-simple of all his power to aliene. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and *give or sell his whole interest or property therein*, upon condition that the donee or vendee shall not aliene, the *same is void*, because his whole interest or property is out of him, so as he hath *no possibility of a reverter*, and it is against trade and traffic, and bargaining and contracting between man and man; and it is within the reason of our author (*Littleton*) that it should oust him of all power given to him. *Id quoniam est ingratum hominibus non esse libertatem rerum suarum alienationem.*" (2 *Th. Co. Lit.* 26.)

Let us take note of the doctrine, (1), When the restriction upon alienation is reasonably qualified, as in respect of *time* or *persons*; and (2), When the restriction is unqualified and universal;

w. c.

- 1<sup>st</sup>. When the Restriction upon Alienation is Reasonably Qualified, *e. g.*, in Respect of *Time* or *Persons*.

A condition imposing restrictions upon alienation, is admissible if it be confined to a *few designated persons*, or limited to a *reasonable time*. (2 *Th. Co. Lit.* 27, and n. (R.); 1 *Lom. Dig.* 335.)

- 2<sup>nd</sup>. When Restriction upon Alienation is Unqualified and Universal; w. c.

- 1<sup>st</sup>. Where the Restriction is Imposed upon a *Corporation created*.

The condition not to aliene attached to a grant of land to a *corporation*, is admissible, apparently because corporations being created, and being allowed to acquire lands for corporate purposes only, it is not only not contrary to, but it is entirely consonant with public policy, and with what *ought to have been* the intention of the parties, to impose restrictions limiting the use of lands purchased to the corporations only, and prohibiting alienation. Thus, a condition annexed to land granted to New York city, that it should be used *ex-*

*clusively* as a public square, was held to be valid, and the land to be forfeited upon the non-observance thereof. So also in case of a condition annexed to a conveyance to a railroad company;—for a church;—a school-house;—and a town-house, respectively. (*Stuyvesant v. Mayor of N. Y.* 11 *Pai.* 414; *Penn. R. R. Co. v. Parke*, 42 *Penn.* 31; *Southard v. Central R. R. Co.* 2 *Dutch. (N. J.)* 13; *Grisson v. Hill*, 17 *Ark.* 483; *Atto. Gen'l v. Merrimack, &c. Co.* 14 *Gray, (Mass.)* 586; *Warner v. Bennett*, 31 *Conn.* 468; *French v. Quincey*, 3 *Allen, (Mass.)* 9.)

2<sup>n</sup>. When the Restriction is Imposed upon a *Natural Person*; *w. c.*

1<sup>o</sup>. When the Restrictive Condition is Annexed to a *Grant of the Estate*.

The condition is always *void for repugnancy*, and the *estate is absolute*. (2 *Th. Co. Lit.* 25 & seq.; 1 *Lom. Dig.* 334 & seq.; 2 *Jarm. Wills*, (5th ed. *Bigelow*), 14 & seq.)

2<sup>o</sup>. When the Restrictive Condition is Annexed to Something *Collateral to the Estate Granted*.

*w. c.*

1<sup>p</sup>. Grant of one Tract of Land on Condition not to Aliene Another *already Belonging to the Grantee*.

This condition is not repugnant to the estate granted, and is valid; so that, if the grantee aliene contrary to its provisions, the estate granted is avoided. Thus, if Z be seised of Black-Acre in fee, and A grants White-Acre to him upon condition that Z shall not aliene Black-Acre, the condition is good; and if not observed, will defeat the grant of White-Acre. (2 *Th. Co. Lit.* 27.)

2<sup>p</sup>. Condition Contained in a *Bond*.

Here, also, there is no *repugnancy* to the estate granted; and, according to Lord Coke, the condition not to aliene, contained in a bond, is therefore valid; for, says he, "he may, notwithstanding, aliene, if he will forfeit his bond that he himself hath made." (2 *Th. Co. Lit.* 25; *Freeman v. Freeman*, 2 *Vern.* 234. But see 1 *Lom. Dig.* 335.)

3<sup>o</sup>. Limitation to Grantee *until he Alienes*.

There would seem to be no reason to doubt the validity of such a limitation, any more than a similar limitation, *until the grantee marries*. They both depend upon the same principle, namely, that there is nothing to give an interest *beyond the event arrived*, so that, upon the happening of the event, the estate is *ipso facto* determined. (1 *Lom. Dig.* 340; *Scott v. Tyler*, (2 *Bro. (c.)* 431), 2 *Wh. & Tud. L. Cas.* 321;

*Ante*, p. 285, 19; 2 Jarm. Wills, (5th ed. Bigelow), 13, n. 1, 24, & n. 1.)

2. Condition that Estate shall *not be Liable to Grantee's Debts*.

This condition is, in general, *repugnant and void*; that is, a man cannot possess property which, whilst his estate *continues*, shall not be liable to his debts. But any attempt to subject the property to his debts may be made the event or condition upon which his interest *shall cease*. It is to be observed, also, that the same distinction applies here as in the preceding case, between a *condition* and a *limitation*.

Thus, a grant of property to A *until he becomes bankrupt*, and then over, is allowable; and so also is a grant until the commission of an *act of bankruptcy*. (*Foley v. Burnell*, 1 Bro. C. C. 274; *Brandon v. Robinson*, 18 Ves. 433; 4; *Graves v. Dolphin*, 1 Sim. (2 Eng. Ch.) 67; *Hallett v. Thompson*, 5 Paige (N. Y.) 585; 2 Stor. Eq. § 974 n. 1 Jarm. Dig. 337.) And although, in conveyances of *freehold* estates operating at common law, there can be no limitation over to another person, after the determination of the first estate by the breach of condition in question, yet where the conveyance is by will, or by conveyance under the statutes of uses or of grants, such subsequent limitation will take effect, not by way of remainder, but as a conditional limitation. But in order that the first estate shall be liable to be determined by alienation, bankruptcy, insolvency, etc., it is necessary that the intention to that effect should be made *plainly manifest*. (*Shaw v. Hale*, 13 Ves. 407 & note; *Cooper v. Wyatt*, 5 Mad. 489, (Am. ed. 297); *Brandon v. Robinson*, 18 Ves. 433.)

3. Condition not to Aliene *Annexed to a Fee-Tail*.

If the condition be not to aliene in the *manner prescribed by law*, e. g., formerly by fine or recovery, and since the statute 3 & 4 Wm. IV., c. 74, (A. D. 1833), by  *deed* enrolled in chancery, it is *repugnant* and void. Otherwise the condition is good: because the alienation of an estate-tail, save in the manner prescribed, is not in accordance with law. (2 Th. Co. Lit. 30, 31; *Ante*, pp. 92, 2, 94, 6; 95, 3.)

4. Condition not to Aliene *Annexed to a Lease for Years*—*perpetua*.

Freedom of alienation is not one of the incidents of an estate for life or for years, as it is of an estate in fee-simple. (*Ante*, p. 100 & seq. 195 & seq.) nor could it be without *somehow* endangering seriously the interests of him to whom it is a remainder.

There is, therefore, no *repugnancy* in a condition pro-

hibiting it, and such a condition is valid wherever it is needful in order to guard the rights of the reversioner or remainderman. Still, the free alienation of all manner of property is so important to the well-being of the community, that conditions of this sort are not favored in law, but are construed *strictly* in favor of the lessee; and are, therefore, not carried further than their terms require. Hence, a condition not to assign a lease, does not *affect an assignee* to whom the term had been transferred, with the lessor's consent; nor if the condition were that the lessee himself should not assign, would it apply to his *personal representative*; nor, it is *said*, would it prohibit a *devise* of the term, because a devise is not a *lease*, (but is it not an *assignment*?) ; nor would it prevent an underlease; nor would it be a bar to taking the lease *in execution* (the assignment contemplated being a *voluntary one*), unless the judgment were had by collusion, in order to bring about a sale. (1 Lom. Dig. 336-7; 4 Kent's Com. (12th ed.) 131 & n. 1; 2 Th. Co. Lit. 29 & n. (T.); Pennant's Case, 3 Co. 64 a; Dumpor's Case, 4 Co. 119 b; S. C. 1 Smith L. C. 74, 80 & seq.; Mildmay's Case, 6 Co. 43 a; More's Case, 1 Cro. (Eliz.) 331; Doe v. Carter, 8 T. R. 60, 61; S. C. Id. 301; Weatherall v. Geering, 12 Ves. 511; Brummell v. McPherson, 14 Ves. 173, 175-6; Doe v. Watt, 8 B. & Cr. (15 E. C. L.) 308; Croft v. Lunley, El. Bl. & El. (96 E. C. L.) 1069 & seq.; Shaw v. Coffin, 14 C. B. N. S. (108 E. C. L.) 372.)

It should be observed, however, that there are not wanting cases which affirm that perfect freedom of alienation is a necessary incident, not of estates in fee-simple only, but of *all estates*, and that no condition restricting it, except to a very limited extent, is in any case valid, even though annexed to an estate for life or years. These cases, however, are in general, if not always, cases of *wills*, where a condition of *non-alienation*, or of *non-liability for the payment of debts*, was annexed to the devise of a first estate for life, with remainder over, but not with the design to protect the rights of the remainderman or of any reversioner. And although the language of the judges in deciding them is indiscriminately applicable to all estates for life, yet they do not seem to have had in mind at all the instance of a lease for life or years, where the power to restrict or even to prohibit alienation or assignment is indispensable in order duly to secure the lessor against irreparable injury to his reversion. Indeed, the attention of the court in all of them seems to have been principally directed to the enforcing of the just distinction, especially as it regards non-liability for debts, between *limitations* and *conditions*, as set forth, *supra*.



p. 200. (Brandon v. Robinson, 18 Ves. 429; Graves v. Desjardins, 1 Sim. (2 Eng. Ch.) 66; Rochford v. Harkman, 9 Hare, 11 Eng. Ch. 479; Dickson's Trust, 1 Sim. N. S. 440 Eng. Ch. 37; Mebane v. Mebane, 4 Ired. Equity, N. C. 131; Campv. Cleary, 76 Va. 140.)

The writer submits that the true principle (leaving out of view the distinction between a condition and a limitation), as stated above, that a condition restrictive of alienation is always to be regarded as adverse to public policy, and for that reason to be strictly construed, and when it is not needed in order to provide for the reasonable interests of the grantor, or of the person from whom the estate or interest proceeds, it is in general void.

A condition in a lease for years, that the lessor shall recover, or that the lease shall otherwise come to an end, upon the tenant's committing an act of bankruptcy, or the term's being taken in execution, is valid; although apparently to the distinction already referred to (*Ante*, p. 299, 20), it could not be screened by condition from his debts, whilst it *continued his property*. (1 Lom. Dig. 337; Brandon v. Robinson, 18 Ves. 433-'4.)

#### 7. Condition not to Use in Some Particular Manner.

Never to sell intoxicating liquors is valid. (Com'th v. Ship Co. 10 Otto (100 U. S.) 57; Shep. Touchst. 129, 131. Cases cited, 10 Otto, 58.)

### 2. The Doctrine Touching *Strictness in the Performance of Conditions*.

See 1 Th. Co. Lit. 59 & seq.; 1 Lom. Dig. 343;

#### 1. Doctrine Touching *Strictness in Performing Conditions*.

As estates *are to arise* upon the performance of conditions *precedent*, they are regarded with liberality, and whilst they must always be fulfilled, not *colorably* merely, but *lawfully* and *substantially*, yet it suffices to perform them according to the *intent and meaning*, albeit the *letter and words* cannot be performed. This is in pursuance of the maxim which requires words to be construed most strongly against the user of them. But otherwise it is, as we shall see, of conditions subsequent, that *destroy* an estate, so they are to be *taken strictly*, unless it be in certain special cases. And in no case can an estate vest until the condition precedent is performed. (2 Th. Co. Lit. 58, 59; 10 2d. c. (A), 1 Lom. Dig. 343-'4.)

#### 2. Doctrine Touching *Strictness in Performing Conditions*

*Conditions subsequent* go to defeat estates which *have* vested, and to change the existing state of things. Hence, they are regarded less favorably than conditions *precedent*,

and must be performed with *more strictness*, save, as has been said, in certain special cases. (2 Th. Co. Lit. 59; 1 Lom. Dig. 343-'4.)

If a condition consists of divers parts in the *conjunctive*, whether it be subsequent or precedent, *all the parts* must be performed, unless it be *impossible* to be so performed, when it is to be taken in the *disjunctive*; but otherwise it is, if it be in the *disjunctive*, for then the performance of either will suffice. And if it be *both in the conjunctive and disjunctive*, the disjunctive is understood to refer to the whole, and to make all disjunctive. (2 Th. Co. Lit. 58-'9, n's (M. 1), & (N. 1); 1 Lom. Dig. 344.)

3<sup>h</sup>. The Time within which Conditions are to be Performed; w. c.

1<sup>i</sup>. Where a particular Time is *Appointed for Performance*.

The condition must in that case be performed at or before the appointed time, and the *right to perform* passes to an alienee, or to a personal representative, or descends to the heir. (2 Th. Co. Lit. 45; 1 Lom. Dig. 346; *Aute*, p. 278, 2<sup>h</sup>.)

2<sup>i</sup>. Where no *Particular Time* is Appointed for Performance.

It must be performed in general by the party himself in *his life time*, and when that latitude would be productive of injustice, it must be performed within a *reasonable time*. (2 Th. Co. Lit. 45, and n. (E. 1).)

w. c.

1<sup>k</sup>. When the Condition must be Performed Within Convenient (*i. e.*, *Reasonable*) Time.

The condition must be performed within a reasonable time, when the act to be done is merely *transitory* (not *local*), *e. g.*, the payment of money, the delivery of charters, etc.; or where promptness of performance is needful in order to protect the rights of the other parties, *e. g.* feoffment on condition that *feoffee pay*, etc. That the feoffee should have the estate, and retain the money also, indefinitely, is not just, and therefore he or his alienee must pay *within a reasonable time*. (2 Th. Co. Lit. 45, and n. (E. 1); 1 Lom. Dig. 346; Bac. Abr. Conditions, (P.) 3.)

2<sup>k</sup>. When the Party has *During his Life* to Perform the Condition; w. c.

1<sup>i</sup>. Absolutely *During Life*.

Where prompt performance of the condition in no wise concerns the other party, the time is protracted through the performer's life, *e. g.*, feoffment on condition that if *feoffor* pays, etc., he may re-enter. Here, since the feoffee is in possession of the land, it is supposed not to concern his interests how long the feoffor may delay the performance, and so the feoffor has his life-time in which to pay.

2<sup>i</sup>. When the Party has *During Life* to Perform, but Subject to be *Hastened by Request*.

The party to perform the condition is liable *to be hastened by request* where the act to be done is *local* (and *not transitory*), and it concerns the other party that it be *done promptly*; *e. g.*, condition that feoffee shall re-*infeoff* feoffor. (2 Th. Co. Lit. 47; Bac. Abr. Conditions, (P. 3).)

2<sup>d</sup>. The Place at which Conditions are to be Performed; w. c.

1<sup>st</sup>. Where a Particular Place is Appointed for Performance.

The condition must be performed *at the place appointed*, unless by mutual consent. (2 Th. Co. Lit. 50; 1 Lom. Dig. 347.)

2<sup>d</sup>. Where no Certain Place is Appointed; w. c.

1<sup>st</sup>. When the Condition is to Pay Money; w. c.

1<sup>st</sup>. When the Money to be Paid is *Real*.

It must be paid *on the premises*, or tendered or demanded there. (2 Th. Co. Lit. 49; Bac. Abr. Conditions, (P. 4).)

2<sup>d</sup>. When the Condition is to Pay Money Generally.

The condition is to be performed by payment *to the payer*, wherever he *may be found* within the State, and it is the payer's business to seek him. (2 Th. Co. Lit. 47 & seq.; 1 Lom. Dig. 347; Bac. Abr. Conditions, (P.) 4.)

2<sup>d</sup>. When the Condition is to do a Collateral Thing.

See 1 Lom. Dig. 347; Bac. Abr. Conditions, (P.) 4;

w. c.

1<sup>st</sup>. Where the Condition is to Deliver an Article; w. c.

1<sup>st</sup>. Where the Party to Perform the Condition is the *Grower of* Manufacturer of, or Dealer in the Article.

The place of delivery (in the absence of any stipulation or understanding) is the *farm, factory, or place of trade* of him who is to perform the condition. (2 Greenl. Cruise, 29; 2 Greenl. Ev. §§ 609, &c.; 1 Lom. Dig. 347.)

2<sup>d</sup>. Where the Condition is to Deliver an Article whereof the Party to Perform the Condition is *not the Grower, Manufacturer, etc.*; w. c.

1<sup>st</sup>. When the Goods to be Delivered are *Portable, e. g., Cattle, etc.*

The goods are deliverable at the place where the *performer* lived at the date of the instrument creating the condition. (2 Greenl. Cruise, 29; 2 Greenl. Evid. § 609, &c.)

2<sup>d</sup>. When the Goods to be Delivered are *Cumbrous, and not Easily Portable, e. g., Timber and the Like.*

They are deliverable where the *performee* shall appoint, or if he, upon application, will name no place, or names an unreasonable one, then at such reasonable and convenient place as the *performer* shall appoint, *after* the *performee* reasonable previous notice, if practicable. (2 Greenl. Cruise, 29; 2 Greenl. Evid. § 609, &c.)

2<sup>l</sup>. Where the Condition is to do *Some Other Collateral Thing*.

The condition is to be performed where the *performer* shall reasonably appoint, or if, when applied to, he names no place, or an unreasonable one, then where the *performer* shall reasonably appoint, giving the *performer* reasonable previous notice, if practicable. (2 Greenl. Cruise 29; 2 Greenl. Evid. §§ 609, &c.; 1 Lom. Dig. 347.)

7<sup>g</sup>. Effect of Conditions.

The effect of conditions may be set forth by showing, (1), The effect when the condition is complied with; (2), When it is not complied with; and (3), The circumstances which excuse the non-performance;

W. C.

1<sup>h</sup>. The Effect of the Condition *being Complied With*.

The condition is gone, and the *thing* to which it was annexed becomes *absolute* and *unconditional*. The thing which thus becomes absolute is sometimes *the estate*, and sometimes the *right of entry* thereon. If the condition is *precedent*, it is always *the estate* which becomes absolute; if it is *subsequent*, it may be the grantor's *right to re-enter* which becomes absolute, or the *estate of the grantee*. Thus, upon a grant of Black-acre to A in fee, on condition that he pay Z \$1,000, as soon as he pays the \$1,000, the *estate* is absolute; and upon a grant of Black-acre to A in fee, on condition that if he does not within ten years pay Z \$1,000 his estate shall cease, upon the payment of the \$1,000, A's *estate* is unconditional; but upon a grant of Black-acre to A in fee, on condition that, if the grantor pays \$1,000 to A in one year, A's estate shall cease, and the grantor pays the money accordingly, the grantor's *right of re-entry* becomes absolute. (1 Lom. Dig. 348; 2 Th. Co. Lit. 60, n. (O. 1).)

2<sup>h</sup>. The Effect if the Condition *be Not Complied With*.

If it be a condition *precedent*, the estate will not arise; if it be a condition *subsequent*, where it is to be performed by the *grantor*, and it is not complied with, the estate is *absolute*; but where it is to be performed by the *grantee*, and is not complied with, the estate is avoided, and the grantor's *right of entry* becomes absolute.

The acceptance of an estate on condition carries with it, as we have seen (*Ante*, p. 277, 1<sup>h</sup>), a *personal obligation* to fulfil the condition. (1 Lom. Dig. 348; *Vanneter v. Vanneter*, 3 Grat. 148; *Crawford's Ex'or v. Patterson*, 11 Grat. 364.)

3<sup>h</sup>. The Circumstances which Excuse the Non-Observance of a Condition.

The circumstances which excuse the non-observance of a condition are, (1), The impossibility of compliance; and (2), The act or default of the other party;

W. C.



1. The Impossibility of Compliance; *W. C.*
- 1<sup>st</sup>. Impossibility of Compliance by the Subsequent *Act of God, in the Grantor.*

The grantor being the cause wherefore the condition is not performed, shall never take advantage by reason of the non-performance thereof; neither shall any injury result to the grantee from any act of God. In either case, therefore, the estate is *absolute*. (2 Th. Co. Lit. 19, 21; 1 Lom. Dig. 348, 9.) So, also, if the benefit of the condition is to redound to the *grantor*, no impossibility of compliance brought about by the act of the *grantor* shall work any injury to the grantor, who shall avoid the grantee's estate just as if he had fulfilled the condition, for else the grantee would take advantage of his own wrong. (*Ante*, p. 280.)

The student will not fail to observe that the condition is supposed always to be *subsequent*, as we have seen that the common law holds it to be *invariably* necessary that a condition *precedent* should be *performed* before the estate can vest. (*Ante*, p. 265, 1<sup>st</sup>, & p. 282, 1<sup>st</sup>.)

- 2<sup>nd</sup>. Impossibility, at the Time, or by Subsequent Act of God, of one of two Conditions *Conjunctive*.

If one of two conditions *conjunctive* be impossible at the time it was created, or become impossible afterwards, by the *act of God*, the other must be performed, and in general the performance of that will be sufficient. (1 Lom. Dig. 348, 350; 2 Th. Co. Lit. 58, 60; 2 Greenl. Cruise, 33.)

- 3<sup>rd</sup>. Impossibility, by Subsequent Act of God, of one of two Conditions *Disjunctive*.

The party having at first an *election* which he will perform (*Ante*, p. 292, 2<sup>nd</sup>), it is said, is not to be deprived, *by the act of God*, of that choice, so that, if one of the alternatives becomes, after the creation of the condition, providentially impossible, he is excused from the performance of the other. But not, it seems, if the condition were for the benefit of the *performee*, and certainly not if it became impossible otherwise than by the act of God, and especially by the default of the obligor himself. Thus, where the condition was to settle lands on Jane G. *and her heirs*, or else that the obligor would leave her *by his will*, a proportionate *legacy*, and J. G. died *before obligor*, whereby it became by the act of God impossible to leave her a *legacy by the obligor's will*, it was held that he was discharged from the other alternative of settling lands on *J. G. and her heirs*. *Lougher's Case*, 5 Co. 22 a; 1 Lom. Dig. 340.

But had the condition been to settle land on Jane G. *or her heirs*, so that the heirs would have been, not merely *in contemplation*, but *directly* the objects of the condition,

it might have been otherwise. And it has been adjudged that when the condition was to make a lease for the life of the obligee before such a day, *or* pay him £100, the obligee died *before the day*, yet that obligor should pay the £100. So, also, where the lessee of a mill *covenanted* (and *covenants* and *conditions* in this regard stand on the same footing), to leave the mill-stones in as good plight as he found them, *or else* to pay such damages as A should assess, and A *made no assessment*, it was held that it was the duty of the obligor to have procured the assessment; and as that alternative had failed by *his own default*, he should not be excused from the other. (*Studholme v. Mandell*, 1 Ld. Raym. 279; *Da Costa v. Davis*, 1 Bos. & Pull. 242; 1 Lom. Dig. 350, & n. (6).)

The propriety of the doctrine has indeed been questioned in all cases, save where the impossibility of performing one of the alternatives is occasioned by the *act of the obligee*. (*Da Costa v. Davis*, 1 Bos. & Pull. 242; *Bac. Abr. Condition*, (K. 2); *Stevens v. Webb*, 7 Carr. & P. (32 E. C. L.) 61.)

2<sup>i</sup>. Non-Performance of a Condition, by Reason of the Act or Default of the Other Party; *w. c.*

1<sup>k</sup>. The Absence of the *Performee*.

If the Performee is absent at the proper time and place, when his presence *is needful* to the act of performance, the obligor is excused for non-performance. (1 Lom. Dig. 351.)

2<sup>k</sup>. Obstruction of Performance by the *Performee*.

The obstruction of performance by the performee *a fortiori* excuses non-performance. (2 Greenl. Cruise, 34.)

3<sup>k</sup>. Tender of Performance and Refusal.

Thus, if a grantor on condition to pay money, at the day and place appointed makes a *legal tender* of the money to the grantee, and it is refused; or if the condition be that the grantee shall enfeoff, and at the appointed day and place he offers to enfeoff, and it is refused; in these cases the tender and refusal are *equivalent to performance*, so far as the condition is concerned. And if the condition be to do a collateral thing, or to pay money, if it is a sum in gross, collateral to the land, the benefit thereof is, by the tender and refusal, wholly and for ever lost, there being no remedy therefor at law. If there were a *covenant* or promise to pay the money, or to do the collateral thing, tender and refusal do not necessarily extinguish that, since, although the *condition* be gone, the *covenant* remains, and may be enforced by action, if the covenantor is in default. (1 Lom. Dig. 351; 2 Th. Co. Lit. 68 & seq.; 4 Min. Insts. (611), 659.)

4<sup>k</sup>. The Performee's *Failure to do the First Act*.

Thus, if previous notice or request is required, or any *general* condition is to be fulfilled by the performee, the omission of such previous notice, request, or antecedent condition, excuses non-performance by the obligor. (1 Lom. Dig. 351 '2 & seq.; *St. Albans v. Shore*, 1 Hen. Bl. 270, 273, n.; *Hard v. Wadham*, 1 East. 619.)

Whether any stipulation is a condition precedent to the performance of the condition in question, is sometimes a perplexing question. It is admitted to depend upon the intention of the parties, as disclosed by their language, but that intention is not unfrequently hard to explore. If the condition is to *pay money*, this general rule may be stated, that where the thing which is the consideration for the money is to be done before the time arrives for the payment, the doing of the thing is a condition precedent to the payment of the money, and in an *action at law* must be necessarily averred and proved before the money can be recovered. But where the time appointed for the payment of the money does arrive, or *may arrive*, before the time appointed for the doing of the thing, the latter is not a condition precedent to the demand of the money. (*Thorp v. Thorp*, 1 Salk. 171; *Pordage v. Cole*, 1 Saund. 319; *Brockenbrough v. Ward*, 4 Rand. 355; *Bailey v. Clay, &c.* Id. 350; *Roach v. Dickinson*, 8 Grat. 154.)

#### 5<sup>th</sup>. The Waiver of the Condition by the Performee.

The party to whom the condition is to be performed may undoubtedly waive the performance, or after default, he may waive the forfeiture. Mere indulgence, however, or silent acquiescence, is no waiver; and the party, at the time when he is supposed to have waived the forfeiture, must have known of the breach of condition; and if it be not an express waiver, the conduct from which it is implied must be such as cannot be reconciled with a purpose to insist on the condition, or the forfeiture. (1 Lom. Dig. 337 '8; 2 Greenl. Cruise, 34, n. 1; *Dunpor's Case*, (4 Co. 119) 1 Smith's L. Cas. 80 & seq.)

#### 6<sup>th</sup>. Relief in Equity against Forfeitures Arising Out of Breach of Conditions.

We are to take notice, under this head, of (1), The principle of equitable intervention; and (2), The cases wherein equity intervenes:

*W. L.*

##### 1<sup>st</sup>. The Principle of Equitable Intervention.

The true ground of relief in equity against forfeitures is from the *original intent* of the parties, where the penalty or forfeiture is designed only to *secure the performance* of some act, whether it be a collateral act or to pay money; and the court may give the party, by *way of recompense*, all that he ought to have expected or desired. (1 Lom. Dig. 355 & seq.;

Peachy v. Somerset, 1 Stra. 447; Sloman v. Walker, 1 Bro. C. C. 418; same cases, 2 Wh. & Tud. (Pt. II.), 448, 456 & seq.

This doctrine of compensation and relief in equity is more particularly applicable to conditions *subsequent*. Whether relief can in any case be given in default of performance of a condition *precedent*, is not a little doubtful. The weight of judicial authority seems to be against it, whilst in some old cases (Jennings v. Gower, 1 Cro. (Eliz.) 219, Lord Buckhurst's case, Moor, 519), a distinction is taken between *wills* and *deeds*, allowing the interpositions in wills, but not in deeds. (Popham v. Bumpfield, 1 Vern. 83; Woodman v. Blake, 2 Vern. 167, n. (1); Cary v. Bertie, 2 Vern. 339; 4 Kent's Com. 125.) But there is much authority, and great show of reason, on the other side. See Hayward v. Angell, 1 Vern. 2, 3; Woodman v. Blake, 2 Vern. 222; 1 Lom. Dig. 355; City Bank v. Smith, 3 Gill & J. 265; Columbian Coll. v. Clopton's Adm'r, 7 Grat. 168.

## 2<sup>b</sup>. The Cases wherein Equity Relieves.

Equity undertakes to relieve against forfeitures arising out of the breach of conditions, wherever the substantial object which the parties had in view can be obtained without the forfeiture, by mere compensation; which will most frequently happen when the condition is *to pay money*, and will rarely occur when it is *to do a collateral thing*. The doctrines which regulate the interposition of equity may be referred to the heads of, (1), When the condition is to pay money; (2), Where it is to do a collateral thing; and (3), Where it is to pay stipulated damages;

W. C.

### 1<sup>a</sup>. Where the Condition is *to Pay Money*.

As in this case compensation can always be made, so equity always relieves upon the offer to pay the money, *with interest*, within a reasonable time after default; the penalty or forfeiture being attended with no other design than to secure the payment. (1 Lom. Dig. 355 & seq.; Peachy v. Somerset, (1 Stra. 447), 2 Wh. & Tud. L. Cas. (Pt. II.), 457 & seq.)

It may be observed that equity distinguishes between a promise *to pay more*, if a stipulation be not observed (which it denominates a *penalty*, and will relieve against), and a *remission of a part*, if a stipulation be fulfilled, which it regards as not obnoxious to a similar objection. And yet it is obvious that the same result may be attained by the latter means, as is condemned in the former. Thus, if a bond bind the obligor to pay \$100 in twelve months, and if it be not punctually paid, *with interest from the date*, this latter stipulation is a penalty, and cannot be enforced, the interest accruing only from the expiration of the year. But if the bond were to pay in twelve months \$100, *with interest*



*from the date*, and if the principal was punctually paid, the *interest to be remitted*, the debtor can entitle himself to a remission of the interest only by paying the principal punctually. Upon like principles, when a deed of trust to secure a debt not payable for ten years, stipulated for the *annual* payment of interest, and provided that if any such annual interest were *not punctually paid*, the whole debt should immediately become payable, and that the deed might be enforced *in whole*, it was held that the *proviso* was a penalty against which equity would relieve, in case the interest were paid or tendered at any time before a sale under the deed. But had the debt been made payable immediately, with a *proviso* that the deed should not be liable to be closed for ten years, if the interest were annually paid, equity would not have interposed. (Nicholls v. Maynard, 3 Atk. 521; Wallis v. Long, 6 Munt. 78; Bonafous v. Rybot, 3 Burr. 1370; Goodlet v. Hansforth, 2 Wm. Bl. 958; Mayo v. Judd, 5 Munt. 495.)

This equitable principle is frequently invoked where a lessee neglects to pay his rent at the time specified, whereby a right of re-entry accrues to the lessor, or the lease is in such contingency absolutely *avoided*; and the principle has even been applied by a *court of law*, by a rule to *stay proceedings*, upon payment or tender of the rent. (1 Lom. Dig. 356-7; Goodtitle v. Holdfast, 2 Stra. 900; Anon. 1 Wils. 75.)

The penalty in equity allowed to the tenant relief against the forfeiture at any *indefinite* time, but the statute touching re-entries, already referred to (*Ante*, p. 277, 2\*) limits the period to twelve months, and enables the tenant to assert his equity in a court of law, as well as in chancery. (V. C. 1873, ch. 134, §§ 17 to 20, 24; V. C. 1887, ch. 127, §§ 2797 to 2800, 2804; Peachy v. Somerset (1 Stra. 447), 2 Wh. & Tud. L. Cas. (Pt. II.), 458.)

## 2. Where the Condition is to do a *Collateral Thing*.

Compensation is by no means universally possible in case of conditions *to do collateral things*, and when the *performance* of the condition cannot be put into a plight essentially the same, or at least as advantageous, as if the condition had been punctually performed, equity does not interpose. Hence a breach of the condition by assigning the premises without license; by the tenant's neglecting to repair; by omitting to keep the premises insured; by adopting a prohibited course of husbandry; or by exercising a forbidden trade on the premises; will in none of these cases be relieved against in equity, because there is no known measure of damages whereby the breach may be compensated. Neither will equity interpose to grant relief against *voluntaries*, i. e. duties in public works for non-payment of

calls, from considerations of public policy connected with the necessity of punctuality in such cases; nor where the forfeiture is exacted by a statute, nor in pursuance of a condition in law. (1 Lom. Dig. 357-8; Peachy v. Somerset, (1 Stra. 447), 2 Wh. & Tud. L. Cas. (Pt. II.), 460 & seq.)

It should be observed that, whilst equity will give a person relief against a penalty, where it is only intended to secure the performance of a stipulation, so, on the other hand, it will not permit him to elect to pay the penalty, and so evade the specific execution of the contract, unless the alternative was contemplated. (Peachy v. Somerset, (1 Stra. 447), 2 Wh. & Tud. L. Cas. (Pt. II.), 465.)

3<sup>d</sup>. Condition to Pay Stipulated Damages.

The parties may fix their own measure of damages for the breach of any stipulation between them, provided they appear to have made an *actual estimate*, in good faith, of the loss which will accrue in the contingency contemplated. In that case equity will not interfere to prevent the *performer* from enforcing the payment of the full sum agreed on, which is, in no sense, a *penalty* in order to *secure performance*, but the true *measure* of damage occasioned by *non-performance*. It is not enough to make the damages *liquidated*, and recoverable *eo numero*, that they should be so denominated by the parties. Although said to be liquidated, yet if the exorbitance of the estimate, or any other circumstance, shall satisfactorily demonstrate that really *no actual and bona fide computation* was made of the loss which would result from the breach of the contract, the sum named is a penalty, and not liquidated damages. Amongst other circumstances which refute the idea of any real computation, and therefore of the damages being truly liquidated, is the fact that the stipulations are several, and an *aggregate sum* is named; for it is impossible that the same sum can be at once a compensation for the breach of all the stipulations, and of each one separately. (1 Lom. Dig. 358-9; Peachy v. Somerset, (1 Stra. 447), 2 Wh. & Tud. L. Cas. (Pt. II.), 469-70.)

3<sup>d</sup>. Estates on Condition, which are *Securities for Money*.

Estates on condition, which are securities for money, arise, (1), By compulsory process of law; and (2), By the assent and conveyance of the debtor;

W. C.

1<sup>o</sup>. Estates on Condition, which are Securities for Money, by *Compulsory Process of Law*.

Estates on condition, which are securities for money, by compulsory process of law, are, (1), Estates by *degit*, and other judicial liens; (2), Estates by *statute-merchant*; and (3), Estates by *statute-staple*;

W. C.

#### 14. *Charges by Elegit, and other Judicial Liens.*

See 2 Bl. Com. 164-2; 3 Do. 418; 3 Th. Co. Lit. 517-'18; 1 Lom. Dig. 367 & seq.; V. C. 1873, ch. 182, §§ 6, 1, 9; Id. ch. 183, § 20; V. C. 1887, ch. 174, §§ 3566 & seq., 3557; Id. ch. 175, § 3581.

We are to discuss this subject by adverting to, (1), The nature of the estate by *elegit*; (2), The proceeding with a writ of *elegit*; (3), The liabilities of tenant by *elegit*; (4), Proceedings if tenant by *elegit* is evicted; (5), The present state of the law in Virginia in respect to the writ of *elegit*; (6), The lien of judgments and decrees; and (7), Other judicial liens besides those of judgments;

W. C.

#### 15. The Nature of Estate by *Elegit*.

By the feudal law, introduced into England immediately after the Conquest, the *lands* of feudal tenants were not liable to debts in general, because such liability would of itself have interfered with the prompt and effective rendition of the military services, which constituted the safeguard and protection of the realm; and would besides have made it easy to evade that principle of *non-alienability* without the lord's consent, which was an essential element of the feudal system. For debts due to the king, indeed, the common law allowed lands to be taken, as appears by *Magna Charta*, c. 9, because the king, by the doctrine of feuds, being the grand superior and ultimate proprietor of all landed estates, could not be defrauded of the military services, when the ouster of the vassal proceeded from his own action. (3 Bl. Com. 419; 2 Do. 161; 1 Lom. Dig. 368-'9.)

The feudal restraints upon alienation had already begun to give way, especially to the demands of trade and commerce, when, by statute Westm. II., 13 Edw. I., c. 18 (A. D. 1285), it was provided that, "when a debt should be recovered, or recognizance should be acknowledged in the king's court; or when damages should be adjudged, it should be *in the election* of the plaintiff to sue out a writ commanding the sheriff to make the debt or damages out of the *goods and chattels* of the debtor, or to deliver to the creditor all the *chattels* of the debtor (except *oxen and horses of the plough*), and a *moiety of his land*, until the debt should be levied by a reasonable *price or extent*; and that, if the creditor were ejected from that *tenement*, he should recover the same by writ of *novel disseisin*, and afterwards, if need be, by a writ of *re-disseisin*." When a creditor chose to avail himself of this latter alternative, of recovering the debtor's lands, there was an entry upon the roll, *Quod cum esset executio fieri de omnibus catallis et* &c. &c. &c. (that he elected to have execution

against the debtor's chattels, and a moiety of his land; and thence the execution itself came to be denominated an *elegit*, and the estate devolved, by means of it, upon the creditor, "*until the debt should be levied* by a reasonable price or extent," was known as an *estate by elegit*. (2 Bl. Com. 161; Bac. Abr. Execution, (C.) 2.)

The words of the statute are that the creditor shall have the property delivered to him *per rationabile pretium vel extentum*, which implies that there is to be a valuation made. This valuation, it has always been held that the sheriff alone cannot make. It must be made *by a jury* which the sheriff impanels for the purpose, whose charge is to *appraise* the debtor's goods and chattels (except beasts of the plough), which thereupon the sheriff is to deliver to the creditor *as his own*; and if thereby the debt is satisfied the lands are not to be *extended*; but if the debt is not thereby extinguished, the moiety of the debtor's lands is to be delivered to the creditor at an *annual sum*, to be assessed by the jury, to be held by him *until the residue of the debt shall be levied*. (Bac. Abr. Execution, (C.), 2.)

The language of the statute is *medietatem terræ*, which has been always interpreted to mean the moiety of the *freehold lands* (for leasehold is subject to the execution of *fieri facias*), whereof the debtor *was seised* at the date of the judgment, or afterwards, and so have ever been the terms of the writ of *elegit*. (3 Th. Co. Lit. 518, n. (D.); Lilly's Entries, 576; Fitzh. Nat. Br. 595.)

Tenant by *elegit* has plainly only a *term for years*, and yet the precept of the writ is that the moiety of the lands shall be delivered to the creditor at a *reasonable price and extent*, "*to be holden as his freehold*" (*ut liberum tenementum*), until the debt shall be *thereof levied*. "*But ut,*" says Lord Coke, "*is similitudinary,*" because the tenant is, by the statute 13 Edw. I., allowed a writ of *assize* as a tenant of the freehold shall have, "*and to that respect his interest has a similitude of a freehold, but nullum simile est idem.*" (Fitzh. Nat. Br. 595; 1 Th. Co. Lit. 487.) Hence, if the creditor dies during the continuance of the term, the residue thereof vests in his *personal representative*.

In Virginia, until 1850, there was a statute essentially the same as 13 Edw. I., c. 18; but by the revival of the Code, which took effect 1st July, 1850, several changes were made, of which it will suffice to note two, namely, 1st, that *personal chattels* were wholly excluded from the operation of the writ; and 2nd, that it applied to *the debtor's lands*, leasehold as well as freehold. (1 R. C. (1819), ch. 134, §§ 1, 4 to 8; V. C. 1873, ch. 182, §§ 8 to 10,



1857, ch. 174, § 3570 & seq.; 1 Lom. Dig. 370 & n. 31. But the *degit* is now abolished in Virginia. (V. C. 1857, ch. 170, § 3581.)

## 2. Proceedings with a *Writ of Eject.*

The proceedings with a writ of *degit* will be best set forth by explaining in succession: (1), The form of the writ; (2), The mode of levying it; (3), What property may be extended under it; (4), Proceedings on it against an *heir*; (5), Proceedings against *purchasers* from the debtor; and (6), The return of the writ;

### 1<sup>st</sup>. The Form of the *Writ of Eject.*

The statute in Virginia, with a particularity far exceeding its English prototype, has always prescribed, and does now prescribe (or rather did prescribe until the writ was abolished), the precise form, not only of the writ, but also of the officer's return, including the *inquisition* taken before him, by the jury, of the value of the lands levied upon. At present the writ is more brief than it was formerly, or than the English precedents, reciting simply the recovery of the judgment, and commanding the sheriff to cause all the real estate of, or to which the debtor was possessed or entitled, *at or after* the date of the judgment, to be delivered *by reasonable extent* to the creditor, for him and his assigns to hold the same until the debt is levied thereof. (V. C. 1873, ch. 182, § 8; 1 Lom. Dig. 370; 1 R. C. 1819, ch. 134, § 1.)

### 2<sup>d</sup>. The Mode of Levying the Writ of *Eject.*

When the jury have found the possession or title and value of the land, the sheriff, and not the jury, is to set out and deliver the same to the plaintiff; and when a moiety only was subjected, it was requisite that it be done by *metes and bounds*, unless in the case of joint-tenants, tenants in common and co-parceners, when it was impossible, as the debtor was himself seised only of an undivided portion. In case of fraud, partiality, or any other irregularity in executing the writ, it may be quashed by the court, and a new writ issued. The *delivery* to the plaintiff was formerly an *actual* delivery, but some inconvenience to third persons, who might be in possession under an adverse title, arising from this practice, it has long been discontinued, and the sheriff delivers only *legal* possession, actual possession being obtained, if need be, by means of an action of ejectment, or of unlawful detainer, etc. (1 Lom. Dig. 384-5; Id. 401, *How. Adv. Exor.* (C.) 2.)

### 3<sup>d</sup>. What Property *May be Extended*.

The writ commands the sheriff to cause to be delivered to the creditor *all the real estate* of or to which the

debtor was *possessed or entitled, on or after* the day on which the judgment was rendered (or, if it was in court, on which the term commenced). The subject must be *real estate*, but it may be freehold or leasehold, legal or equitable (so only that the equitable interest be not *unascertained*, like an equity of redemption), jointly or solely owned, corporeal or incorporeal; embracing, therefore rents of all sorts and reversions, and including, not only such real property as belonged to the debtor at the date of the judgment, but such also as he afterwards acquired. Hence, a judgment binds *all the real estate* of or to which the debtor was possessed or entitled *at or after* its date, notwithstanding the debtor may have sold it to purchasers *for value and without notice* of the judgment. (1 Lom. Dig. 385, 399 to 403; Bac. Abr. Ex'or, (C.) 2; Coutts v. Walker, 2 Leigh, 268.)

And it should be observed that, even in the case of an *unascertained* equitable interest, such as an equity of redemption, although the *degit*, from consideration of policy, because it is *uncertain*, or rather *unascertained*, cannot be levied upon it, yet it is as much subject as other real estate to the *lien of the judgment*, which may be *enforced in equity*. (Coutts v. Walker, 2 Leigh, 268; Foreman v. Lloyd, &c. 2 Leigh, 284; Findlay v. Toncray, 2 Rob. 377.)

4<sup>h</sup>. Proceedings on a Writ of *Elegit*, against an *Heir*.

Previous to 1850, the object of the proceeding was to levy the *degit* upon lands in the hands of the heir, but by the revival, which took effect in that year, it is provided that an heir or devisee *may be sued in equity* by any creditor to whom a debt is due, for which the estate descended or devised is liable, in respect to such estate; he shall *not be liable to an action at law* for any matter for which there may be redress by such suit in equity, where, moreover, the *lien of a judgment* may be always enforced. The effect seems to be to do away with the technical rules which formerly regulated the enforcement against the heir of judgments against his ancestor, and in all cases to bring such causes into a court of chancery. (V. C. 1860, ch. 131, § 6; Id. ch. 186, § 9; 1 Lom. Dig. 386.)

It will be not undesirable, however, briefly to state the principles which formerly governed in such cases. When the ancestor dies, no proceedings of any kind can be had, either against his heir or devisee, or against his personal representative, until, by what is called a writ of *scire facias*, the new party has received notice that he is to be proceeded against, and has had an opportunity to show cause against it; that is, until the judgment *has been re-*

—*scire facias* against him. Nor in England can such a writ be issued against the heir during his minority, he having a right to insist that the writ shall *demour*, that is, that the proceedings be stayed until he is of age. But this source of delay is obviated with us by statute (V. C. 1873, ch. 167, § 15; V. C. 1887, ch. 159, § 3255), declaring that the proceedings in a suit shall not be stayed because of infancy in any party, but that a guardian *ad litem* shall be appointed to defend the infant. If the lands were in the hands of a third person, the proceedings must have been by *scire facias* against the heir alone, or jointly with the third party usually against them jointly. However, before such *scire facias* against the heir and *terre-tenants* would lie, it was necessary to resort to *scire facias* against the administrator's personal representative, and to have a return of *nihil* thereupon, because it said the lands were not executable until the goods were exhausted (whilst the *elegit* was directed against goods, as well as lands). And whilst the heir might have been proceeded against without the *terre-tenants*, it seems that the latter could not in general be charged alone. For the heir may have a release to plead, or other matter in bar of the execution; and his land is rather to be charged than that of the *terre-tenants*. (1 Lom. Dig. 385-86; Rob. Forms. 25, 371.)

#### 7. Proceedings Against Purchasers from the Debtor, Subject to the Lien of the Judgment.

If the creditor should extend but a portion of the lands, the whole being at that time still in the debtor's possession, the debtor has no right to complain, the irregularity being for his benefit and therefore he cannot quash the execution. But if there were several purchasers who had bought all the same *terra* portions of the land after the judgment lien attached, and the creditor should extend only a part of the lands, the purchasers whose lands were thus charged with a burden, which ought to be shared ratably with the others, have reason to complain of the partiality of the proceeding. They may be relieved by means of a writ of *audita querela* (or its modern substitute, a *motion*), upon which the execution will be set aside, the purchasers aggrieved will have the *mesne* profits restored to them, and the creditor will be obliged to sue execution of all the lands. (1 Lom. Dig. 386-7.)

When, however, the purchasers have bought, at different times, in succession, the rule established by many applications in Virginia, and now confirmed by statute, is that the purchasers shall be subjected in equity in the order of their purchases, the last first, etc.; and if any part remain in the debtor's hands, that shall be subjected first of all. And this rule is a reasonable and just

one, obliging each successive purchaser to take *cum onere*, with reference to the burden resting upon that portion of the land when he bought it. (Conrad v. Harrison, 3 Leigh, 532; McClung v. Beirne, 10 Leigh, 324; Rodgers v. McCluer, 4 Grat. 81; Henkle's Ex'or v. Allstadt, Id. 284; Jones v. Myrick, 8 Grat. 179; Buchanan v. Clark & als. 10 Grat. 181; Harman v. Oberdorfer, 33 Grat. 503-'4, 504 & seq.; V. C. 1873, ch. 182, § 10; V. C. 1887, 174, § 3567; 1 Lom. Dig. 386 & seq.)

The statute which prescribes, or rather affirms, the above rule is as follows:

"Where the real estate liable to the lien of a judgment is more than sufficient to satisfy the same, and it, or any part of it, *has been aliened*, as between the alienees *for value*, that which was *aliened last* shall in equity be first liable, and so on with other successive alienations until the whole judgment is satisfied. And as between alienees who are volunteers under such judgment-debtor, the same rule as to the order of liability amongst such volunteers shall prevail; but any part of such real estate *retained by the debtor* himself shall be first liable to the satisfaction of the judgment." (V. C. 1873, ch. 182, § 10; V. C. 1887, ch. 174, § 3575.) In applying this principle, it is held that regard must be had to the general doctrine, that where there is a *common burden*, and the parties liable are all before the court, equity will apportion the burden, in the *first instance*, according to the rights and liabilities of the parties, provided it can be done without prejudice to the creditor who has a claim on all. (Lewis v. Overby, 31 Grat. 620.)

Hence, where three several parcels of land, all subject to the lien of the same judgment, were sold at auction, at the same place, on the same day, and on the same terms, to three different purchasers, who were at once put into possession under their respective contracts, and afterwards received conveyances at different times, which were recorded at several successive periods, it was held that, within the meaning of the statute above cited, the "*alienations*" were to be regarded as all taking place on the same day, namely, the *day of sale*, and therefore, at the *same time*, the law in such a case taking no account of the fractions of a day. For a court of equity habitually considers that as *actually done* which is *agreed to be done*, and will construe the contract to sell to each of the three purchasers as if it had been specifically executed. (2 Stor. Eq. §§ 790, 1212; 1 Sugd. Vend. c. iv., § 1, p. 274 (bottom); Harman v. Oberdorfer, 33 Grat. 506.) The purchasers of these several parcels, bought thus *at the same time*, are therefore bound to contribute *ratably* to



pay the judgment, and to this end there should be an apportionment by the court of the amount to be paid by each in proportion to the relative value of their respective lots on the day of sale, and a decree against each *separately in that sum*, and upon his failure to pay, for the sale of *his part* of the land. And if in the case of any one of them the land fails to satisfy his share, the deficiency is to be apportioned *ratably* amongst the other purchasers, and so on until the judgment is satisfied, or the lands in the possession of the purchasers *are all sold*. (Harman v. Oberdorfer, 33 Grat. 504 & seq.; Horton v. Bond, 28 Grat. 825; Lewis v. Overby, 31 Grat. 620.)

In like manner, in pursuance of the principle that "*substantive*," within the meaning of the statute in question (V. C. 1873, ch. 182, § 10; V. C. 1887, ch. 174, § 407), refer to the alienor's divesting himself *in equity* of his title to the land, whether by contract executory or conveyance executed, and involve no question touching the *registry* of the writings, under V. C. 1873, ch. 114, § 5, 11; V. C. 1887, ch. 109, §§ 2465, 2472; it is held that, if H's deed *bears date* 1st January, was acknowledged before a justice 1st February, and was recorded 13th April, and B's is dated and acknowledged 1st February, and recorded 24th February in the same year, H is the *first* and B the *last purchaser*, and the portions of the land subject to the judgment, in their hands respectively, are liable accordingly; that is, B's portion first, and H's not until B's is entirely exhausted, notwithstanding B's conveyance was first recorded. The statute directs the land *last aliened* to be *first taken*, without reference to the order of registry; and the *dates* of the instruments of title, in the absence of any contrary evidence, are *prima facie* to be taken as showing the true time when they were executed. (Harvey v. Alexander, 1 Rand. 219, 241; Rodgers v. McCluer, 4 Grat. 81, 83; Harman v. Oberdorfer, 33 Grat. 501-'2.) Nor can the last alienee insist that the omission of the first alienee to record his conveyance postpones him, for the statute of registry (V. C. 1873, ch. 114, § 5, 11; V. C. 1887, ch. 107, §§ 2465, 2472) applies to avoid the unrecorded assurance only as between purchasers of the *same subject*, whereas in the case under consideration H and B were purchasers of *different subjects*. B's purchase, therefore, as has been said, is to be subjected before H's. (Harman v. Oberdorfer, 33 Grat. 503-4; Rhea v. Preston, 75 Va. 757.)

It is not foreign to the subject under discussion to remark, that wherever several persons are liable *ratably* to pay a common debt, whether by reason of a personal obligation or of the ownership of different portions, bought

at the same time, of a subject charged with an incumbrance paramount to the titles of all, a court of equity ought not to decree at large against them all collectively, but should first ascertain the share to be paid by each, and decree against him separately therefor, and, upon his failure to pay, should order a sale of his land, supposing the land to be chargeable. And if the land fails, in case of any of them, to satisfy that party's share, the deficiency is to be apportioned amongst the other parties, with a like decree against each for his share of the deficiency, and so on until the judgment is satisfied, or the lands of the parties subject to the demand are all sold. Of this principle several exemplifications present themselves. Thus, the principle is applied.

1, In the case, above discussed, of several *purchasers* buying *at the same time* the land subject to the common charge. (*Ante*, p. 307; *Harman v. Oberdorfer*, 33 Grat. 504 & seq.; *Horton v. Bond*, 28 Grat. 825; *Lewis v. Overby*, 31 Grat. 620.)

2, In a case between the *sureties of an insolvent principal*. (*Mayo v. Tomkies*, 6 Munf. 520; *Mason v. Peter*, 1 Munf. 446; *Horton v. Bond*, 28 Grat. 825 '6.)

Nor in such a case ought a sale to be decreed until it has been ascertained, settled and determined, what debts are chargeable on the lands, the amounts thereof, to whom payable, and the order in which they are payable. Until this be done, a decree of sale tends to sacrifice the property by discouraging creditors from bidding, as they probably would do, if their right to satisfaction of their debts had been previously adjusted. (*Cole v. McRae*, 6 Rand. 644; *Smith v. Flint*, 6 Grat. 40; *Buchanan v. Clark*, 10 Grat. 164; *Lege v. Bossieux*, 15 Grat. 83; *Lipscombe v. Rogers*, 20 Grat. 658; *White v. Meeh. B. F. Assoc.* 22 Grat. 333; *Moran v. Brant*, 25 Grat. 104; *Simmons v. Lyles*, 27 Grat. 929; *Kendrick v. Whitney*, 28 Grat. 655; *Horton v. Bond*, 28 Grat. 822; *Schultz v. Hansbrough*, 33 Grat. 577.)

3, In case of a decree for a debt due from the devisor, against the lands devised, *in the hands of several devisees*.

Here the debt being chargeable alike against all, the decree should ascertain what each is to pay, which (unless the will direct otherwise) is to be in proportion to the value of the lands willed to the devisees, respectively, and the court should decree against each *separately* for that sum, and that if it cannot be made out of any devisee, the deficiency on his share is to be re-apportioned amongst the others, and so on until the whole debt is satisfied, or all the lands sold. (*Lewis v. Overby*, 31 Grat.

200; *Masson v. Peters*, 1 Munt. 446; *Horton v. Bond*, 28 Gratt. 825, 829-30; *Harman v. Oberdorfer*, 33 Gratt. 307.) But see *Crawford v. Waller*, 23 Gratt. 852-3, as to the effect of account in dispensing with such previous account.

6. The Return of the *Writ of Elegit*.

The return of the writ, which is in the form of an *inquisition* taken before the sheriff by the jurors named, is prescribed at length by the statute in Virginia. It recites the fact that it was taken before the sheriff, by virtue of the writ, by the jurors whose names are given, and sets forth that the debtor, on or after the date of the judgment, was possessed or entitled of or to the real estate described (and none other to their knowledge), in the said county, and that it is of the *annual value* stated; and it further sets forth that the sheriff delivered the said real estate to the creditor at such value, for him and his assigns to hold the same until the amount of the judgment be levied thereon. And it concludes, "In testimony whereof, we, the sheriff and jurors aforesaid, hereto put our hands." (V. C. 1850, ch. 187, § 9; 1 R. C. (1819), ch. 134, § 1; 1 Lomb. Dig. 383.) But notwithstanding the terms of the writ, and of the officer's return, the officer, as we have seen, does not deliver to the creditor *actual possession* of the premises, but only the *legal possession*, which may be enforced by ejectment, or at the option of the creditor, by writ of unlawful entry and detainer, where the cause of action has accrued within three years. And if after the extent, the debtor, or any one claiming under him, withholds possession of the premises, the tenant by *elegit* may not only recover them by action, but may hold them, it seems, after his proper term has expired; that is, his term will be in that case reckoned, not from the date of the extent, but from the time of his obtaining *actual possession*. (*Lyons v. McGuire*, 22 Gratt. 204.)

The *elegit* is one of the few executions to whose complete validity a *return* is essential. The general principle is that "an execution *executed* is the end of the law," whether returned or not; but where the writ is not to be executed by the *sole authority* of the sheriff, but he must employ the aid of a jury, as in case of the *elegit*, he must *return the writ*, that it may appear that he has *performed the direction* of the law. (Bac. Abr. Execution, (C.) 2, 1.

7. The Limitation of *Tenant by Elegit*.

Upon the entry of the creditor into the lands extended, he is called *tenant by elegit*; and although his estate is in *perpetuity* uncertain in its duration (being liable to be determined at any time by a *casual profit* sufficient to pay the debt), yet inasmuch as its utmost limit is ascertained

by the *yearly value* assessed by the jury, with which the creditor is chargeable at all events, it is an estate *for years*, and so a chattel-interest, passing at the creditor's death to his *personal representative*. The tenant by *elegit* is, therefore, punishable for waste, even under the statute of Gloucester (6 Ed. I., c. 5), and much more under the law of Virginia, which is applicable not only to tenants *for life or years*, but to *all tenants*. (1 Lom. Dig. 403; Fitzh. Nat. Br. 58; V. C. 1873, ch. 133, §§ 1, 3; *Contra*, 3 Th. Co. Lit. 249; Dean, &c., of Worcester's Case, 6 Co. 37; Scott & al. v. Lenox, 2 Brock. 59.) The reason assigned for the contrary view is, that tenant by *elegit* is liable for the waste done in another form of remedy, namely, by a writ of *venire facias ad computandum*. (3 Th. Co. Lit. 240, n. (Y.); 1 Lom. Dig. 403.)

These estates were formerly liable, like other estates for years, to be barred by a common recovery suffered by the owner of the freehold; against which abuse they are protected in England, by statute 27 Hen. VIII., c. 15, a precaution apparently not imitated, and doubtless not necessary, in Virginia. (1 Lom. Dig. 403.)

#### 4<sup>g</sup>. Proceedings if Tenant by *Elegit* is Evicted.

Prior to the statute 32 Hen. VIII., c. 5, this very probable case was unprovided for. The levy and return of an *elegit* was a *satisfaction*, and precluded the plaintiff from any further remedy. There could never be a re-extent upon any *eviction*. That statute authorized a new *elegit* to be sued out upon a *scire facias*, in case of *eviction* of the tenant, before the debt was satisfied; and a corresponding enactment in Virginia provides, in case of *eviction*, for *any new execution* here, upon *scire facias* or motion, within *five years*. (3 Th. Co. Lit. 519 & seq.; V. C. 1873, ch. 183, § 39; Wilson v. Jackson's Adm'r, 5 Leigh, 107; 1 Lom. Dig. 405-'6.)

#### 5<sup>g</sup>. The *Present State of the Law in Virginia* in Respect to the Writ of *Elegit*.

In pursuance of the deplorable policy which has characterized too often the legislation of the country since the termination of the war, to obstruct the recovery of debts in order to extend indulgence to unfortunate debtors—a policy hardly less destructive in reality of the true interests of debtors than of creditors—it is enacted by act of March 26, 1872, "that from and after that date no writ of *elegit* shall issue upon any judgment heretofore or hereafter rendered." (V. C. 1873, ch. 183, § 26; V. C. 1887, ch. 175, § 3581.) This policy, it is apprehended, cannot long endure, and the writ of *elegit*, under that or some other designation, will probably soon be restored (but see Borst v. Nalle, 28 Grat. 430), and the student is, therefore, advised



to give heed to all that relates to the writ, as learning for which, if it be at present in suspense, he is likely soon to have practical occasion. Meanwhile, the direct lien of judgments and decrees for money, created by statute *in rem* (V. C. 1873, ch. 182, §§ 6, &c.; V. C. 1887, ch. 174, §§ 3567 & seq.) still subsists as to the debtor's lands, and may be enforced in a *court of equity*. (V. C. 1873, ch. 182, § 9, &c.; V. C. 1887, ch. 174, §§ 3571 & seq.)

#### (c) The Lien of Judgments and Decrees on Lands.

It is by virtue of the writ of *elegit* that a judgment at first becomes a *lien* on real estate, as that writ enables the creditor to get possession of it; thereby *over-reaching* all intermediate conveyances, without regard to notice or not. Hence, as decrees in equity for money, and also judgments of a justice of the peace (after a *fiery facias* returned to the clerk's office of the county or corporation court), may be enforced in like manner, they too constitute, like judgments of the law courts, a *lien* on real estate, a proposition which is now, as we have seen, declared in terms, by statute. And they bind the *undivided* lands of the debtor, whether docketed or not, in the order in which they are recovered. (1 Lom. Dig. 371 & seq.; V. C. 1873, ch. 182, §§ 1, 6 & seq.; Id. ch. 147, §§ 9, 10; V. C. 1887, ch. 174, §§ 3557, 3558, 3567; Id. ch. 140, §§ 2949, 2950; Coleman v. Cocke, 6 Rand. 629; Taylor v. Spindle, 2 Grat. 63; Rogers v. Marshall, 4 Leigh. 426; U. States v. Morrison, 4 Pet. 124; Burton v. Smith, 13 Pet. 464; Scriba v. Deanes, 1 Brock. 166; United States v. Winston, 2 Brock. 252; Boast v. Nalle, 28 Grat. 428-9; Hutcheson v. Grubbs, 80 Va. 251; Rhea v. Preston, 75 Va. 757.)

We are to give heed to, (1), The duration of the lien of judgments; (2), The docketing or registry of judgments; (3), The effect of the lien of the judgment; (4), The subordination of sureties to the lien of a judgment; and (5), The mode of enforcing a judgment lien;

1. The Duration of the Lien of Judgments; w. c.
2. The Commencement of the Judgment Lien.

The common law regards, for most purposes, the whole term of a court as *one day*, so that a judgment given at any time during the term relates back to the *first day*, as if rendered then. This practice prevails in Virginia, and in equity as well as at law. The principle, however, does not apply where the cause was in such a plight that it was *not prepared for judgment* on the first day, a circumstance, from the nature of the proceedings in the courts, respectively, more likely to occur in a court of chancery than of law. (Mut. Assur. Soc. v. Stowood, 4 Mif. 539; Coutts v. Walker, 2 Leigh,

268, 276; Skipwith v. Cunningham, 8 Leigh, 278-9; Horsley v. Garth, 2 Grat. 492; Withers v. Carter, 4 Grat. 418 & seq.; Jones v. Myrick, 8 Grat. 179; Brockenbrough v. Brockenbrough, 31 Grat. 690; 1 Lom. Dig. 372, & n. \*; Yates v. Robertson, 80 Va. 477.)

This doctrine is now substantially confirmed by statute, which provides that *every judgment* for money (and that includes *decrees* also), rendered in Virginia, *shall be a lien* on all the real estate of, or to which the debtor is possessed or entitled, at or after the *date of the judgment*, or if rendered in court, at or after the *commencement of the term* at which it was rendered; but not as against a *purchaser* for value and without notice, unless it be *docketed* according to law in the county or corporation wherein the real estate is, within *twenty days* from the date of the judgment, or *fifteen days* before the conveyance to such purchaser. (V. C. 1873, ch. 182, §§ 6 to 8; V. C. 1887, ch. 174, §§ 3567 to 3570; 1 Lom. Dig. 373-4; Gordon v. Rixey, 76 Va. 694.)

But it is provided that where, from the *nature of the case*, a judgment or decree could not have been rendered at the commencement of the term, it shall be a lien, not from the commencement of the term, but only on and after the day on which it is rendered or becomes final. (V. C. 1887, ch. 174, § 3568.)

It is proper to observe, that the term of the court is not considered as necessarily commencing on the day appointed for its commencement, but on the first day that the court *actually sits*, and the first moment of that day, that is the first moment after midnight. (Skipwith v. Cunningham, 8 Leigh, 279; Horsley & als. v. Garth & als. 2 Grat. 474, 491.)

Judgments entered in the clerk's office, where there is no order for an inquiry of damages, if not previously set aside, become final judgments of the last day of the next term, or the 15th day thereof (whichever shall happen first), and have the same effect, *by way of lien* or otherwise, as a judgment rendered in the court at such term. (V. C. 1873, ch. 167, § 45; V. C. 1887, ch. 159, § 3287; Enders v. Burch, 15 Grat. 71.) Hence, where a judgment was confessed on the first day of a term, and on the last day of the same term an office-judgment becomes final, they are both considered as judgments of the first day, and are to be treated as rendered at the *same time*. (Brockenbrough v. Brockenbrough, 31 Grat. 599, 600; Heale v. Utz, 75 Va. 480.)

Judgment confessed *in the clerk's office*, it is declared by statute, "shall be entered of record by the clerk in the order or minute-book, and be *as final and as valid*

as if entered in court on the day of such confession, except merely that the court shall have such control over them" as it has over all proceedings in the office during the *proceeding vacation*, namely, by setting aside any of the said proceedings, or correcting any mistake therein, and making such order concerning the same as may be just. (V. C. 1873, ch. 167, §§ 42, 52; V. C. 1887, ch. 150, §§ 3283, 3293.) A judgment by confession in the clerk's office in vacation creates a lien on the defendant's land from the *day of confession*, in like manner, as if it had been on that day entered in court, notwithstanding it is liable to be set aside, or corrected, by the court at its next term. (4 Min. Insts. (604,) 651.)

## 2. The Continuance of the Judgment Lien.

The lien of the judgment is a legal lien, and the purchaser of the legal estate from the debtor takes it subject to the lien, although he *had no actual notice of it*. The lien, moreover (supposing the judgment to be duly docketed), continues as long as the judgment remains in force, and is *susceptible of being revived*, when revival is necessary. It is not requisite, as was once thought, and especially not since the revival of 1849, to issue an *elegit* in order to secure or retain the lien of the judgment, nor to enter upon the record book the creditor's election to charge the lands; nor is the lien suspended by an inability to issue execution, provided the judgment may be revived by *scire facias*, or otherwise. (Taylor v. Spindle, 2 Grat. 65-66, 69-70; Leake v. Ferguson, 2 Grat. 419; 3 Prest. Abst. 327; Tinsley v. Anderson, 3 Call. 285; Stuart v. Hamilton, 8 Leigh, 503; U. S. v. Morrison, 3 Pet. 224; Burbridge v. Higgins' Adm'r, 6 Grat. 120, 127, 130; V. C. 1873, ch. 182, §§ 6, 9, 12, 13; V. C. 1887, ch. 174, §§ 3567, 3571, to 3574, 3577, 3578, 3579; Boret v. Nalle, 28 Grat. 430; Price v. Thrash, 30 Grat. 525; Barr v. White, 30 Grat. 545; Hutcheson v. Grubbs, 80 Va. 251.)

## 2. The Docketing or Registry of Judgments.

The law of Virginia, until 1843, had required no registry of judgments in the county or corporation wherein the lands sought to be charged by them were located, and purchasers were thus exposed to great risks, considering how numerous were the courts in the Commonwealth, and that the judgments of each bound the lands of the debtor throughout the State. By statute of March 3d, 1843, however, provision was made for the case; and by subsequent statute it is declared, that *no judgment for money* (which includes any bond or recognizance having the form of a judgment) shall be a lien on real estate, as against a purchaser thereof for valuable consideration,

without notice, unless it be docketed according to law (V. C. 1873, ch. 182, § 4; V. C. 1887, ch. 174, §§ 3559 &c.), in the county or corporation wherein such real estate is, either *within twenty days next after the date of such judgment, or fifteen days before the conveyance of such estate to the purchaser.* (V. C. 1873, ch. 182, § 8; V. C. 1887, ch. 174 §3570; 1 Lom. Dig. 378.)

### 3<sup>h</sup>. The Effect of the Lien of the Judgment.

The lien of a judgment may always be enforced in a court of equity; and if it appear to the court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in *five years*, the court may decree the said estate, or any part thereof, to be sold, and the proceeds applied to the discharge of the judgment. (V. C. 1873, ch. 182, § 9; V. C. 1887, ch. 174, § 3571; *McClung v. Beirne*, 10 Leigh, 400, &c.; *Taylor v. Spindle*, 2 Grat. 44.) But when the amount of the judgment does not exceed \$20, exclusive of interest and costs, no bill to enforce the lien thereof shall be entertained, unless it appear that sixty days' notice was given to the judgment-debtor, or his personal representative, and the owner of the real estate on which the judgment is a lien, or in case of a non-resident, his agent or attorney (if he have one in this state), before the institution of the suit. (V. C. 1887, ch. 174, § 3572.)

Lands purchased after the obtaining of the judgment are subject to the lien, and may be taken upon a writ of *elegit*, or subjected in equity, notwithstanding the debtor had aliened them before the execution was issued, or the bill was filed, to a purchaser for value and without notice. Any alienation of the legal estate, however, prior to a judgment, or even of an equitable estate, is good against the judgment. (1 Lom. Dig. 385; *Sinclair v. Sinclair*, 79 Va. 40.)

### 4<sup>h</sup>. The Subrogation of Sureties to the Lien of a Judgment.

Sureties who have *satisfied* a judgment against them and their principal, have in general a right to be substituted (or, as the technical phrase is, *subrogated*) to the benefit of the judgment-lien; and even before satisfying the debt, they may, in equity, compel the creditor to resort to the lien of the judgment, or to any other fund which the debtor has subject to the debt, so as to relieve the sureties, or to obtain indemnity for them by the doctrine of substitution, which is carried so far as to give them the same priorities and the same redress that the creditor was entitled to. And this doctrine applies as well to sureties in a forthcoming bond, or an injunction, or appeal-bond, as to the original sureties for the debt. (1 Lom. Dig. 379 & seq.; 1 Stor. Eq. §§ 499 & seq.; Nis-



See *Smith*, 2 Bro. C. C. 579; *Kent v. Matthews & al.* 12 Leigh, 585; *Powell v. White*, 11 Leigh, 309; *Leake v. Jefferies*, 2 Grati. 420; *Garland v. Lynch*, 1 Rob. 545; *Douglas v. Figg*, 3 Leigh, 588; *Hill v. Manser & al.* 11 Grati. 525; *Bank of United States v. Winston*, 2 Brock. 252. See 3 Mod. Insts. 386 & seq.)

The right of subrogation, comprehensive as it is admitted to be, is yet not without its limits, and is by no means a matter of course, under all circumstances, even in favor of creditors. It is a creature of equity, and is never enforced to the prejudice of the creditor, whose rights and remedies are sought to be used (*Grubbs v. Bryson*, 32 Grati. 131), nor against the superior equities of third persons. 11 L. Cas. in Eq. (4th Am. ed.) Part I., p. 152; *Channing v. Miller*, 27 Grati. 740; *Sherman v. Shaver*, 75 Va. 8; *Gatewood v. Gatewood*, 75 Va. 407.)

#### C. Mode of Enforcing the Lien of a Judgment.

The proper and original mode of subjecting lands to judgments was by the execution of *elegit*; but equity, taking upon itself to carry into full effect the lien thence arising, has, for more than a century, been in the practice of decreeing a sale of a moiety of the lands (when the *elegit* reached only a moiety), and in Virginia will now decree the sale of the *whole*, wherever the rents and profits are not equal to the interest, or so little exceed it that the debt would not be discharged in a reasonable time, which, in Virginia, is fixed by statute at *five years*. So, for a like reason, equity will decree a sale of a *dry reversion*; that is, a reversion not attended by any rent, such as the reversion which an heir has in respect to the lands assigned to the ancestor's widow for her dower. It will also enforce the judgment-lien against the *equitable interest* in the debtor's freehold estate; and if the interest be an *indefinite one*, such as an equity of redemption, it can be subjected in equity alone. (2 Stor. Eq. § 1216 a, and 1216 b; V. C. 1873, ch. 182, §§ 6, 9; V. C. 1887, ch. 174, §§ 3567, 3571; *Coutts v. Walker*, 2 Leigh, 268; *Tennant's Heirs v. Pattons*, 6 Leigh, 196.) Indeed, since the abolition of the writ of *elegit*, by Act of 26th March, 1872 (*ante*, p. 312, 13), there is no way of subjecting lands to judgments and decrees except by bill in equity, and accordingly it is enacted by statute that "the lien of a judgment may *always* be enforced in a court of equity," that is, without previously issuing an *elegit*, or any other execution, but not without regard to the lapse of time as prescribed by the statutory limitations to proceedings on judgments and decrees. (V. C. 1873, ch. 182, §§ 9, 12, 13; V. C. 1887, ch. 174, §§ 3571, 3573, 3577, 3578; *Borst v. Noll*, 48 Grati. 130; *Price v. Thrash*, 30 Grati. 525)

Barr v. White, 30 (Grat. 545; Hutcheson v. Grubbs, 80 Va. 251.)

In England it is the received doctrine, that in order to call forth the powers of equity, even in case of equitable estates, it is necessary to sue out an *elegit*, or at least to enter upon the record an election to do so; and formerly a similar view prevailed in Virginia. A previous *elegit*, however, or any election to issue one, has long been considered unnecessary with us, even before the abolition of the *elegit*. (Taylor v. Spindle, 2 Grat. 65-6, 69-70; *Ante*, p. 314, 2<sup>d</sup>.)

7<sup>a</sup>. Other Judicial Liens, besides those of Judgments.

The judicial liens, besides those of judgments, include (1), The lien of forthcoming or delivery bonds; (2), That of a *lis pendens*; (3), That of an attachment; (4), That of the Commonwealth for debts due it; (5), United States liens; (6), Vendor's lien; (7), Mechanic's lien; and (8), Lien on crops to secure advancements to agriculturists. Although to arrange the three last under the head of *judicial* liens may be of doubtful propriety;

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1<sup>b</sup>. The Lien of Forthcoming Bonds.

A forthcoming or delivery bond is a bond which it is provided by statute (V. C. 1873, ch. 185, §§ 1, &c.; V. C. 1887, ch. 177, § 3617), that a sheriff or other officer, levying a writ of *fieri facias*, or a warrant of *distress*, on chattels, may take from the debtor, with sufficient surety, payable to the creditor, reciting the service of the writ or warrant, and the amount due thereon (including all lawful charges of the officer), with condition that the property shall be forthcoming at the day and place of sale. Whereupon the property remains in the possession and *at the risk* of the debtor. And if the condition of the bond be not performed, the bond is said to be *forfeited*.

A forthcoming bond forfeited is directed to be returned within thirty days, with the execution or warrant, to the clerk's office of the court whence the process emanated, or in which the officer qualified, and against such of the obligors therein as may be alive when it is forfeited, and *so returned*, it shall have the force of a judgment: but the bond is not a satisfaction of the debt, but only a security therefor, and the obligee may recover the money by *motion or action* against not only the survivors, but also, it is presumed, against the personal representatives of such as are deceased. (V. C. 1873, ch. 185, §§ 2, 3; Id. ch. 49, § 27; V. C. 1887, ch. 177, §§ 3619, 3629; Rhea v. Preston, 75 Va. 758.)

The lien of the *bond* takes effect only from its *return* to the clerk's office, which, if no other time appear, will

be presumed to be the day on which execution is awarded thereon. But although the bond be forfeited, and not quashed, yet, in equity, the lien of the original judgment shall continue, and if the obligors in the bond prove insolvent, a court of equity will treat the bond as a nullity, and proceed to enforce the judgment lien. (Jones, &c. v. Myrick, 8 Grd. 179, 211; 4 Lou. Dig. 373 '4.)

### 6. The Lien of a *Lis Pendens*.

Every man, from considerations of public policy, must be careful to give attention to the proceedings of courts of justice in the State where he resides. And, therefore, a purchase made *pendente lite*, from a party to the suit, of property actually in litigation, although the purchase be made for a valuable consideration, and without actual notice, is yet subject to the decision of the suit. This doctrine, which, it must be admitted, sometimes operates harshly, does not depend upon the presumption of notice, but upon reasons of *public policy*, which make it indispensable in order to prevent an indefinite multiplication of suits, and to give effect to the determinations of the courts. (1 Stou. Eq. § 405 '6; French v. Lyoal Co., 5 Loui., 664, 684; Carrington v. Didier & als. 8 Grd. 265; Crode v. Buchanan, 22 Grd. 220.)

In order to prevent this lien of a *lis pendens* from too much embarrassing the transfer of property, it is provided by statute that no *lis pendens*, or attachment under chapter 141, shall "bind or affect a purchaser of real estate without actual notice thereof, unless and until a *memorandum*, setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the land, and the name of the person whose estate is intended to be affected thereby, shall be left with the clerk of the court of the county or corporation in which the land is situate, who shall forthwith *record the said memorandum* in the deed-book, and index the same by the name of the person aforesaid." (V. C. 1873, ch. 182, § 2. V. C. 1887, ch. 174, § 3566; Crode v. Buchanan, 22 Grd. 220.)

### 7. The Lien of an Attachment.

An attachment is a summary proceeding, designed either to make the process of the court available in ordinary cases or to supplement the ordinary process by an extraordinary proceeding, which some peculiar exigency makes needful in order to prevent a failure of justice. In Virginia it is statutory purely; but the hint is said to have been taken from an ancient custom of the city of London, known as the custom of foreign attachment. The present statutes of Virginia contemplate five species of attachment, governed by rules and principles in all cases

closely analogous, and in most identical. The cases are the following :

- (1), If at the time or *after the institution* of any action *at law* for the recovery of *specific personal property*, or a debt or damages for breach of contract or *for tort*, upon *affidavit* stating the *justice* of the plaintiff's demand, and also the *affiant's belief* of one or more of the grounds following, the *clerk of the court* where the action is, may issue an attachment against such specific property, and against the defendant's estate, as the case may require. (V. C. 1887, ch. 141, §§ 2959, 2960.) The grounds are as follows :

1. That the defendant, or one of the defendants, is a *foreign corporation*, or is a *non-resident* of the State, and has estate or debts due him in the county or corporation in which the action is, or is sued with a defendant residing therein.

2. That the defendant *is removing*, or is *about to remove* out of this State, *with intent to change his domicile*.

3. That the defendant *is removing*, *intends to remove*, or *has removed* the specific property sued for, or his own estate, or the proceeds of the sale of his personal property, or a material part thereof, out of this State, so that process of execution will be unavailing.

4. That the defendant *is converting*, is *about to convert*, or *has converted*, his property *into money*, securities, or evidences of debt, *with intent to hinder, delay or defraud his creditors*.

5. That the defendant has *assigned or disposed of*, or is *about to assign and dispose of*, his estate, or part of it, *with intent to hinder, delay, or defraud his creditors*.

- (2), Against a debtor, whether the *claim be payable or not*, on complaint by the creditor, or his agent, on oath, to a justice of the county or corporation where the debtor resides, or if he has removed from the State, where he last resided, or if he never resided in Virginia, where he has estate, or debts owing to him, showing the *justice of his claim*, the *amount*, and *when payable*, and that the debtor *intends to remove*, is *removing*, or *has removed*, his effects out of *this State*, so that there will probably not be left therein effects sufficient to satisfy the claim when judgment is obtained, if only the ordinary process of the law be used, the justice shall issue an attachment against the estate of the debtor, for the amount. (Id. ch. 141, § 2961.)
- (3), Against a *tenant* removing his effects from the leased premises.

On complaint by any lessor, his agent or attorney, to a justice of the county or corporation where the leased premises or any part thereof are, that one liable to him for rent



stands to remove, or is removing, or within *thirty days* has removed his effects from the leased premises, upon oath to the truth of such complaint, to the best of the affiant's belief, and to the rent reserved (whether in money or other thing), and will be payable within one year, and the time or times when payable; and also make oath that there is not, or he believes, unless an attachment issues, there will not be left on such premises property liable to distress sufficient to satisfy the rent so to become payable, the justice shall issue an attachment for the rent, against such goods as *might be distrained* therefor, if it had become payable, and against *any other estate* of the person so liable therefor. (V. C. 1887, ch. 141, § 2962.)

(4) *Against vessels in certain cases.*

If any has a claim against the *master or owner* of any steamboat or other vessel, raft or river-craft, or against any steamboat or other vessel, raft or river-craft, *found within the jurisdiction of this State*, for materials or supplies provided or furnished, or for work done for, in or upon the same, or for wharfage, salvage, pilotage, or for any contract for transportation of, or any injury done to, any person or property by such steamboat or other vessel, raft or river-craft, or by any person having charge of her, or in her employment, such person *shall have a lien* on such steamboat or other vessel, raft or river-craft, for such materials or supplies furnished, work done, or services rendered, wharfage, salvage, pilotage, and for such contract or injury as aforesaid; and may *in a pending suit*, sue out of the *clerk's office* of the circuit court of the county, or the circuit or corporation court of the corporation, in which such steamboat or other vessel, etc., may be found, an *attachment* against such *steamboat or other vessel, etc.*, with her tackle, apparel, furniture, and appurtenances, or against *the estate of such master or owner*. Any attachment may be sued out under this section for a cause of action that may have arisen *without the jurisdiction of the State*, as well as within it, if the steamboat or other vessel, etc., be *within the jurisdiction* of this State at the time the attachment is sued out or *is made*. (V. C. 1887, ch. 141, § 2963.)

(5) *Attachment in Equity, and Proceedings therein.*

When one has a claim, *legal or equitable*, to any specific personal property, or a like claim to any debt, *whether payable or not, or to damages for the breach of contract*, express or implied, if such claim *exceeds* *the value of interest*, he may, on a bill in equity filed for the purpose, have an *attachment* to secure and enforce the claim, on affidavit by himself, his agent or attorney, according to the nature of the case, conforming as

nearly as its nature will admit, to the affidavit required by section 2959; except that, if the claim be *to a debt not payable*, the affidavit shall state when it is payable. Upon such affidavit, the clerk must endorse *on a summons*, an order to the officer to whom it is directed, to attach the *specific property* (if any be mentioned in the affidavit), and the *debts owing* by other defendants (if any) to the defendant against whom is the claim, and also *any other estate* of that defendant. Any attachment under this section shall be executed in the same manner, and shall have the same effect *as at law*, but the proceedings therein shall be the *same as in other suits in equity*. And the court or the judge in vacation, may interpose by injunction, or by the appointment of a receiver or otherwise, to secure the forthcoming of the specific property sued for, and so much other estate as will probably be required to satisfy any future order or decree in the case.

But this section is not to be understood to give a court of equity jurisdiction to enforce *by attachment* a claim *not payable*, where the only ground for the attachment is that the defendant against whom the claim is, is a *foreign corporation*, or is *not a resident* of this State, and has estate within the county or corporation in which the suit is, or is sued with a defendant residing therein. (V. C. 1887, ch. 141, § 2964.)

The *lien* is the same in all. It exists from the *time of the levying* of such attachment, or serving a copy thereof, upon the personal property, *choses in action*, and other securities of the defendant, against whom the claim is, in the hands of, or due from, any *garnishee* on whom it is served, and on any real estate mentioned in an endorsement on the attachment or subpoena, made by the officers, as the law requires in § 2967, from the *suing out* of the same; or if there be no process of attachment, nor any mention made in connection with the *subpœna*, of the land sought to be charged, but the bill sets out the demand, and describes the estates to be subjected, the lien dates from the filing of the bill. But in order that the lien may occasion no loss to purchasers, a provision is made identical with that already stated (*supra*, p. 318, 2<sup>b</sup>) touching *lis pendens*, and requiring the attachment—at least against a *non-resident*,—to be recorded. (V. C. 1873, ch. 148, § 12; Id. ch. 182, § 5; V. C. 1887, ch. 141, § 2971; Id. ch. 174, § 3566; Daniel on Attachments, §§ 148 & seq.; Farmers Bank v. Day, 6 Grat. 360, 362-3; Cirode v. Buchanan, 22 Grat. 218; 4 Min. Insts. (335-339) 366-371; Gregg v. Sloan, 76 Va. 497; Dorrier v. Masters, 83 Va. 476.)

14. The Prior Lien of the Commonwealth for Debts Due Her for Ransomages, Taxes and County Levies.

See 1 Leon. Dig. 390 & seq.; V. C. 1873, ch. 53, § 17; *Id.* ch. 38, § 4; *Id.* ch. 182, §§ 3, 4, 6, &c.; *Id.* ch. 37, § 2 &c.; V. C. 1887, ch. 174, §§ 3557 & seq., 3567, 3568, 3580; *Id.* ch. 24, § 456; *Id.* ch. 28, § 636.)

15. The Priority of United States Liens and Debts.

See 1 Leon. Dig. 390 & seq.; Rev. Stats. U. S. §§ 3466 & seq.

16. Vendor's Lien.

The lien of a vendor for the unpaid purchase-money for *land* was established by the court of equity as a *resulting trust*, upon the presumption that such was the intention of the parties. Its general nature has been already described, in connection with that class of trusts (*Id.*, p. 221), and it will be mentioned again as one of the transactions known as *equitable mortgages*. (*Post*, p. 221.)

At present it will suffice to observe, that in Virginia we have a statute declaring that, "If any person hereafter contracts any real estate, and the purchase-money, or any part thereof, remains unpaid at the time of conveyance, he shall not thereby have a lien for such unpaid purchase-money, unless such lien is *expressly reserved on the face of the conveyance*." (V. C. 1873, ch. 115, § 1; V. C. 1887, ch. 110, § 2474.)

A lien thus reserved, creates no property in the land. It passes as personalty, being merely a *chose in action*, and if the promise to pay the purchase-money be assigned, the lien will pass to the assignee, and will bind the land for the purchase-money in his hands, as it did in the hands of the vendor. (*Gordon v. Rixey*, 76 Va. 694.) But a court of equity in enforcing the lien, may decree a sale of the land to satisfy it, and sometimes with an account of previous rents and profits. (*Neff v. Woodring*, 88 Va. 332.) And whilst it is a recognized general rule that in suits to sell real estate, to satisfy liens by judgment or deed of trust, an account ought to be taken of all the liens and of their priorities before decreeing a sale, it is not certain that the same rule applies when the object of the suit is to enforce a *vendor's lien*. (*Effinger v. Keamey*, 79 Va. 551; *Hoge v. Tunkin*, 79 Va. 220.)

17. Mechanic's Lien.

The *mechanic's lien* on land and buildings, for money contracted to be paid for erecting or repairing the building, or for work and materials furnished therefor, is the result of comparatively recent statutes, no such lien existing at common law. See Philips on Mech. Liens, §§ 1 &

The first statute upon the subject, enacted in 1842-'3, applied only to buildings *in a city or town*, and where the lien was stipulated for by contract *in writing*, and duly *recorded*. In 1866-'7 the provisions of the statute were applied to buildings on *any land*, whether in the country or in a city or town, and the benefit was extended to sub-contractors, and to persons furnishing materials or labor. And in 1869-'70, the enactments were much enlarged in their scope, and were made to give a lien for work and materials furnished by artisans, builders, mechanics, lumber-dealers and others, although there was *no contract in writing* stipulating for such lien; and indicating the mode in which a general contractor, sub-contractor, or furnisher of labor or materials may respectively avail themselves of the lien, and may enforce the same. See *post*, , ; Phillips on Mechanics' Liens, §§ 9 & seq., 65 & seq., 82 & seq., 101 & seq.: 4 Min. Insts. 68-'9; Shackleford v. Beck, 80 Va. 573.

The statute, as it now exists in the Code of 1887, is substantially as follows :

1<sup>i</sup>. The general Doctrine of the Mechanic's Lien.

"All artisans, builders, mechanics, lumber-dealers, and other persons performing labor about, or furnishing materials for, the construction, repair, or improvement of any building or structure, permanently annexed to the freehold, whether they be general contractors or sub-contractors, shall have a lien, if perfected as herein after provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment of the premises, for the work done and materials furnished. But where the claim is for repairs only, no lien shall attach to the property repaired, unless the said repairs were ordered by the owner of the property or his agent. Nor shall any lien attach under this section to a railroad track or bed, or any part thereof, by reason of work and labor done thereon or materials furnished for the same." (V. C. 1887, ch. 110, § 2475. See *post*, pp. 328-'9.)

2<sup>i</sup>. Mode of Perfecting the Mechanic's Lien, (1), by a General Contractor; and (2), By a Sub-Contractor; w. c.

1<sup>k</sup>. Perfecting the Mechanic's Lien in the Case of a *General Contractor*.

"A general contractor, in order to perfect the lien given him by the preceding section, shall at any time after the work done or materials furnished by him, and before the *expiration of thirty days from the time such building or structure is completed, or the work thereon otherwise terminated*, file in the clerk's office of the county or corporation court of *each county or corpora-*



tion or which the building or structure, or any part thereof, is, or in the chancery court of the city of Richmond, if the said building or structure is *within the — private limits* of the said city, an account showing the amount of, and character of, the work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant or his agent, with a statement attached, declaring his intention to claim the benefit of said lien and giving a brief *description of the property* (so as, reasonably to identify it) on which he claims the lien. It shall be the duty of the clerk in whose office such account and statement shall be filed as herein before provided, to record the same in a book to be kept by him for that purpose, called the "Mechanic's Lien Record," and to index the same in the name as well of the claimant of the lien as of the owner of the property; and from the time of such filing all persons shall be deemed to have notice thereof." (V. C. 1887, ch. 110. § 2476; Shackelford v. Beck, 80 Va. 573, 582; Boston v. C. & O. R. R. Co. 76 Va. 184; Lester v. Pedigo, 84 Va. 309.)

2) Perfecting the Mechanic's Lien in the Case of a *Sub-Contractor*.

"Any sub-contractor, in order to perfect the lien given him by § 2475, shall comply with the provisions of the preceding section, and in addition, *give notice in writing* to the owner of the property, or his agent, of the *amount and character* of his claim. But the amount for which a lien may be perfected under this section shall *not exceed the amount* in which the owner is indebted to the general contractor at the time the notice is given." (V. C. 1887, ch. 110, § 2477; S. V. R. R. Co. v. Miller, 80 Va. 821; N. & W. R. R. Co. v. Howison, 81 Va. 125.)

3) *Personal Liability* of the Owner to the Sub-Contractor.

Note: (1). The mode of bringing about such personal liability. — and (2). The mode of adjusting the liability of the owner as between the sub-contractor and the general contractor;

W. G.

1) The Mode of Establishing a Personal Liability of the Owner to the Sub-Contractor.

"Any sub-contractor may give *notice in writing* to the owner or his agent before performing work for or furnishing materials to a general contractor, stating the probable value of the work to be done or materials to be furnished, and if such sub-contractor shall afterwards perform such work, or furnish such materials,

and the said materials *are used* in the construction, or improvement of such building or structure, and shall at any time after the work done or materials furnished by him, and before the expiration of *thirty days* from the time such building or structure is completed or the work thereon otherwise terminated, furnish the owner thereof or his agent, and also the general contractor, with a correct account, verified by affidavit, of his claim against the general contractor for the work done or materials furnished and of the amount due, the owner shall be *personally liable* to the claimant for the said amount, provided the same *does not exceed* the sum in which the owner is indebted to the general contractor at the time the notice is given." (V. C. 1887, ch. 110, § 3479; Roanoke Land and Improvement Co. v. Karns, 80 Va. 589. S. V. R. R. Co., v. Miller, 80 Va. 821.)

2<sup>k</sup>. The Mode of Adjusting the Personal Liability of the Owner, as between the Sub-Contractor and the General Contractor.

"If the amount furnished under the preceding section be *approved* by the general contractor, or if after *ten days' notice* to him of the filing of the said account with the owner, such contractor shall fail to file with the owner any objections *in writing* to the said account, in either case, the owner may pay the amount of the account to the sub-contractor, and shall then be entitled to credit for the amount so paid, upon whatever may be due by him to the general contractor. If the general contractor dispute the correctness of the account furnished to the owner by the sub-contractor at any time before the same is paid, the parties may have the amount of such disputed claim summarily adjudicated and settled by arbitrators, selected, one by the general contractor and one by the claimant, or by an umpire selected by the arbitrators, in case of their disagreement; and upon the failure or refusal of either of the said parties to select an arbitrator, then the matter in controversy shall be settled by an action at law; and upon the payment by the owner or his agent of the amount ascertained to be due by the award of the arbitrators, or by action at law, he shall be released from all liability, if any there be, to the said sub-contractor, and entitled to credit against the general contractor for the amount so paid. The cost of the arbitration shall be borne and paid as the arbitrators may adjudge and award in each case." (V. C. 1887, ch. 110, § 2480; Kim v. Champion Iron Fence Co., 86 Va. 608.)

4<sup>i</sup>. *Limitation to the Enforcement of a Mechanic's Lien.*  
 "No suit to enforce any lien perfected under the pre-

ending sections of this chapter, shall be brought *after* ~~one month~~ from the time when the whole amount covered by such lien has become payable." (V. C. 1887, ch. 110, § 2481.)

8. The Enuring of a General Contractor's Lien to the Benefit of the Sub-Contractor.

"The perfected lien of a general contractor on any building or structure shall enure to the benefit of any sub-contractor who has not perfected a lien on such building or structure, provided such sub-contractor shall give written notice of his claim against the general contractor to the owner or his agent before the amount of such lien is actually paid off or discharged." (V. C. 1887, ch. 110, § 2484.)

9. The Extent of the Lien where the Owner has *less than a Fee* in the Land, and *Preference* allowed to the Mechanic's Lien.

"If the person who shall cause such building or structure to be erected or repaired, owns less than the fee-simple estate in such land, then only his interest therein shall be subject to such liens. No lien or encumbrance upon the *land* created *before* the work was commenced or materials furnished shall operate *upon the building or structure* erected thereon, or materials furnished for and used in the same, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied; nor shall any lien or encumbrance upon the *land*, created *after* the work was commenced or materials furnished, operate *on the land*, or such *building or structure*, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied. And in the enforcement of the liens acquired under the previous sections of this chapter, any lien or encumbrance created *on the land*, *before* the work was commenced or materials furnished, shall be preferred in the distribution of the proceeds of sale only to the extent of the *value of the land* estimated *exclusive of the buildings or structures*, at the time of the sale, and the residue of the proceeds of sale shall be applied to the satisfaction of the liens provided for in the previous sections of this chapter." (V. C. 1887, ch. 110, § 2483.)

10. Mode of *Enforcing Mechanic's Liens*.

"The liens created and perfected under the preceding sections of this chapter, may be enforced in a *court of equity*. There shall be no priority among them, except that the lien of a *sub-contractor* shall be preferred to that of his general contractor." (V. C. 1887, ch. 110, § 2484.)

Upon these statutory provisions touching a mechanic's lien, some adjudged cases have occurred, to which we may now address ourselves. It is held, surely with good reason, that the requirement, that the suit to enforce the lien shall be instituted within *six months* from the time when the *last instalment* to be paid for the work *shall be payable*, does not preclude the contractor from bringing the suit as soon as the *first instalment is due*, notwithstanding others are not yet payable, and that the court, in its decree, may provide for these latter. (*Iaeger v. Bossieux*, 15 Grat. 93-4.) And the builder's contract and lien under the statute are capable of being assigned, at least in equity, and the assignee may enforce the lien just as the mechanic himself might, all persons interested, including the assignor, being made parties. (*Iaeger v. Bossieux*, 15 Grat. 98-9; *Pairo v. Bethell*, 75 Va. 832.)

It will be observed that, by § 2483 of the statute, no incumbrance created *after the making of the contract* for the erection of a building shall operate upon the building erected until the *mechanic's lien is satisfied*. But this does not affect an incumbrance created *before the building contract is entered into*, even though the money secured by the incumbrance were advanced in part after the contract, and especially not if the money advanced were applied to pay in part for the building. (*Iaeger v. Bossieux*, 15 Grat. 103-105; *Wroten v. Armat*, 31 Grat. 259-60.) And the prior lien prevails only to the extent of the value of the land estimated, exclusive of the buildings or structures, at the time of sale. (V. C. 1887, ch. 110, § 2483.)

The statute gives a lien not only on the buildings, but also on so much land therewith as shall be necessary for the convenient use and enjoyment of the premises; and in the absence of proof to the contrary, an ordinary lot in a town will be deemed to be necessary to the convenient and reasonable enjoyment of the building erected upon it. (*Pairo v. Bethell*, 75 Va. 832.)

Prior to the act of 13th April, 1867, the mechanic's lien was, by statute, allowed only when the land on which the buildings to be erected or repaired was situated in a *city or town*. That act gave the lien whether the land were in town or country; but the act had no retrospective effect, and did not avail to create a lien when the contract was made in 1866, and was recorded in 1868. Hence, when, in March, 1866, F agreed *in writing* to erect certain buildings for H, *on land in the country*, and F had the contract recorded in January, 1868, in the clerk's office of the county court, it was held that F



land and labor on the land or buildings for the cost of erecting the latter. (Hendricks v. Fields, 26 Grat. 452-'3.)

A *general contractor*, within the meaning of the statute, is one who contracts directly with the *owner of the property*, whether to construct a part or the whole of a building, or only to furnish the materials. The term is used in contrast with a *sub-contractor*, who makes his agreement not with the owner, but with a general contractor, or some other sub-contractor. (Merch. & Mech. Sav. Bank v. Dashiell, 25 Grat. 621-'23.)

Section 2476 of the statute, as above cited, requires that the general contractor, in order to have the benefit of his lien, shall file his account of the work done or materials furnished, accompanied by a claim of the lien, in the clerk's office, within *thirty days* after the *completion or termination of the work*, and it is held that if such contractor is prevented *by the owner* from completing the work, he is not thereby precluded from his lien, either in consequence of the non-completion, or by reason of the failure to file his account and claim. And the mechanic's lien in such cases will have priority over any liens upon the building or premises, created after work was commenced under the building contracts, which, it should be observed, may be as well *verbal as in writing*.

Merch. & Mech. Sav. Bank v. Dashiell, 25 Grat. 616, 625-'6 624; Phillips' Mechanics' Liens, § 138; Bushfield v. Wheeler, 14 Allen (Mass.), 139; Schwartz v. Saunders, 40 Ill. 18; Trustees F. St. Church v. Davis, 85 Va. 193.

For form of claims of mechanic's lien, see 4 Min. Insts. 1330,7.

#### Liens of Employees, &c. of *Transportation Companies*, &c. on the *Franchises and Property* of the Company.

All conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, store-keepers, mechanics, or laborers, and all persons furnishing railroad iron, engines, cars, fuel, and *all other supplies* necessary to the operation of any railway, canal, or other *transportation company*, or of any *mining or manufacturing company*, chartered in Virginia, and doing business within it, shall have a prior lien on the franchises, gross earnings, and on all the *real and personal property* of the company used in operating it, to the extent of the moneys due them by the company for *wages or supplies*; and no mortgage, deed of trust, sale, hypothecation, or conveyance executed since March 21st, 1877, shall defeat or take precedence over said lien; *provided*, that if any person entitled to a lien, as well under § 2475, as under this section, shall perfect his lien, given by either section,

he shall not be entitled to the benefit of the other. (V. C. 1887, ch. 110, § 2485.)

But every one designing to claim such lien, must, within six months after his claim has fallen due, file in the clerk's office of the court of the county or corporation where is the chief-office in this State of the company, or if that is in Richmond, in the clerk's office of the city chancery court, a memorandum, sworn to, of the amount and consideration of his claim, which the clerk shall forthwith record and index in the name both of the claimant and of the company. And such lien may be enforced in equity; and any assignees of such claim may make the memorandum and take the oath required, and shall have the same rights as his assignor. (V. C. 1887, ch. 110, §§ 2486, 2487.)

9<sup>h</sup>. Lien on Crops to Secure Advancements *Made to Agriculturists.*

The lien on crops to secure advancements made to agriculturists, like that in favor of mechanics, is purely of statutory origin, being wholly unknown to the common law. The statutes upon the subject enact that:

"If any person other than a landlord shall make any advance, . . . either in money or supplies, to any person . . . engaged in, or . . . about to engage in, the cultivation of the soil, the person . . . so making such advance . . . shall be entitled to a lien on the crops which may be made during the year upon the land in the cultivation of which the advances so made have been, or were intended to have been expended, to the extent of such advance . . . ; provided, however, that an *agreement in writing* shall be entered into before any such advance is made to that effect, in which shall be specified the amount to be advanced, or in which a limit shall be fixed, beyond which the advance or advances made from time to time during the year shall not go; which agreement shall be recorded in the clerk's office of the county in which the land lies, in the manner in which *deeds* are required to be recorded." (V. C. 1873, ch. 115, § 12; V. C. 1887, ch. 110, § 2494.)

"If any person . . . to whom such advances have been made shall be about to sell or dispose of said crops, without having paid, or secured to be paid, such advance or advances, or in any way to defeat the lien hereinbefore provided for, it shall be lawful for a court having equity jurisdiction in said county, in term time, or any judge thereof in vacation, (V. C. 1887, ch. 168, § 3437) or the judge of the county court in term time or vacation, to restrain such person . . . from making such sale or disposition, or in any way defeating such lien; and such decrees or orders may be made according to the practice of courts

of equity for securing the payment and satisfaction of the same, an equity may require in the premises. But when the injunction is awarded by the county court or judge, it shall be directed to the clerk of the circuit court having jurisdiction, and the proceedings thereon shall be as if the writ had been made by the said circuit court or the judge thereof. (V. C. 1887, ch. 110, § 2495.)

Landlords may in like manner secure themselves for advances made to tenants, and may also recover the same by distress, as if it were rent. (V. C. 1887, ch. 110, § 2496.)

But it is declared that this lien shall not affect the rights of landlords to rent or to right of distress, nor any liens existing at the time of making the agreement, such as are required by law to be recorded, and shall at the date of said agreement be recorded, or lodged for record, as required by law; nor shall it affect the rights of the party to whom the advances were made, to claim such part of his crops as is now exempt from levy or distress for rent. (V. C. 1873, ch. 115, § 14; V. C. 1887, ch. 110, § 2497.)

See *Proof*, pp. . . . : 4 Min. Insts. 70; and for the form of an agreement for such a lien upon crops, see 4 Min. Insts. 1339.

The student will observe that it is made the duty of the creditor, within ninety days after the satisfaction of any lien, to enter a memorandum thereof upon the margin of the record of the lien. (V. C. 1887, ch. 110, § 2498.) And for failure to do so he forfeits \$20. Such entry is to be signed by the creditor, and attested by the clerk, and then shall operate as a release of the lien. And any person having an interest in *real estate* on which is such a lien, may on ten days' notice have the lien released, and entry accordingly on the margin of the record, by order of the county or corporation court in whose clerk's office the lien is recorded, upon ten days' notice to the lienor, and upon proof that it has been discharged or paid. (V. C. 1887, ch. 110, § 2498.)

## 2° Estates by Statute-Merchant.

Estates by statute-merchant are securities for money, in the nature of a recognizance, entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I., *de mercatoribus* (statute 3), and thence the security is called a *statute-merchant*. Originally it was permitted *only amongst traders*, for the benefit of commerce, but was soon extended to all classes; and by virtue of it, not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his *land* may be delivered to the creditor, till out of the rents

and profits of them the debt shall be satisfied: and during such time as the creditor so holds the lands he is *tenant by statute-merchant*. (2 Bl. Com. 160; Bac. Abr. Ex'or, (B.) 1.)

3<sup>d</sup>. Estates by *Statute-Staple*.

Estates by statute-staple are also securities of a like kind with estates by statute-merchant. They are entered into pursuant to the statute 27 Edw. III., c. 9, before the mayor of the *staple*, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held in certain trading towns, whence this security is called a *statute-staple*. In its character and operation it is essentially the same as the statute-merchant, and during the time the creditor holds the lands under the security he is *tenant by statute-staple*. (2 Bl. Com. 160; Bac. Abr. Ex'or, (B.) 1.)

Neither of these securities, by statute-merchant or by statute-staple, exists in Virginia. (1 Lom. Dig. 368-9.)

2<sup>e</sup>. Estates on Condition, which are Securities for Money, by the Assent and *Conveyance of the Debtor*.

These are estates *in radio*, or in pledge. (1 Lom. Dig. 411 & seq.; 2 Th. Co. Lit. 34 & seq.)

W. C.

1<sup>f</sup>. Estates *in Vivo Vadio*.

Glanville, in the time of Henry II. (about A. D. 1170), describes two kinds of pledges as then existing, namely, one where the seisin of the lands has been delivered to the creditor for a definite term, and it has been agreed that the proceeds and rents shall in the mean time *reduce the debt*; and the other, where the seisin has been in like manner delivered for a definite term, but the fruits and rents received in the interval *in no measure tend to reduce the demand*. To the former transaction he assigns no name, but it seems to have been well enough known to the law of Normandy by the designation of *vicum radium*. The latter he calls mortgage, (*mortuum radium*), and characterizes it as an unjust and dishonest agreement, although not prohibited by the king's court. (Glanville (Beames), B. X., cc. vi. and viii., pp. 252, 258.)

*Vicum radium* is described by Lord Coke as where a man borrows £100 of another, and maketh an estate of lands to him until he hath received the said sum *of the issues and the profits* of the land; so as in this case neither money dieth nor land is lost, and therefore it is called *vicum radium*. (2 Th. Co. Lit. 34; 2 Bl. Com. 157.)

2<sup>f</sup>. Estates *in Mortuo Vadio*, or Mortgage.

Under this head let us observe, (1), The nature of a mortgage; (2), The character of the estates of the mortgagee and



mortgage respectively; (3). To whom mortgage money is payable; and (4). By whom it is payable;

W. 20.

#### 1<sup>st</sup>. The Nature of a Mortgage.

A mortgage is a conveyance of property on condition to be void if a sum of money be paid, or a collateral thing be done, by a designated time. It is intended to secure the payment of the money, or the doing of the thing. (2 Th. Co. Lit. 34; 2 Bl. Com. 158.)

The notion of mortgages, and of the redemption thereof, seems to have been derived from the civil or Roman law, which distinguished between a pledge or pawn (*pignus*) on the one side (where the possession passed to the creditor), and a *hypotheca* on the other (where it remained with the debtor). In the latter case, if the money be not paid, the creditor is obliged to obtain a judicial sentence before the property of the subject is vested in him, and meanwhile it is liable to redemption; which idea, derived from the civil law, seems to have aided in suggesting that right to redeem which the courts of equity have for over two centuries enforced in respect to mortgages.

The difference between a pledge or pawn and a mortgage is twofold: (1), A pledge is necessarily chattel property, or movables alone; a mortgage may be either of personal or real estate; (2). A pledge passes only a special property to the pawnee, the general property remaining still with the pawner, but with the privilege to the pawnee to *sell at auction*, if the money be not paid upon giving reasonable opportunity to the debtor to redeem, and apprising him of the time and place of sale; a mortgage vests a legal title *constitutively* in the mortgagee, and if the condition be not performed by the payment of the money at the time stipulated, the title becomes absolute at law, although equity in modern times will compel the allowance of a right of redemption. (4 Kent's Com. 138-9; 2 Do. 577 & seq.; 2 Th. Co. Lit. 34, n. (Z.).)

The name *mortgage* (equivalent to the Latin *mortuum onus*), is said by Littleton and Coke to be given to this security because if the grantor (the debtor) does pay, the land is *dead* to the creditor, and if he does not pay, it *is dead* to himself. (2 Th. Co. Lit. 34.)

In order to understand definitely the nature of a mortgage, it will be necessary to contemplate, (1), The estate conveyed in mortgage; (2), The condition on which, in mortgages, the land is conveyed; (3), The effect, in the view of a court of law, of non-payment of the money; (4), The equity of redemption; (5), Deeds of trust to secure debts, &c.; (6), The power of sale reserved in a mortgage to the mortgagee himself; and (7), Equitable mortgages;

1<sup>h</sup>. The Estate Conveyed in Mortgage.

The estate conveyed in mortgage may be any interest whatever,—in fee-simple, for life, or for years,—and may embrace property in reversion as well as in possession. But before the interposition of equity in relaxing the rigor of the common law, and enforcing the right to redeem (which gained no permanent foothold until the time of Charles I.), conveyances of the fee-simple by way of mortgage were attended with great inconveniences. Thus, if the money were not paid at the day, the condition was forfeited, and the creditor's estate became absolute, and of course thenceforward subject to the dower of the creditor's wife, and all other incumbrances created by him. To avoid these inconveniences, mortgages for long terms of years were adopted, with condition to be void upon payment of the money intended to be secured. And this kind of mortgage had the incidental advantage that, upon the death of the mortgagee, the mortgage term became vested in his personal representatives, who also were entitled to the money, had it been paid. But when the court of chancery had at length firmly established the power of redemption as an equitable right inherent in the land, and binding all persons whatsoever, so that the payment of the money, even after forfeiture, does, in the consideration of a court of equity, put the mortgagee *in statu quo*, since the lands were originally only a pledge for the money lent, the inconveniences formerly attending mortgages in fee ceased, and they have again become usual: and the more because, although mortgages for terms for years were free from the embarrassments above mentioned, yet they were not without objection, as in case of non-payment and foreclosure, the mortgagee became only a tenant, the fee-simple remaining in the mortgagor. (2 Th. Co. Lit. 34 & n. (Z.); Id. 35-6; 4 Kent's Com. 158-9; 1 Lom. Dig. 416; 2 Bl. Com. 158.)

2<sup>h</sup>. The Condition on which, in Mortgages, the Land is Conveyed.

The condition is that the grantor (the debtor) shall, on or before a day designated (and sometimes without the designation of the time), pay to the mortgagee (the creditor), or to his personal representatives or assigns, or to his heirs, personal representatives or assigns, the money, etc., intended to be secured. (2 Th. Co. Lit. 34 & seq., and n. (Z).)

It should be observed that, for the most part, every pledge implies *a debt*, and therefore an action lies on a mortgage to recover the money thereby sought to be secured, unless it be stipulated that the recourse shall be to

the subject mortgaged alone. Hence, where the subject, being personally, is lost or destroyed without the default of the mortgagee, he may still recover the money, by an action against the mortgagor. And this is equally true, whether there be a promise to pay contained in the mortgage or not; but that circumstance may make a difference in the action proper to be brought, and in the application of the statute of limitations. (King v. King, 3 P. Wms. 360; Coggs v. Bernard, 2 Ld. Raym. 917; Bac. Abr. Bailment, (B.) ; Reynolds v. Carter, 12 Leigh, 170; *Id.*, pp. . . . ; Wolf v. Violet, 78 Va. 60.)

And so a change in the evidence of the debt does not discharge the mortgage. A mortgage secures *the debt*, and not merely the note or bond or other evidence of it. No change in the form of the evidence, or the mode or time of payment—nothing short of the actual payment of *the debt*, or an actual release—will operate to discharge the mortgage. (Hanna v. Wilson, 3 Grat. 232; Knisely v. Williams, 3 Grat. 353; Yancey v. Mauck, 15 Grat. 300; Cole v. Withers, 33 Grat. 186; Stimpson v. Bishop, 82 Va. 198.)

### 3. Effect, in the View of a Court of Law, of the Non-Payment of the Money.

The effect of this breach of the condition is to make the creditor's estate in the land absolute, so that the land is thenceforth at law *dead* to the mortgagor, to whom the rigorous doctrine of conditions denied any future opportunity to redeem it; and in like manner, if the condition had been fulfilled by the payment of the money, the land would have been *dead* to the mortgagee. In equity, as we have seen, and shall further see, the performance of the condition within any *reasonable time* entitles the debtor to his property again. (2 Bl. Com. 158; 2 Lom. Dig. 412; 2 Th. Co. Lit. 38, n. (Z.).)

### 4. The Equity of Redemption.

See 2 Bl. Com. 159 & n. (8); 1 Lom. Dig. 413 & seq., 444 & seq.; 2 Th. Co. Lit. 38 & n. (Z.).

The study of the doctrines which relate to the equity of redemption involves the consideration of, (1), The nature and reason of the equity of redemption; (2), That it is inseparably incident to every mortgage; (3), The doctrine of conditional sales; and (4), That an equity of redemption has the incidents of an *estate*;

See, also,

#### 1. The Nature and Reason of the Equity of Redemption.

An equity of redemption is defined to be an equitable right inherent in the land (a *title* in equity, and not merely a *claim*), which binds all persons, whereby, although the condition be not strictly performed, so that

the estate is forfeited at law, yet if the debtor pay the money, with interest, within a reasonable time, he is entitled in equity to call on the creditor for a re-conveyance of the land. The mortgagor is thus enabled to constrain the mortgagee, who has possession of his estate, to deliver it back, and account for the rents and profits received, on payment of his whole debt and interest; thereby, as Blackstone observes, turning the *mortuum* into a kind of *vivum vadium*. (Reeve v. Atto. Gen. 2 Atk. 223; Tucker v. Thurston; 17 Ves. 133; 2 Th. Co. Lit. 38, n. (Z.); 2 Bl. Com. 159; 1 Lom. Dig. 444 & seq.)

On the other hand, the mortgagee, as soon as default is made, may call upon the mortgagor in equity to redeem his estate presently, or else in default thereof, to be forever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. (2 Bl. Com. 159.)

The reason for the allowance of the equity of redemption is to be found in the general maxim of the courts of equity, that penalties and forfeitures are always to be relieved against when the *substantial* object in view can be attained, and the other party put essentially *in statu quo*, without enforcing them. It is obvious that a mortgage is meant only *as a security* for the money, and that if, within a reasonable time, although not within the time limited, the money be paid with interest, the object of the transaction is substantially attained, and the creditor ought to be satisfied. (1 Lom. Dig. 413; 2 Stor. Eq. §§ 1013 & seq.)

It is not clearly ascertained when the equity of redemption was first allowed. As Lord Coke makes no mention of it, it may be presumed not to have been generally acknowledged at the period of the publication of his first Institute, the commentary upon Littleton, which was in 1621 (*Ante*, B. I, p. 36); but in the first year of the reign of Charles II. (A. D. 1660), we find the right supported as a thing of course. It must, therefore, have been established during the period of the Commonwealth or *temp.* Charles I., or in the latter years of James I. (Fonbl. Eq. B. III. c. 1, § 2; 2 Stor. Eq. § 1014; 1 Lom. Dig. 413, 444 & seq.)

2<sup>i</sup>. An Equity of Redemption is Inseparably Incident to every Mortgage.

The right of redemption is so carefully guarded by courts of equity that they will suffer no agreement in a mortgage deed to prevail whereby the right to redeem is waived, and the estate is to become an absolute purchase in the mortgagee upon any event whatever. If it



can be discerned, or proved *by parol*, that the estate was intended as a security for money, it is a mortgage, and without regard to stipulations to the contrary, it has *invariably incident* to it an equity of redemption. Nor is this right to redeem confined to the mortgagor, and persons in privity with him, as his heirs, personal representatives, and assignees, but it extends also to subsequent incumbrancers, and to all persons claiming any interest whatever in the premises, as against the *mortgagee*. Hence, a person claiming under a deed voluntary, and therefore void as against a subsequent mortgagee, may redeem, for the voluntary deed is binding on the mortgagee. *A fortiori*, may one claiming for valuable consideration, as tenant under the mortgagor, or a judgment creditor, or a tenant by *degit*, or a tenant by the curtesy, or in dower. (2 Th. Co. Lit. 40, n. (Z.); Howard v. Harris, 1 Vern. 190; S. C. 2 Wh. & Tud. L. Cas. (Pt. II.), 415 & seq., 430 & seq.; James v. Oades, 2 Vern. 402; Toomes v. Slade, 7 Ves. 273; Ross v. Norvell, 1 Wash. 14; Floyd v. Harrison, 2 Rob. 161; 1 Lom. D. 414 & seq.)

It is a wholesome and well-known general rule of evidence to exclude *verbal* testimony to contradict or alter any *writing*; yet notwithstanding, it is allowed, as said above, to prove *by parol* that a conveyance absolute on its face was in fact intended only as a security for money; that is, as a mortgage, with the inevitable concomitant of an equity of redemption. It is admitted, however, that the evidence, in order thus to refute the express terms of the deed, must be clear, and the proof cogent. For this acknowledged exception to the general rule, several reasons are given, as (1), That a mistake has been made, or else a fraud committed in carrying out the intention of the parties, by making the conveyance absolute instead of conditional; and that it is a peculiar function of a court of equity to correct such mistakes; (2), That the admission of parol evidence in such cases is necessary in order to prevent oppression and fraud on the part of creditors; and (3), That the equity to redeem incident to a mortgage is analogous to, or rather identical with, a *resulting trust*, which has always been allowed to be established by verbal testimony. (4 Kent's Com. (12th ed.), 142; 2 Whart. Ev. § 1032; Thornbrough v. Baker, 2 Wh. & Tud. L. C. (Pt. II.), 418, 431-2; Maxwell v. Montacute, Pree. Chanc. 526; Young v. Peachy, 2 Atk. 258; Jones v. Statham, 3 Atk. 389; Watkyns v. Watkyns, 2 Atk. 97-8; Cotterell v. Purchase, Cas. Temp. Talbot, 62, 63; Dixon v. Parker, 2 Ves. Sen. 225; Strong v. Stewart, 1 Johns. Ch. (N. Y.) 167; Henry v.

Davis, 7 Id. 4; Van Buren v. Olmstead, 5 Pai. (N. Y.) 9; Robertson v. Willoughby, 65 N. C. 520; Phillips v. Croft, 42 Ala. 477; Klinik v. Price, 4 W. Va. 4; Oldham v. Halley, 2 J. J. Marsh, (Ky.) 114; Edrington v. Harper, 3 Id. 355; Prince v. Bearden, 1 A. K. Marsh. (Ky.) 170; Morris v. Nixon, 1 How. 126; Conway v. Alexander, 7 Cr. 238; Sprigg v. Bank of Mt. Pleasant, 14 Pet. 201; Russell v. Southard, 12 How. 147; Babcock v. Wyman, 19 How. 299; Morgan v. Shinn, 15 Wal. 110; Ross v. Norvell, 1 Wash. 14; King v. Newman, 2 Mumf. 40; Towner v. Lucas, 13 Grat. 714-'15; Phelps v. Seeley, 22 Grat. 589; Snively v. Pickle, 29 Grat. 30, 31; Edwards v. Wall, 79 Va. 321.)

3<sup>i</sup>. Conditional Sales, as Distinguished from Mortgages; W. C.

1<sup>k</sup>. The Difference, in *Nature and Effect*, between Conditional Sales and Mortgages.

A conditional sale is not a security for money, but is what its designation imports, namely, a *sale* in good faith, and a sale on *condition* that the vendor may repurchase on certain terms, which must be strictly complied with. Of course, therefore, no equity of redemption is incident to such a sale; because, as it is not the design of the transaction to secure the payment of money, a court of equity has no ground to say the substantial object can as well be reached by the payment at a subsequent time, with interest, as by a prompt compliance with the condition; nor does it follow that the party can thereby be put *in statu quo*. (Barrell v. Sabine, 1 Vern. 268; Williams v. Owen, 5 My. & Cr. (46 Eng. Ch.) 305; Howard v. Harris, 1 Vern. 190; S. C. 2 Wh. & Tud. L. Cas. (Pt. II.), 416-'17; Id. 431-'2; 1 Lom. Dig. 415, 422.)

2<sup>k</sup>. Marks whereby to Discriminate between a Transaction Intended as a *Mortgage* and One meant to be, in Good Faith, a *Conditional Sale*.

As a conditional sale has no equity of redemption incident to it, the attempt is not unfrequently made to give to what is really in purpose and intent a mortgage, the aspect of a conditional sale; and as the terms in which they are conceived are very similar, it is usually requisite to resort to parol evidence, extrinsic to the deed creating the estate, to determine the true character of the transaction. If, upon the whole investigation, it shall appear that a security for money was intended, it is a mortgage, whatever may be its terms; and it will be remembered that to a mortgage the right of redemption is *inseparably annexed*. (*Ante*, p. 335-'6 2<sup>l</sup>.) And if, on the other hand, it shall, upon the

whole, appear that it was a conditional sale, the performance of the condition punctually at the time cannot be dispensed with. But doubtful cases are generally declared to be mortgages. (1 Lom. Dig. 415, 422; Thompson v. Davenport, 1 Wash. 127; Roberts' Adm'r v. Cocke, 1 Rand. 125; Leavell v. Robinson, 2 Leigh, 161; Kroesen v. Seevers, 5 Leigh, 439 to 441; Miss v. Green, 10 Leigh, 251; Forkner v. Stuart, 6 Grd. 204; Williams v. Owen, 5 My. & Cr. (46 Eng. Ch. 303; Howard v. Harris, 3 Wh. & Tud. L. Cas. (Pt. II.), 417-48; Id. 434 & seq.; Earpe v. Boothe, 24 Grd. 375; Snively v. Pickle, 29 Grd. 34; Sutherlin v. March, 75 Va. 223.)

The marks whereby a mortgage is discriminated from a conditional sale are these: (1), That no price, or an inadequate one, is set on the property; (2), That the grantor remains in possession; and (3), That there is a covenant or promise obliging the *grantor* to pay the money.

W. C.

1. Where no Price, or an Inadequate One, is set on the Property.

Where no price is contemplated or discussed, or a price grossly inadequate, it is pregnant evidence that a mortgage was in view, and not a purchase on condition, since an omission to state or to have reference to a stipulated price is a natural and usual concomitant of a mortgage, but is hardly reconcilable with the notion of a sale and purchase; and a grossly inadequate price, if it were treated as a sale, would savor of fraud. (Thompson v. Davenport, 1 Wash. 127; Robertson v. Campbell & al. 2 Call, 430; Roberts' Adm'r. v. Cocke, 1 Rand. 128, 130; Kroesen v. Seevers, 5 Leigh, 439-40; Conway v. Alexander, 7 Cr. 218; Howard v. Harris, 2 Wh. & Tud. L. Cas. 435 & seq.; Snively v. Pickle, 29 Grd. 35.)

2. Where the Grantor Remains in Possession.

The grantor's remaining in possession is strong proof that the transaction is a mortgage, inasmuch as it is usual in such cases, and is not an ordinary concomitant of a sale. (Thompson v. Davenport, 1 Wash. 127; Ross v. Norvell, 1 Wash. 14; Strider v. Reid's Adm'r, 2 Grd. 43.)

3. Where there is a Covenant or Promise Obliging the Grantor to pay the Money.

That the grantor should *oblige* himself to pay the money is natural and proper in a mortgage, but hardly reconcilable with the idea of a conditional sale. In the latter case the grantor reserves the privilege of paying,

but does not *bind himself* to do so. The want of such a promise does not, indeed, necessarily establish the transaction to be a conditional sale; for if it can be shown otherwise to be a mortgage, a promise, as we have seen, is implied (*Ante*, p. 334); but it is an important circumstance, tending to prove that a conditional sale was designed. (Chapman v. Turner, 1 Call, 288 to 290; Ransome v. Frayser's Ex'ors, 10 Leigh, 592; Strider v. Reid's Adm'r, 2 Grat. 43; Conway's Ex'or v. Alexander, 7 Cr. 218; 1 Lom. Dig. 415, 422-3; Howard v. Harris, 1 Vern. 190; S. C. 2 Wh. & Tud. L. Cas. 438, &c.)

4i. Equity of Redemption has the *Incidents of an Estate*.

An equity of redemption, as we have seen, is a mere creature of a court of equity, founded on the principle that, as a mortgage is only a pledge to secure money, it is but natural justice, and is, moreover, the substance of the transaction, to consider the *ownership of the land* as still vested in the mortgagor, subject only to the mortgagee's legal title, so far as needful for his security. It is something more than a *mere trust*, being *inherent in the land*, and binding all persons, whether they come in *in the post*, or otherwise. Whilst the mortgagor, entitled to an equity of redemption, is in receipt of the rents and profits, he has such a seisin of the equitable estate in the land as is equivalent to the actual seisin of a legal estate in a court of law; and the analogy is so complete that the equity of redemption may be divested, and an adverse possession of it obtained. (1 Lom. Dig. 445.)

It follows from all this, that an equity of redemption, like any other estate, may be aliened, devised, mortgaged, charged with debts, be subject to curtesy, and, in Virginia, to dower, and, in short, may have most, if not all, of the qualities and incidents which belong to legal estates. There are, however, certainly some differences. Thus, equities of redemption are cognizable in equity only, and cannot be elsewhere subjected to debts. Then, although they may be mortgaged, yet a third mortgagee, without notice, by paying off the first mortgage may acquire a preference over the second; nor has such second mortgagee any legal remedy for his money by taking possession, but must resort to an expensive suit in chancery to recover even the annual interest. Again, if there be no foreclosure in the mortgagor's life-time, the equity of redemption (supposing the mortgage to be *in fieri*, descends upon his heir, and is in Virginia subject to dower, etc.; but if the mortgage be foreclosed during the mortgagor's life, and a surplus result, it belongs to the personal estate of the mortgagor, and upon his death will de-



volve on his personal representative, and at common law is not subject to dower, etc., although as to dower, this doctrine is changed by statute in Virginia, as we have seen (*1 Ab.*, p. 112, 1<sup>st</sup>). (1 *Lom. Dig.* 445 & seq.; V. C. 1873, ch. 112, § 16; V. C. 1887, ch. 107 §§ 2428, 2429; 4 *Kent's Com.* 159 & seq.; *Haleys v. Williams*, 1 *Leigh*, 140; *Coups v. Walker*, 2 *Leigh*, 280; *Wilson v. Davisson*, 2 *Red.* 402, 410.)

#### Deeds of Trust to Secure Debts, etc.

A bill to foreclose the debtor's equity of redemption being a necessary preliminary to the satisfaction of the mortgagee's debt, whether by quieting the latter in the unconditional enjoyment of the lands, according to the English practice, or by a sale and application of the proceeds, in pursuance of the usage in Ireland and Virginia, the delay and expense thence arising have stimulated the ingenuity of modern times to frame a mode of conveyance, whereby the creditor may procure his principal and interest by a sale of the subject within a short period, without being under the necessity of applying to a court of equity. This is done by taking a conveyance, not as in case of a mortgage, to the creditor himself, but to a third person as trustee, in trust upon default of payment at the time stipulated, to sell the land, and to apply the purchase-money, after defraying the expenses incurred in discharging the trust, to pay the debt with interest, and the residue, if any, to pay to the debtor. And it has long been understood that the trustee alone may make an irredeemable title, without the concurrence of the debtor, or his representatives. (2 *Th. Co. Lit.* 36, n. (Z.); *Corder v. Morgan*, 18 *Ves.* 344, 346; *Chowning v. Cox*, 1 *Rand.* 311.)

This security, familiarly known as a *deed of trust*, has in practice in Virginia quite superseded mortgages, although it has been sometimes complained of as affording facilities for oppression and fraud. (1 *Lom. Dig.* 424; *Chowning v. Cox*, 1 *Rand.* 311; *Marks v. Morris*, 2 *Munf.* 107.)

B. C.

#### 1. The Reason for Allowing a Summary Sale of the Trust-Subject in Case of a *Deed of Trust*.

The reason is to be found in the interposition of the trustee, who is, or is supposed to be, *impartial and disinterested*, the common friend and agent of the parties. It is, at all events, his duty so to act, and he ought to disregard the suggestions of either party inconsistent with the character he holds, and with his impartial duty as the agent of both. (1 *Lom. Dig.* 424-'5; 1 *Tuck. Com.* 109 & seq., B. II.; *Quarles v. Lacy*, 4 *Munf.* 251;

Lane v. Tidball, (Gilm. 132; Chowning v. Cox & al. 1 Rand. 311.)

2<sup>i</sup>. The Trustee's Duty and Compensation.

These topics have already been discussed, (*infra*, pp. 245, 8<sup>f</sup>, and 255, 16<sup>f</sup>;) and it will suffice here to sum them up in a few words;

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1<sup>k</sup>. The Trustee's Duty.

The general principle of his duty is to act justly, impartially, and discreetly, without permitting himself to be swayed to one side or the other by the suggestions or persuasions of either party. He has been likened, in this respect, to the commissioner of a court of equity. (1 Lom. Dig. 424-'5; *Supra*, 1<sup>i</sup>);

W. C.

1<sup>l</sup>. The Mode of Sale by the Trustee.

He must conform to the terms of the deed, in respect to the time and manner of giving notice, and the time and manner of sale, as well as in all other particulars; and in all points where the deed is silent, he must govern himself by the general rule to sell to the best advantage, and with an impartial regard to the rights and interests of both parties. It is a principle, also, of such transactions, that the trustee is charged with a *personal confidence*, and must, therefore, act in person, and not by agent. (1 Lom. Dig. 427; 1 Tuck. Com. 108, B. II.; Harvey v. Steptoe, 17 Grat. 289; Walker v. Beauchler, 27 Grat. 526-'7; Shurtz v. Johnson, 28 Grat. 664, 667-'8.)

But although the trustee should sell ever so much contrary to the terms of the deed, or to his general duty, yet by his conveyance the *legal title passes*, and the purchase is to be assailed in a court of equity alone. In that court, however, any material departure from the provisions of the deed, or from the line of his duty, will vitiate his proceedings. But if his conduct has been fair and honest, although it may have been irregular, the court will interpose very reluctantly, especially after the lapse of a considerable time, nor ever against a *bona fide* purchaser for valuable consideration and without notice. (Taylor v. King, 6 Mumf. 366; Harris v. Harris, 6 Mumf. 368; Gibson v. Jones, 5 Leigh, 370; Hughes v. Caldwell, 11 Leigh, 348.)

2<sup>l</sup>. The Trustee's Forbearing to Sell.

It is the trustee's duty to forbear to sell, and to ask the aid and instructions of a court of equity in all cases where the amount of the debt is undiquidated, or in good faith disputed; where any cloud rests upon the title; where a reasonable price cannot

be obtained; or where for any reason a sale is likely to be accompanied by a sacrifice of the property, which, at the cost of some delay, may be obviated.

(1 Tuck. Com. 106, B. II.; 1 Lom. Dig. 425; Lane v. Toddall, Gilin. 132; Wilkins v. Gordon & als. 11 Leigh, 547; Miller v. Argyle, 5 Leigh, 460; Miller v. Trevillian, 2 Rob. 25; Bryan v. Stump, 8 Grat. 247.)

### 3. The Trustee's Distribution of the Proceeds of Sale.

In the distribution of the proceeds of sale, the trustee must conform to the directions of the deed, if any are given; if none, then in general he is to pay *first*, the expenses of the trust, including a proper compensation to the trustee for his services; *then*, the debt, with interest; and *lastly*, the residue, if any, to the debtor or his representative. (V. C. 1873, ch. 113,

G. Smith v. Wash. City, Va. M. & G. S. R. R. Co. 33 Grat. 622.

It will be remembered that the trustee is also required, within *four months* after the sale, to return to the commissioner of accounts of the court wherein the deed was first recorded, an inventory of the property sold, and an account of the sales, under penalty of forfeiting his commissions thereon. He is moreover required to settle an account of his receipts and disbursements in pursuance of the trust once a year, as long as the transactions continue, before the commissioner of accounts of the court of the county or corporation wherein the instrument creating the trust was first recorded; and on failure for six months, he forfeits all compensation for his services during the period for which such annual settlement is omitted, unless it be allowed by the court. (V. C. 1873, ch. 128, §§ 4, 7, 8; V. C. 1887, ch. 121, §§ 2674, 2678, 2679.)

### 2. The Trustee's Compensation; w. c.

#### 1. The Doctrine in England.

Being regarded as an office of friendship merely, no compensation is allowed trustees (but only expenses actually incurred), unless it be expressly stipulated in the instrument creating the trust. (1 Tuck. Com. 108, B. II.; Foulsh. Rep. B. II., c. vii., § 3; Ayliffe v. Murray, 2 Atk. 58; *Ante*, p. 245, 2<sup>h</sup>.)

#### 2. Doctrine in Virginia; w. c.

##### 1<sup>m</sup>. Doctrine Independently of Statute.

Besides expenses of a larger kind actually incurred, *consequential compensation* is allowed for the trustee's trouble and responsibility, which will include trivial expenses such as postage and the like. This compensation it has been usual to put at five per cent. *on*

*receipts*; that is, in trusts for the payment of debts, five per cent. *on the debt*, or as much of it as the proceeds of the property will pay. (Lomax v. Pendleton, 3 Call, 538; Miller v. Beverleys, 4 H. & M. 420; S. C. 6 Munf. 99; 1 Tuck. Com. 108, B. II.)

2<sup>m</sup>. Doctrine by Statute in Virginia.

Where the trust is for the *payment of debts* or to indemnify sureties, the compensation of the trustee is to be like that of a sheriff on execution, namely, five per cent. on the first \$300, and two per cent. on the residue of the *proceeds of sale*. (V. C. 1873, ch. 113, § 6; V. C. 1887, ch. 108, § 2442.)

The student will observe how inferior in adaptation to practical cases this statutory provision is to the rule pursued, independently of statute, by the courts of equity, namely, to allow the trustee a *reasonable compensation*, to be determined by the peculiar circumstances of the case.

Two objections may be urged to the statutory rule:

1. That the compensation will be sometimes too little, and sometimes so excessive as to oblige the court of equity to take upon itself the administration of the trust through a *commissioner*, whose compensation is more within the court's own control, as *e. g.* in the case of R. R. trusts. Even in sales made under a decree of court, however, it is provided, that the commission for selling and paying out the proceeds of sale *shall not exceed* five per cent. on the first \$300, and two per cent. on all above that. (V. C. 1887, ch. 167, § 3404.)

2. That such a mode of compensation places the trustee under the temptation to sell more property than is necessary, seeing that his commission is not limited to the amount of the *debt secured*, but extends to the *whole proceeds of the sale*.

3<sup>d</sup>. The Intervention of a Court of Equity at the Instance of a Trustee, or of a *Cestui Que Trust*.

A court of equity is specially charged with the cognizance and direction of trust, and it is the peculiar privilege and duty of a trustee at all times to apply for its instruction and assistance. And on the other hand, should he fail to do so, it is equally the right and privilege of the *cestui que trust* to demand its intervention. (1 Lom. Dig 425 & seq.; 1 Tuck. Com. 106, B. II.)

The intervention of equity is usually made needful by one or other of the exigencies following, namely: (1), When the title to the trust-subject is clouded; (2), When the sum to be raised is reasonably doubtful; (3), When no trustee authorized to act is in existence; (4), Where



the deed is made before the trust is executed; and (5), Where the deed is alleged to be affected with usury;

1<sup>st</sup>. When the Title to the Trust-Subject is Clouded.

As no sale can advantageously be made with a cloud on the title, it is emphatically the duty of the trustee to forbear to sell until a court of equity shall remove the embarrassment;

1<sup>st</sup>. Where there are Adverse Claims of Title.

See 1 Lom. Dig. 425-6; 1 Tuck. Com. 106, B. II.; Lane v. Tidball, Gilm. 132; Gay v. Hancock, 1 Rand. 72; Miller v. Argyle, 5 Leigh, 467, 470; Bryan v. Stump, 8 Grat. 247.

2<sup>nd</sup>. Where there are Prior Incumbrances.

See 1 Tuck. Com. 106, B. II.; Lane v. Tidball, Gilm. 132; Miller v. Trevillian, 2 Rob. 25; 1 Lom. Dig. 425-6.

2<sup>nd</sup>. When the Sum to be Raised is *Reasonably Doubtful*.

See 1 Lom. Dig. 425; 1 Tuck. Com. 106, B. II.; Lane v. Tidball, Gilm. 132; Wilkins v. Gordon & als. 11 Leigh, 547; Miller v. Trevillian, 2 Rob. 25.

3<sup>rd</sup>. When no Trustee Authorized to Act *is in Existence*;

W. C.

1. The Death, Removal, Resignation, or Refusal to Act, of a *Single Trustee*.

In any of these events, as we have seen (*Ante*, p. 247, 2<sup>nd</sup>), or, indeed, in *any event* where there is a trust, and no trustee to execute it, the court of chancery will supply one, agreeably to the maxim that *equity will never suffer a trust to fail for want of a trustee*. (Dunscomb v. Dunscomb, 2 Hen. & M. 11; Lee v. Randolph & als. 2 Hen. & M. 12; 2 Th. Co. Lit. 593, and n. (C.); 2 Stor. Eq. § 976, 1059 & seq.; 1 Lom. Dig. 427; Hughes v. Caldwell, 11 Leigh, 342.)

And instead of a formal bill in chancery, when the case is that a trustee, or all of several trustees, in any deed of trust, die, remove from the commonwealth, decline the trust, or resign, a new trustee may be *substituted* upon application, simply *by motion* to the circuit, or county or corporation court of the county or corporation where the *deed* is recorded, on reasonable notice to the creditor and other persons concerned. (V. C. 1873, ch. 174, § 8; V. C. 1887, ch. 167, § 3419.)

2<sup>nd</sup>. Death, or Refusal to Act, of *one of Several Joint Trustees*.

The *surviving* *act* of one of several *joint trustees*, *may* *now* *make*, and does now make, an application

to a court of equity indispensable, inasmuch as, in case of a *joint trust*, all of the trustees must join, and a less number than all can do nothing. (Fonbl. Eq. B. II., c. vii., § 5; 1 Lom. Dig. 311, 427; V. C. 1873, ch. 174, § 8; V. C. 1887, ch. 167, § 3419.)

The *death* of one of several *joint trustees*, at common law occasioned no embarrassment, because the interest and the power *survived to the survivor*. The statute law of Virginia, prior to 1st July, 1850, by unqualifiedly abolishing the right of survivorship, made it requisite in such case, as in case of the death of a sole trustee, to resort to equity to direct the execution of the trust. But since 1st July, 1850, the right of survivorship is restored in respect to *joint trustees* and joint executors, and also in cases where it is so expressly limited, and hence, where one of several joint trustees dies, there is now no need of the aid of a court of chancery, any more than at common law. (1 Tuck. Com. 107, B. II.; 1 Lom. Dig. 427; V. C. 1873, ch. 112, § 19; V. C. 1887, ch. 107, § 2431; 1 Th. Co. Lit. 399-400, and n. (13).)

3<sup>l</sup>. Where the Trustee is Interested in the Debt Secured.

If the trustee becomes the executor or administrator of the creditor, or the assignee of the debt, he is disqualified to act that disinterested and impartial part which his duty assigns to him, and becomes a *mortgagee*. He may not, therefore, in case of *lands*, exercise the power of sale conferred by the deed, but must apply to a court of chancery, as in case of a mortgage, to foreclose the debtor's equity of redemption. The same principles are obviously applicable, in the main, where the trust-subject is *chattels*; but in that case as the analogy of pledges or *pawns* (where the pawnee is recognized as having the right to sell), may have more or less weight, the proposition cannot be so unreservedly asserted in respect to them. (Lane v. Tidball, Gilm. 132; Chowning v. Cox & al. 1 Rand. 311; 1 Tuck. Com. 104, 107, B. II.; Breckenridge v. Auld, 1 Rob. 154; Floyd v. Harrison, &c. 2 Rob. 178, 183, 185 to 188.)

4<sup>k</sup>. Where the Debtor Dies before the Trust is Executed.

The death of the debtor separates the duty of redeeming and the benefit of redemption, which before were blended in the same person: the *duty* devolving on the personal representative of the debtor, who also is in possession of any evidences of payment or counter demand which may exist, whilst the *benefit* results to the heir or devisee. Hence, it is insisted that no deed

of trust can be properly executed after the debtor's death, save by the decree of a court of equity, whereby justice may be done to the several parties interested.

1 Tuck. Com. 107, B. II.; 1 Lom. Dig. 426; Gibson v. Jones, 5 Leigh, 374. But see Fell v. Brown, 2 Br. C. C. 279. Bradshaw v. Outram, 13 Ves. 234.)

Upon this conclusion it is possible that the terms of the present statute, prescribing the duties of trustees, may exercise some control. That statute directs that, if any surplus remain after paying the debts, etc., the trustee shall pay it "to the grantor, his heirs, *personal representatives*, or assigns," which, it may be said, shows that the legislature contemplated the death of the debtor, and did not mean in that event to suspend the powers or action of the trustee. (V. C. 1873, ch. 113, § 6; V. C. 1887, ch. 108, § 2442.) And it is the practice for the trustee to proceed to sell without regard to the debtor's death.

#### 5. Where the Deed of Trust is Alleged to be Affected with Usury.

The interest laws of Virginia contain two prominent provisions, namely:

1. To declare legal interest to be at the rate of *six* per centum per annum; and to enact that all contracts and assurances made directly or indirectly for the loan or forbearance of money, or other thing, at a greater rate than six per centum per annum, shall be deemed to be for an illegal consideration *as to the excess* beyond the *principal amount* so loaned or forborne. (V. C. 1887, ch. 130, §§ 2817, 2818; White v. Freeman, 79 Va. 597.)

2. To allow the borrower to exhibit his bill in equity against the lender, and compel him to discover, upon oath, the money or thing really lent, and the true nature of the contract, when, if it appear that more than lawful interest was reserved, the lender shall recover only his principal money or other thing *without interest*, and pay the costs of suit. (V. C. 1873, ch. 137, § 9; V. C. 1887, ch. 130, § 2822.) And if a sale is apprehended, an injunction may be awarded to prevent it pending the suit. But this provision in the present state of the law is superfluous, except only as a means of discovery, seeing that the relief in equity is thereby made identical with that given at law. It was devised when the legal penalty of usury was the forfeiture of the *whole debt*, and might very well have been repealed when the statute ceased to exact that forfeiture, and denounced upon the usurer only the loss of the interest.

The question of *what is usury* cannot be here fully discussed. It will suffice at present to indicate the

general principles which govern the subject. See 3 Min. Insts. 283:

1, There must be a *loan or forbearance* of money, or other commodity.

Hence, an *actual sale* of stocks, goods, bonds, notes, bills, or any other property, at more or less than its value, or its face amount, is not usurious. (Hansborough v. Baylor, 2 Munf. 96; Greenhow's Adm'r v. Harris, &c. 6 Munf. 472; Pollard v. Baylors & al. 6 Munf. 433; Taylor, Adm'r, v. Bruce, Gilm. 42; Stribling v. Bank of the Valley, 5 Rand. 132; Whitworth, &c. v. Adams, 5 Rand. 333; Selby v. Morgan, 3 Leigh, 577; Brockenbrough v. Spindle's Adm'r, 17 Grat. 21; Brummel & Co. v. Ender's & al. 18 Grat. 873; Gimmi v. Cullen, 20 Grat. 439; Danville v. Sutherlin, 20 Grat. 555; Lynchburg v. Norvell & als. 20 Grat. 601; Moseley v. Brown, 76 Va. 421; Bailey v. Hill, 77 Va. 497.)

But if the application be to *lend money*, and in *response thereto*, the party, instead of money, or as a condition upon which money is advanced, furnishes stocks, or other property at *exorbitant prices*, it is a *loan*, and usurious. (Gibson v. Fristoe, 1 Call, 62; Douglas v. McChesney, 2 Rand. 109; Stribling v. Bank of the Valley, 5 Rand. 132; Clarkson's Adm'r v. Garland, 1 Leigh, 147; Brockenbrough's Ex'r v. Spindle's Adm'r, 17 Grat. 21.)

2, The interest must be *at a greater rate* than is allowed by law.

Hence, it is not usury to agree for the lawful rate of interest to be taken *in advance*, for any period *not exceeding a year*. (Crump v. Nicholas & al. 5 Leigh, 251; State Bank of N. C. v. Cowan, &c. 8 Leigh, 238; Parker v. Cousins, 2 Grat. 372; Thornton v. Bank of Washington, 3 Pet. 36; Meyer v. City of Muscatine, 1 Wall. 384, 391; Mowry v. Bishop, 5 Pai. 98.) But see sundry provisions allowing interest to be taken in advance by banks, &c., whence it may possibly be deduced, that it can be done only by them. (V. C. 1873, ch. 59, § 84; Id. ch. 58, § 10; V. C. 1887, ch. 130, § 2820.)

The student will observe that the statute of 1869-'70 (now repealed), which authorized twelve per cent. interest, required that the agreement therefor should be *in writing*, and specified in the bond, note, etc., *evidencing the debt*. If, therefore, more than six per cent. should be taken or agreed for, otherwise than by a written contract, and the contract which evidenced the debt, it seems that it would have been usurious. (Acts 1869-'70, p. 19, ch. 19.)

3, There must be an *agreement* for a *profit* on the



money or thing loaned, in the *nature of interest*, exceeding the rate allowed by law.

Hence, it is not usury if the excess were *bona fide* the result of a *mistake in calculation*, or arose from the use of tables (like Rowlett's) calculated for *convenience sake*, upon the basis of three hundred and sixty days making a year. (Classford v. Laing, 1 Campb. 149; Parker v. Cousins, 2 Grat. 385; Chit. Cont. 702-'3.)

Nor is it usury if the excess be a *penalty*, from which the debtor may relieve himself by punctuality; nor if the principal be *bona fide* put in jeopardy; nor if the excess is *bona fide* for *services rendered* or *expenses incurred*. (Campbell v. Shields, 6 Leigh, 517; Pollard v. Baylor, 6 Munf. 438; Coster v. Dilworth, 8 Cow. N. Y. 299; Ketchum v. Barber, 4 Hill, 224; Boulware v. Newton, 18 Grat. 708; Danville v. Sutherlin, 20 Grat. 555; Lynchburg v. Norvell & als. 20 Grat. 601.)

4, The agreement for illegal interest must *not be sub-sequent* to the promise or instrument whose validity is in question.

Hence, a pre-existing *bona fide* debt, for which an usurious security is given, is still binding, although the usurious security is void. (Parker v. Cousins, 2 Grat. 387; Rankin v. Rankin, 1 Grat. 155; Bank of Washington v. Arthur, 3 Grat. 173, 186; Chit. Cont. 705; White v. Freeman, 79 Va. 597.)

5, A new agreement, divested of all taint of usury, *post and become*, is valid and binding.

Thus, if the new agreement were made with *new obligee*, it is deemed to be purged of the usury, even though it still provides for the payment of the illegal interest. And so if it be made payable by the old obligors to a *new obligee*. (Chit. Cont. 706; Martin v. Hill, 9 Grat. 8; Cuthbert v. Haley, 8 T. R. 390; De Wolf v. Johnson, 10 Wheat. 367; Law's Ex'or v. Sutherland & als. 5 Grat. 357; Drake's Ex'or v. Chandler, 18 Grat. 911, &c.; Michie v. Jeffries, 21 Grat. 345; Keckley v. Union Bank, 79 Va. 464; Vaught v. Rider, 83 Va. 659.)

When suit is instituted, whether at law or in chancery, upon an usurious security, and the defence of usury is sustained by proof, the creditor formerly lost *his whole debt*, in pursuance of the statute of usury. Usurious mortgages were liable thus to be invalidated, since the creditor could not finally secure the liquidation of his debt without filing a bill to foreclose, and thus affording the debtor an opportunity to establish the usury, and so avoid the mortgage. But with a deed of trust it was otherwise. That might be enforced without application to any court; and if the debtor refused to *redeem the sale* of the property by the trustee,

he must himself supplicate the equitable intervention of the court; and the relief proper to be administered to him was, for many years, the subject of much controversy in Virginia.

There were three views, either of which might have been adopted with more or less of plausibility, namely, (1st), That the debtor asking for equity should himself be required to do equity, according to one of the favorite maxims of chancery, by paying the debt with legal interest; (2d), That the debtor should conform to the analogy of the statutory terms prescribed in case an appeal has to be made to the creditor's conscience to disclose the usury; that is, to pay the principal, without interest; and (3rd), That the court should stay the hand of the trustee from selling, without imposing any terms, until the creditor shall establish his debt by an action at law, whereby the debtor would have an opportunity to make out the usury, and invalidate the security.

The first case in which the question arose was *Marks v. Morris*, 2 *Munf.* 407, wherein the last view was adopted, and it was determined that, when a debtor by deed of trust *wanted no discovery* from the creditor, but being full-handed with proof of the usury, only found it necessary to apply to the court of equity *to stay the trustee* from selling until the question of usury should be inquired into, *no terms should be imposed* on him, but the trustee *should be enjoined* from selling, until, by some proper proceeding, to be instituted by the creditor, he should establish the validity of his contract; in which case the injunction should be dissolved, and in the contrary event, perpetuated. The court sustained its opinion by several analogies, showing that equity had been long accustomed to afford a corresponding *collateral* relief without imposing terms; *e. g.*, where a debtor applies to have his testimony perpetuated, touching a question of usury (*Suffolk v. Green*, 1 *Atk.* 450); or to be relieved against a judgment at law, obtained by accident or surprise, in a case of usury; and that even a court of law, where a judgment had been entered upon a warrant of attorney, and a *scire facias* was depending to revive and enforce it, upon a suggestion of usury, had directed an issue to try the fact, on the ground (most emphatically applicable in the case of a deed of trust), that the defendant "had had no opportunity to plead the statute of usury, and was, therefore, without relief, but by the interposition of the court." (*Coke v. Jones*, *Cowp.* 727.)

The case of *Marks v. Morris*, which was determined

in 1812, was from that time continually doubted, often assailed, sometimes departed from (see *Bank of Washington v. Arthur*, 3 Grat. 178-'9, 180), but never overruled until 1851. (*Bell v. Calhoun*, 8 Grat. 26.) But by the revisal of 1849, which had taken effect the year preceding the judgment (1st July, 1850), the doctrine of *Marks v. Morris* had been by statute finally established as to cases *thereafter arising*. The statute provides that, upon a bill requiring *no discovery* of the creditor, but praying an injunction to prevent the sale under a deed of trust alleged to be usurious, the court should cause an issue to be made up and tried *at its bar* by a jury, whether or no the transaction be usurious, on the trial of which neither the bill nor the answer should be given in evidence. If the jury find the transaction usurious, the same relief should be given as if the creditor had resorted to the court to make his claim available; that is, the deed of trust was in general to be *invalidated*, and a perpetual injunction granted prohibiting any sale under it. The verdict of the jury, it should be observed, was not merely (as in most issues, out of chancery), to inform the conscience of the court, but *concluded the question* of fact, and the court *must* decree accordingly, unless, indeed, it should think fit to grant a new trial, which it has express power to do as in other cases. The issue was directed to be tried at the bar of the court which awarded it, that is of the *court of chancery*; but it seems it was not error to try it on the common law side of the *same court*. (V. C. 1860, ch. 141, § 10; *Brockenbrough's Ex'ors v. Spindle's Adm'r*, 17 Grat. 26 to 29.)

If the inquiry should result in ascertaining that the deed of trust was usurious, but that it was intended, in part, to secure a pre-existing *bona fide* debt, that debt is not affected, as we have seen, by the usury which tainted the deed of trust, and the deed is allowed to stand so far as it is a security therefor. (*Bank of Washington v. Arthur & als.* 3 Grat. 186; *Parker v. Cousins*, 2 Grat. 387.)

This doctrine, contested for so many years, and only settled at last by statute, is now of no interest, the forfeiture at law being, as we have seen, precisely the same as in equity. (V. C. 1887, ch. 130, §§ 2822, 2818.)

12. The Power of Sale Reserved in a Mortgage to the Creditor Himself; *w. c.*

1. The Power of Sale Reserved to the Creditor in a *Mortgage of Chattels*.

In England such a power is uniformly admitted, as it is by the common law, in case of chattels *pawned*,

(that is where the possession is delivered to the creditor), after notice to redeem. Whether such a power can be legitimately conferred upon a *mortgagee* of chattels in Virginia is uncertain. The analogy of the doctrine of *pawns* is admitted to be strong, but the reasons urged against a similar power in a mortgage of *lands*, in *Chowning v. Cox* & al. 1 Rand. 311, and the *duties* of trustees, as depicted in *Lane v. Tidball*, Gilh. 130, seem to be well nigh conclusive on the other side, against allowing such unlimited power to one alien, and even adverse in interest to the debtor. (4 Kent's Com. 139; 1 Tuck. Com. 105, B. II.; *Lockwood v. Ewer*, 2 Atk. 303; *Tucker v. Wilson*, 1 P. Wms. 261; S. C. 1 Bro. C. C. 494.)

2<sup>i</sup>. The Power of Sale Reserved to the Creditor in a *Mortgage of Lands*; w. c.

1<sup>k</sup>. The Doctrine in England.

It seems, unfortunately, to have been settled in England that a power of sale, *even of lands*, may be reserved to the mortgagee, whose disposition of the property will be supported in equity. The practice had gained some foothold, when it was powerfully shaken by the objection manifested to it by Lord Eldon, in 1825, in *Roberts v. Bozon*, 1 Pow. on Mortg. p. 9, note; but it seems now to have been recognized in many cases. (1 Lom. Dig. 423; *Corder v. Morgan*, 18 Ves. 344; *Croft v. Powel*, Com. R. 603; *Anon.* 6 Madd. 10; *Wright v. Rose*, 7 Sim. & Stu. (Eng. Ch.), 323; *Clay v. Sharpe*, 6 Ves. 346.)

2<sup>k</sup>. The Doctrine in Virginia.

The practice of conferring the power of sale on mortgagees *of lands* has been in several cases in Virginia very earnestly condemned, and for reasons of a most convincing character, although it is to be feared that it may receive ultimately the sanction of our courts, unless the legislature shall intervene, as it might well do, seeing the oppression and fraud to which the usage can hardly fail to give birth. (1 Lom. Dig. 433; 1 Tuck. Com. 104, B. II.; *Chowning v. Cox*, 1 Rand. 306-11; *Breckenridge v. Auld*, 1 Rob. 154. But see *Floyd v. Harrison*, 2 Rob. 172, 178, 186.)

If, however, the mortgagee do proceed to make sale in pursuance of the power, and the sale is fair, and accompanied by the silent acquiescence of the debtor, who is apprised of it, and makes no objection, it will not be set aside. (1 Lom. Dig. 424; *Taylor v. Chowning*, 3 Leigh, 654; *Floyd v. Harrison*, 2 Rob. 161.)

7<sup>h</sup>. Equitable Mortgages.

Equitable mortgages are such as *at law* constitute no



conveyance of the property, nor charge thereon, but which are then effect wholly to the courts of chancery. There are three principal classes of such equitable interests; (1). Mortgages of merely equitable interests; (2). Mortgages implied by the deposit of title-deeds; and (3). The vendor's lien on lands sold, for the purpose.

# 1<sup>st</sup>. Mortgages of Equitable Interests.

Under this head are to be included, not only actual and express mortgages of *existing* equitable interests, but also *agreements in writing*, whether express or implied, to hold or to transfer lands as a security for money. As equity looks upon that which is agreed, or ought to be done, as actually done, it is obvious enough that, when a debtor *promises* in writing to secure money due from him by mortgage, a court of chancery will enforce a specific execution of the agreement, or what is the same thing in effect, will treat the agreement itself as a mortgage, and decree a sale of the property to satisfy the debt. A power of attorney to the creditor, authorizing him to sell for the purpose of paying the debt, may, to some extent, have the same effect, at least as long as it remains unrevoked by the express act of the maker, or impliedly by his death. (1 Lom. Dig. 417; Huston v. Cantril, 11 Leigh, 173, 178; Hunt v. Rousmanier's Adm'r, 8 Wheat. 174, 1 Pet. 1; Clayton v. Fawcett's Adm'r, 2 Leigh, 19.)

A similar equitable mortgage may arise by a grantee's accepting a conveyance of land in consideration of paying a debt therein named. Nay, wherever it appears by writing signed by the party to be charged, that for a valuable consideration, such as an existing debt, a debt at that time first contracted, or otherwise, he intends to charge his property as security for money, whatever the form of the instrument, the court of equity will fully effectuate the intentions of the parties concerned. Hence, mere promises, in writing, to subject property to debts, powers of attorney, deeds imperfectly executed, conveyances to third persons on condition to pay the grantor's debts, and other written papers, have been held to create equitable mortgages in the contemplation of courts of equity. (Vanmeter v. Vanmeter, 3 Grat. 162; Wm. & Mary College v. Powell & als. 12 Grat. 387; Ruffners v. Feltner & als. 12 Grat. 551; Russel v. Russel, 1 Bro. C. 15 260; 8 C. 1 Wh. & Tud. L. Cas. 467.)

Equitable interests may also be mortgaged, as, for example, *equities of redemption*, or interests, depending upon contracts to convey, not carried into

grant, etc. In England, mortgages of such interests are not in favor with conveyancers, for two reasons: 1st. Because a third mortgagee without notice, by paying off the first mortgage, may acquire a preference over the second, for a reason afterwards to be explained in connection with the subject of *tacking*; 2ndly, Because embarrassments may arise in calling in the money; for as such equitable mortgagee (especially of an equity of redemption) has no *legal remedy*, he is driven to the tedious and expensive process of a suit in chancery to recover even his interest; unless, indeed, having no notice of the first mortgage when he lent his money, he can procure the assignment of a satisfied trust-term attendant on the inheritance, created before the first mortgage, in which case, as he has equal equity with the prior incumbrancer, his legal title shall prevail. But in Virginia, the first objection is practically obviated by the registry laws. (1 Com. Dig. 446; Willoughby v. Willoughby, 1 T. R. 767-'8; V. C. 1873, ch. 114, §§ 5, 7; V. C. 1887, ch. 109, §§ 2465 to 2467.)

2i. Mortgages *Implied by Deposit of Title-Deeds*.

To allow a mortgage to be created by the mere deposit of the title deeds—that is, *by parol*, and by an agreement *merely implied*,—is so far to repeal the statute of conveyances (in England, 29 Car. II., c. 3, §§ 1, 2, 3). It was first declared to be admissible in *Russell v. Russell*, 1 Bro. C. C. 269, although a foundation for it had been laid in *Hales v. Van Berchem*, 2 Vern. 617. The doctrine has been often lamented, although constantly recognized as a binding authority in England, and in consequence of being a subsisting part of the equity jurisprudence of the mother country, has found no inconsiderable acquiescence in the United States, particularly in New York, South Carolina, and Mississippi. (*Russell v. Russell* (1 Bro. C. C. 269), 1 Wh. & Tud. L. Cas. 457 & seq., 465 & seq.; *Ex parte Coming*, 9 Ves. 115; *Ex parte Wetherell*, 14 Ves. 606; 2 Stor. Eq. § 1020.)

It is agreed, however, that the doctrine, where it prevails at all, shall not be extended *beyond the letter* of the precedents; and that, in order to create the lien, there must be an actual and *bona fide* deposit (and not a mere agreement to make deposit), of the title deeds with the mortgagee himself. And it is also true that no such equitable mortgage will, in any case, avail against a subsequent mortgage, duly registered, without notice of the deposit. (4 Kent's Com. 151; 2 Stor. Eq. § 1020.)

In Virginia, the practice is very justly considered as at war, not only with the policy of the statute of convey-

ances, but also with that of *registry*. In England, where they have no general registry laws, the possession of the title deeds is the only, and for the most part a sufficient, guaranty, that lands have no previous incumbrance upon them. Hence, to deposit the title deeds is at all events to prevent the owner of the land from defrauding any one else. With us, however, the dependence, in order to give notice of previous incumbrances and conveyances, is altogether upon the registry acts, and to permit a mortgage to be created by a deposit of the title deeds would, as to third persons, wholly frustrate the wise intent of those laws. Hence, it is regarded as established, that, however it may be as between the parties, there can be no such security as against a subsequent *bona fide* purchaser or incumbrancer. (Colquhoun v. Atkinson, 6 Munt. 550, 556; Siter, Price & Co. v. McClanachan & als. 2 Grat. 314; V. C. 1873, ch. 112, § 1; Id. ch. 140, § 1 (cl. 6); Id. ch. 118, § 5; V. C. 1887, ch. 107, § 2413; Id. ch. 133, § 2840, (cl. 6); 1 Lom. Dig. 417, 496; Russel v. Russel; (1 Bro. C. C. 269), 1 Wh. & Tud L. Cas. 466 '7.)

Immediately connected with this subject is the consideration of a fraud which grows out of it, namely, by a mortgagee *voluntarily* leaving the title-deeds in the hands of the mortgagor. As thereby the mortgagee puts it into the mortgagor's power in England, to defraud a subsequent incumbrancer, if one afterwards, without notice of a prior incumbrance, lend the mortgagor money, upon the faith of his possessing these *insignia* of unincumbered title, he will be entitled to priority over the mortgagee. (1 Lom. Dig. 496; Wms. R. Prop. 418 & seq.) It may be doubted whether leaving the title deeds in the hands of the mortgagor would, in Virginia, be viewed as attended by similar results, inasmuch as, under our registry laws, the possession of the title deeds is *practically* not one of the *insignia* of ownership.

### 3. The Vendor's Lien.

The vendor, as we have seen, generally has at common law an implied lien on the estate sold for the purchase-money; a lien which binds the vendee and his heirs, and all persons claiming under him otherwise than *for value and without notice*. It may, however, be repelled by showing that, from the circumstances of the case, no lien was *intended to be reserved*, as by the taking of other real or personal security, or when the object of the sale was not money, but some collateral benefit. (1 Kent's Com. 152 & seq.; Mackreth v. Sim-

mons, 15 Ves. 329; 2 Stor. Eq. §§ 1217 & seq.; *Ante*, p. 220, 5<sup>g</sup>.)

It will be remembered that, in Virginia, it is provided by statute, that there shall be no lien on land for unpaid purchase-money, unless the lien be *expressly reserved* upon the face of the conveyance. (V. C. 1873, ch. 115, § 1; V. C. 1887, ch. 110, § 2474.)

The student will not fail to observe the diversity between the vendor's lien thus abolished, unless when expressly reserved, (the legal title having been conveyed to the vendee), and the lien which the vendor has when he still *retains* the legal title. This latter is not affected by the statute just cited, and the vendor cannot be deprived of his legal title until the purchase-money is paid; an advantage which he does not waive by accepting a different security, not even though it be a deed of trust on the property. (Lewis & als. v. Caperton & als. 8 Grat. 164; Yancey v. Mauck & als. 15 Grat. 305 & seq.; Hanna v. Wilson, 3 Grat. 243; Kniseley v. Williams, 3 Grat. 265; *Ante*, p. 220, 5<sup>g</sup>.)

2<sup>g</sup>. The Character of the Estates of the Mortgagor and Mortgagee, Respectively.

Let us note the character of the estates of the mortgagor and mortgagee, respectively, (1), *Before* default of payment; and (2), *After* default of payment;

w. c.

1<sup>h</sup>. The Character of the Estates of the Mortgagor and Mortgagee, Respectively, *before Default of Payment*.

We are to have regard to (1), The character of the *mortgagor's* estate before default; and (2), The character of the *mortgagee's* estate;

w. c.

1<sup>i</sup>. The Character of the *Mortgagor's Estate before Default*.

If there be a stipulation that the mortgagor shall remain in possession until default of payment, he is considered *until then* tenant *for years* of the mortgagee. But as soon as default occurs, if he continues in possession at all, it is as tenant *at will*, or more properly *by sufferance*, to the mortgagee, but not so as to entitle him to *emblemments*. (2 Bl. Com. 158; 1 Lom. Dig. 429 & seq.; 1 Tuck. Com. 109, B. II.)

If there be no stipulation (as, however, there usually is), for the continued possession of the premises by the mortgagor, until default, if he occupies them at all, it is as tenant *at will*, or rather *by sufferance*; and in either character he can lay no claim to the *emblemments*. (1 Tuck. Com. 109, B. II.; 1 Lom. Dig. 430, 431.)



2. The Character of the *Mortgagee's Estate before Default*.

At law, before default, the mortgagee has always the *legal title*, with the right to the possession or not, according to the stipulations of the mortgage deed. (2 Bl. Com. 158; 1 Tuck. Com. 106, B. II.; 1 Lom. Dig. 432 & seq.; Bac. Abr. Mortgage, (C.); Erskine v. Townsend, 2 Mass. 493; Reading of Judge Trowbridge, 8 Mass. 551; Goodwin v. Richardson, 11 Mass. 469; Fay v. Brewer, 3 Pick. (Mass.) 203; Flagg v. Flagg, 11 Pick. 475; Blanchard v. Brooks, 12 Pick. 47; Fay v. Cheney, 14 Pick. 399; Bradley v. Fuller, 23 Pick. 49.)

And hence a mortgagee, after giving notice of the mortgage to the tenant in possession, under a lease *prior to the mortgage*, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrein for it after such notice. (Bac. Abr. Mortgage, (C.); 2 Th. Co. Lit. 36, n. (Z.); Wilson *Ex parte*, 2 Ves. & B. 252; Babcock v. Kennedy, (1 Vermont, 457), 18 Am. Dec. 697; Stoney v. Shultz, (1 Hill, Ch. (S. C.) 465,) 27 Am. Dec. 437; Moss v. Crallimore, 1 Dougl. 282-3; Birch v. Wright, 1 T. R. 383-4.) See *Post*.

In equity the mortgagee is a trustee for the mortgagor, and if in possession, is subject to account for rents and profits, and for any waste committed by him, with a lien on the premises for his debt, but obliged to yield possession if the money be paid according to the condition. (1 Lom. Dig. 432 & seq.; 1 Tuck. Com. 106, B. II.)

2. The Character of the Estates of the Mortgagor and Mortgagee Respectively, *after Default of Payment*;

1. The Character of the *Mortgagor's Estate after Default*.

At law, after default, the *legal title* is vested in the *mortgagor*, the mortgagor being merely his tenant at will, or rather by sufferance, but entitled to no *emblemments*. (2 Bl. Com. 159, n. (11); 1 Tuck. Com. 109-10, B. II.; 1 Lom. Dig. 432; Faulkner's Adm'x v. Brockenhough, 4 Rand. 245.)

In equity the mortgagor has that right to redeem within a *reasonable time*, which has been already described as an *equity of redemption*. (*Ante*, p. 339, 4i.) The time which shall be deemed *reasonable* is not definitely fixed. As long as the mortgagor continues in possession, no limit is imposed; and if that possession continues *adversely* a sufficient length of time, it amounts to an extinction of the lien. The right to redeem is *not* to be defeated or barred by the lapse of time, only

when the mortgagee has been in the uninterrupted enjoyment of the premises for a considerable period. That period has long been fixed at twenty years, by analogy to the bar of a *right of entry* by the statute of limitations (21 Jac. I., c. 16), according to the English cases; but according to the view adopted in Virginia, in consequence of the lapse of that time warranting the presumption of an *abandonment* of the equity, as of all other equities, and as in like manner it warrants, even in a court of law, a presumption of *satisfaction* of a debt. (1 Lom. Dig. 454 & seq.; 1 Tuck. Com. 110, B. II.; 2 Bl. Com. 159, n. (8); Howard v. Harris, 2 Wh. & Tud. L. Cas. (Pt. II.), 425 & seq.; Hovenden v. Ld. Annesley, 2 Sch. & Lefr. 636; Cholmondely v. Clinton, 2 Jac. & Walker, 151; Ross v. Norvell, 1 Wash. 14; Snavelly v. Pickle, 29 Grat. 38.)

Whether the bar to redemption arises from the analogy of the statute of limitations, or from mere presumption of abandonment, such as occurs in case of all equitable rights, is a question of some moment. For if it proceeds from the analogy of the statute of limitations, the period would with us be shortened, in the case of lands, to fifteen years east, and to ten years west of the Alleghany mountains, (V. C. 1873, ch. 146, § 1; V. C. 1887, ch. 139, § 2915); and in the case of chattels, to five years. (V. C. 1873, ch. 146, § 14; V. C. 1887, ch. 139, § 2927; Ross v. Norvell, 1 Wash. 14.) But whatever may be the source and ground of the limitation, it is admitted to be a *mere presumption*, capable of being repelled by circumstances sufficient to satisfy the mind that, in the particular case, it is ill-founded. Thus, not only will it be repelled by the existence of any of the impediments which would repel the bar of the statute (in Virginia, infancy, insanity and coverture, V. C. 1873, ch. 146, § 18; V. C. 1887, ch. 139, § 2931); but also by any circumstances of fraud or oppression on the part of the mortgagee tending to clog or embarrass the redemption, and by even a slight act of the mortgagee, or his representative, acknowledging the continued right of the mortgagor, such as by keeping private accounts of the profits of the estate, as if it were still redeemable, especially if kept with the mortgagor, etc., or by conveying subject thereto, or offering to purchase it, or even by a parol recognition in conversation of the mortgagor's right, provided it were clear and unequivocal. (1 Lom. Dig. 455 & seq.; Howard v. Harris, 1 Vern. 190, 2 Wh. & Tud. L. Cas. (Pt. II.), 425 & seq.; Snavelly v. Pickle, 29 Grat. 38.)

There is a class of securities known as *Welsh mort-*

whose peculiarity it is to allow a *perpetual right* of redemption, after an indefinite period of time, the mortgagee entering and taking the profits as a substitute for the interest, until the debt is discharged by the mortgagor, but having no power to *enforce* the payment of the debt, nor the redemption of the land. It bore, therefore, some resemblance to the *vivum vadium*, but with this difference, that in the case of the latter security, the mortgagee took possession, and received the profits *towards his debt*, whereby the estate pledged worked out, as it were, its own redemption. But both the Welsh mortgage and the *vivum vadium* have gone into disuse, even in England. (2 Bl. Com. 157; 1 Washb. R., Prop. 476; *Livingston v. Story*, 11 Pet. 388.)

Seeing that the mortgagor has an indefeasible right to redeem, if the transaction be truly a mortgage, we may observe, (1), The terms upon which the mortgagor is allowed to redeem; and (2), The effect of the lapse of time upon the mortgagor's right to redeem;

W. C.

#### 18. The Terms upon which the Mortgagor is Allowed to Redeem.

In order to exhibit the terms upon which the mortgagor is allowed to redeem, it will be necessary to advert to, (1), The payment of the mortgage money, with interest; (2), The tacking of subsequent debts to mortgages; (3), The right to recover any surplus not satisfied by the mortgaged subject; and (4), The order of payment of mortgages:

W. C.

#### 1. The Payment of the Mortgage Money, *with Interest*.

The mortgagor, proposing to redeem, will be expected to pay the principal money, with interest, after deducting therefrom, if the mortgagee has been in possession, the rents and profits derived, or which, with reasonable care, might have been derived, from the mortgaged estate, less the expenses *actually incurred* by the mortgagee, as in hiring an agent, etc., but allowing him nothing for his own trouble, even though there be a private agreement to that effect. The mortgagee in possession, besides accounting for the actual profits received whilst he held the property, and such as, but for his wilful default, he might have received, is also chargeable with any waste or dilapidation committed by him, or suffered by his neglect. A mortgagee may charge taxes paid, and expenses incurred in keeping the estate in repair, and also in *defending* the title, but not for expenses incurred in speculations or adventures, as in opening mines and

quarries, etc., nor for insurance (which may be for his own security), unless by the consent of the mortgagor. (1 Lom. Dig. 436-'7; Harris v. Banks, 1 Rand. 412; Howard v. Harris (1 Vern. 190), 2 Wh. & Tud. L. Cas. 429-'30.)

Whether a mortgagee in possession shall be credited by the value of the permanent and beneficial improvements which he may have put on the premises is a controverted question. It seems that he should always be so credited with them to the extent of the rents and profits; and the better opinion would seem to be, that he is to be allowed the *whole value*, at least of such improvements as may have been made before the suit to redeem was instituted. (1 Lom. Dig. 437; 4 Kent's Com. 167; Breckenridge v. Auld, 1 Rob. 158-'9.)

An agreement to set the profits of the property against the interest, where they must, in the ordinary course of things, greatly exceed the legal rate, is oppressive (it has been even said to be *usurious*) and void, and the account of profits is to be taken in the usual way. (Robertson v. Campbell, 2 Call. 430.)

As to the persons who may claim to redeem, it is a general rule that the right to redeem belongs to any one who has *an interest in*, or *lien upon* the land. Hence, the assignee of the equity of redemption, the heir or devisee of the mortgagor, or if the mortgagor were the owner merely of a term for years, his personal representative, a consort entitled to dower or curtesy in the land, a jointress, a subsequent incumbrancer, such as a joint creditor, or a subsequent mortgagee, or an assignee in bankruptcy,—all these may offer to redeem. (1 Lom. Dig. 449-'50; Howard v. Harris (1 Vern. 190), 2 Wh. & Tud. L. Cas. 424-'5; Id. 415.)

## 2. The Tacking of Subsequent Debts to Mortgages.

When the mortgagor presents himself to redeem, if the creditor has made subsequent advances, or the mortgagor is otherwise indebted to him, it would, of course, be very acceptable to the creditor if he could constrain the debtor to pay the debts subsequently or otherwise contracted, as the price or condition of his being allowed to redeem the land from the mortgage. But in order that the creditor may exact such a condition, either the debt must be of such a character as will constitute a specific charge on the land, or it must be a constituent part of the original agreement that it shall be included in the security. The ground on which the debt, in the first case, is *tacked* to the mort-



page (such is the homely phrase of the court of equity), is to avoid a *multiplicity of suits*, and, as some say, also because *he who asks equity should do it*. Why equity asks) allow a redemption without paying the debt, when the consequence will be the institution of another suit to charge it upon the subject? Why not avoid the necessity for the second suit by obliging the debtor to pay both debts upon his suit to redeem the mortgage? and especially as thereby the policy will be effectuated of compelling him who asks equity to do equity. The ground on which, in the second instance, the debt is annexed to the mortgage is purely a *matter of contract*. A deed of trust or a mortgage may contemplate and provide for securing future advances, as against the mortgagor and his representatives, and parties claiming under him *with notice*, or *without valuable consideration*, always; and also as against subsequent incumbrancers for value, and without notice, provided the record of the lien gives the requisite information as to the extent and certainty of the contract, so that subsequent parties may, by inspection of the record, and by common prudence and ordinary vigilance, ascertain the extent of the incumbrance. This latter, depending as it does on the provisions of the deed of mortgage, or of trust, need not be further discussed, save only to observe that it is at present as well settled by authority as it is by justice, reason and sound policy, that if a mortgage or deed of trust is given to secure future advances, and then a subsequent lien is created, no advances made by the prior mortgagee after notice of the subsequent incumbrance (and registry thereof is such notice), will be entitled to priority over that lien. (4 Kent's Com. (12th ed.) 175-76, and notes; U. States v. Hooe, 3 Cr. 73; Shirras v. Craig, 7 Cr. 34; Conard v. Atlantic Ins. Co. 1 Pet. 418; Lawrence v. Tucker, 23 How. 26, 27; Craig v. Toppin, 2 Sandf. Ch. (N. Y.) 78; Brinckerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 326; Bank of Montgomery County's Appeal, 36 Penn. 170; Spader v. Lawler, 17 Ohio. 371; Rolt v. Hopkinson, 3 De Gex & Jones, (60 Eng. Ch.) 182, &c.; Shaw v. Neale, 20 Beav. 181; S. C. H. L. Cas. 581, which last two cases overrule the previous case of Gordon v. Graham, 2 Eq. Cas. Abr. 508, pl. 16; S. C. 7 Vin. Abr. 52, Cred'r & Debt'r, E. pl. 3.)

Attention will now be directed solely to the first instance of tacking, namely, tacking in order to *avoid multiplicity of suits*. (Shuttleworth v. Laycock, 1 Yero. 245; Baxter v. Manning, Id. 244; 4 Kent's Com. (12th ed.) 175-76; United States v. Hooe, 3 Cr. 73;

Davison v. Waite, 2 Munf. 533; Colquhoun v. Atkinson, 6 Munf. 556-7; Gilliat v. Lynch, 2 Leigh, 501, 509; w. c.

1<sup>m</sup>. The Principle on which such *Tacking* of Subsequent Debts Rests.

To avoid multiplicity of suits, or as is sometimes said, because "he who asks equity must do equity." Hence, as above stated, in order that the principle may apply, the debt proposed to be tacked to the mortgage must be such as will constitute a *specific charge* on the land after it is redeemed from the mortgage. (1 Lom. Dig. 451, n. 3, 452 & seq.; 1 Tuck. Com. 111 & seq. B. II.; Woodson v. Perkins, 5 Grat. 851.)

2<sup>m</sup>. Particular Instances of such Tacking; w. c.

1<sup>n</sup>. As against the Mortgagor Himself.

In general, no debt other than *one of record*, constitutes a *specific charge* against one's lands whilst he is living, and hence the tacking of a subsequent debt is not, in general, allowed against the mortgagor. However, in all cases where the subsequent debt is a specific charge on the lands in the possession of the mortgagor, the principle will apply, as where it is a judgment debt, or a recognizance. So, where the subsequent debt is a specific charge upon the separate estate of a married woman, it will be *tacked* to a mortgage of the same estate, so as to compel her to pay such debt as the condition of redeeming the mortgage. (1 Lom. Dig. 451 & seq.; Woodson v. Perkins, 5 Grat. 352.)

2<sup>n</sup>. As against the Heir or Devisee of the Mortgagor.

At common law, *bond-debts* binding the heir, and debts of record, constituted a specific charge on the lands in the hands of the obligor's *heir*, and afterwards, by the statute of fraudulent devises (3 & 4 W. & M. c. 14), in the hands of his *devisee*. Where the debt was of this character, therefore, it might be tacked to the mortgage. In Virginia *all debts* are a specific charge on a decedent's lands, and so *all debts* may be thus *tacked*. (1 Lom. Dig. 451; 1 Tuck. Com. 112; V. C. 1873, ch. 127, §§ 3 to 7; V. C. 1887, ch. 120, §§ 2665 to 2670.)

3<sup>n</sup>. As against a Subsequent Incumbrancer, the Assignee of an Equity of Redemption, a Purchaser from the Heir, etc.

As against these parties, the tacking in question is not allowed, as they manifestly do not come within the principle. (1 Lom. Dig. 452; 1 Tuck. Com. 112, B. II.)

1. As against *Leg. Onr.* in whose Hands the Subject-Matter is Charged with the Subsequent Debt.

The process of *tacking* is applicable in all cases where the mortgaged subject is specifically charged with the subsequent debt. Hence it is applicable as against a personal representative, in case of a mortgage of a term for years, etc.; or as against a married woman's separate property, etc. (1 Lom. Dig. 451; Woodson v. Perkins, 5 Grat. 352.)

2. The Right to Recover *by Action* any Surplus not Satisfied by the Mortgaged Subject.

If the property mortgaged is not sufficient to satisfy the debt, or if, being personalty, it be lost or destroyed, it seems to be an established principle, as in justice and good sense it ought to be, that in the absence of any stipulation to the contrary, the mortgagee is a creditor of the mortgagor for the surplus left unpaid. Every pledge implies a loan, and every loan implies a debt, so that even although there be no express promise to pay, one is always implied from the mere existence of a mortgage or pledge. (Williams v. Price, 5 Munf. 527; Bumgardner v. Allen, 6 Munf. 445; Raynolds v. Carter, 12 Leigh, 170; Bac. Abr. Bailment, (B.).)

The character of the action to be brought will depend on whether the promise is contained expressly in the *deed* of mortgage or of trust, or in some other instrument *under seal*, or whether it is merely implied, or if express is in an instrument not under seal. In the former case the action may be either debt or covenant, and in the latter, debt, or trespass on the case in *assumpsit*. (1 Tuck. Com. 114, B. II.; Drummond's Adm'r's v. Richards, 2 Munf. 337; Fonbl. Eq. B. III., c. 1, § 12.) As to whether there is a promise to be derived by construction from the words of the instrument or not, see Bac. Abr. Debt, (A.); Id. Obligation, (B.); 1 Dy. 226; Baker v. Fawcett, referred to by Tuck. P. in Powell v. White, 11 Leigh, 318; Newby v. Forsyth, 3 Grat. 308; Wolf v. Violet, 78 Va. 60; 2 Rob. Pr. (2d ed.) 40; Courtney v. Taylor, 6 Man. & Gr. (46 E. C. L.) 551; Lytle's Ex'r v. Pope's Adm'r, 11 B. Monr. 311; James v. Cochrane, 7 W. H. & G. 177; *Post*, p.     ; *Ante*, p. 334; *Post*, (     ). It depends upon the *intention* of the parties, and in general the ordinary terms of a *deed of trust* do not justify the implication of an *actual promise to pay*. (Wolf v. Violet, 78 Va. 57, 60.)

The mortgagee may pursue concurrently his remedy in equity upon the mortgage, and his remedy at law

upon the accompanying promise, whether express or implied, and there seems to be no sufficient reason why the court of equity itself may not, upon a bill to foreclose the mortgage, at once decree the sale of the mortgaged subject, and pronounce a personal decree against the mortgagor for any surplus which the proceeds of the sale may leave unsatisfied. To do so consults economy and dispatch, tends to prevent multiplicity of suits, and is in conformity with the principle that when equity obtains legitimate cognizance of a subject, for the purpose of relief, it administers complete justice, without turning the parties round to another tribunal. (4 Kent's Com. 183; Append. Wythe's Rep. 419, (Minor's ed.) note by Mr. Wm. Green; 1 Lom. Dig. 536. But see 2 Rob. Pr. (1st ed.) 59.)

4<sup>l</sup>. The Order of Payment of Mortgages; w. c.

1<sup>m</sup>. The General Doctrine as to the Order of Payment.

Mortgages or other incumbrances are *generally* to be discharged according to the priority of their respective dates, or if the incumbrances are required to be *registered* (as in Virginia for the most part they are), they are to be paid in the order of priority of registry. (2 Th. Co. Lit. 56, n. (L. 1); 2 Bl. Com. 160, n. (13); 1 Lom. Dig. 497, 507, 509; V. C. 1887, ch. 109, §§ 2465 & seq., 2469.)

Virginia adopted the wise policy of registering conveyances, including mortgages, so early as 1639-'40, and has ever since continued and enlarged it; so that at present it is extended to all incumbrances of well nigh every sort, including judgments, etc., and to all transfers of title to real estate, and even to contracts therefor. The general provision touching the instruments required to be registered, with the mode of authenticating them for recordation, and the manner of recording, will be explained in connection with the subject of conveyances (*Post*, Ch. XX.) So far as concerns the present subject, it is enough to remark, that every deed of trust or mortgage conveying or charging real or personal estate, is void as to creditors, and subsequent purchasers for valuable consideration, without notice, *until and except* from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be; and if the property be in more than one county or corporation, the deed must be recorded in all. Moreover, if the property, being personal, is afterwards removed to another county, the deed must be recorded there within a year after such removal, saving to married



women (the subject not being her *separate estate*), infants, and persons insane, one year after the disability shall cease. (1 Hen. Stats. 227, 248, 419, 472; V. C. 1873, ch. 114, §§ 5 to 9, 11; Id. ch. 117, §§ 2, 3, 8; V. C. 1887, ch. 109, §§ 2465, 2466, 2468, 2472; Id. ch. 111, §§ 2500, 2501, 2505; *Post*, p. ; Preston v. Nash, 76 Va., 1.)

It is worthy of observation, that whilst unrecorded deeds of trust and mortgages are by this statute declared to be void only as to *subsequent purchasers*, for value, *without notice*, they are avoided as to *all creditors*, whether prior or subsequent, and whether they have notice or not. (*Guerrant v. Anderson*, 4 Rand. 208.)

## 2. Exceptions to the General Doctrine as to the Order of Payment.

When it is said that, in general, incumbrances are to be satisfied in the order of *priority*, in pursuance of the maxim *qui prior est in tempore potior est in jure*, it must be observed that the interests are supposed to be all *equitable* merely, and *not legal*. If any one of the incumbrancers possesses himself of the legal title, he occupies an important vantage ground from which he cannot be dislodged, except to subserve a *superior* equity, which priority in point of time alone does not confer. (1 Lom. Dig. 495-'6.)

It is now to be seen what exceptions exist to the general doctrine just stated. They may be enumerated as follows, namely: (1), Where the mortgagee *has notice of a prior equity*; (2), Where he is postponed in consequence of his *improper conduct*; (3), Where he is postponed in consequence of the subsequent mortgage being *first recorded*; and (4), Where he is postponed in consequence of the *acquisition by the subsequent incumbrancer of the legal title*;

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### 1<sup>n</sup>. Cases where a Mortgagee of the Legal Title is Postponed in Consequence of his *having Notice* of a Prior Equity.

In the case of *Ingram v. Pelham & Co.* 1 Amb. 153, this principle wrought out a remarkable result. *Gibson & Co.* being seised of a legal title to an estate charged with sundry equitable incumbrances, mortgaged the land to *Pelham & Co.*, and covenanted that it was free from incumbrances, except certain of the equitable securities, which were specified and which were later, and therefore inferior in point of right to others *not named*, and of which *Pelham & Co.* had no notice. Lord Hardwicke held

that Pelham & Co. took the legal estate subject to the equities of which they had notice, and that thus those parties obtained priority over the others, to whom otherwise they would have been postponed. (Wilcox v. Calloway, 1 Wash. 41; Hooe & al. v. Pierce, Id. 217; Taylor v. Stone, 2 Munf. 315.)

A corresponding result occurred in *Beavan v. Lord Oxford*, 35 E. L. & Eq. 267 (6 De Gex McN. & G. (55 Eng. Ch.) 514). In that case T, in 1836, recovered a judgment against Lord Oxford, which was duly docketed. In 1838, before 1 & 2 Vict. c. 110, § 19, went into operation, which extended the judgment lien to the *whole* instead of to only a moiety of the debtor's lands, Lord Oxford executed a voluntary settlement in favor of his wife. After that statute took effect, B & C recovered judgments against Lord Oxford, which were docketed, and kept duly registered in pursuance of 2 & 3 Vict. c. 11, §§ 2 and 4, which required the registration to be renewed every *five years*; whilst T omitted to renew the registration of his judgment until 1849, whereby he lost his priority over B and C, although he retained it as to the voluntary settlement on Lady Oxford. Thus, the settlement was superior to the judgments of B and C, which were subsequent thereto, and those judgments had priority over T's, which yet was superior to the settlement. It was held that B and C were not entitled to stand in T's place, as against the settlement, but that T's priority over the settlement, gave him incidentally priority over B and C, to whom, but for the settlement, he would have been postponed. But see *Clement v. Caighn*, 2 McCarter (N. J.) 47.

The point is further illustrated by the case following: A has an undocketed judgment against B for \$2,000. B, after the judgment, executes a deed of trust, duly registered, on land owned by him at the date of the judgment, to secure a debt of \$1,000 due from him to C, who has *actual notice* of the judgment. Then B gives a deed of trust, also duly registered, to secure a debt of \$2,000 to D, who *has no notice* of the judgment. Upon a creditor's bill to enforce the liens, the land is sold for, let us say, \$2,000, a sum insufficient to discharge all the liens, and the practical question is presented how the proceeds are to be applied.

It is clear that A is to be preferred to C, because the latter had *actual notice* of A's judgment when

he took his deed of trust; and that C is to be preferred to D, because C's deed was *duly registered*; and yet D is as clearly to be preferred to A, because he took his deed of trust *without notice* of A's judgment.

The order of priority is conceived to be to prefer *D first* (who in the case supposed would take the whole fund, but in case any surplus had remained), to pay A second, and C last of all. See *Hill v. Rixey*, 26 Grt. 72, 81-2; (*Gurnee v. Johnson*, 77 Va. 712).

The *rationale* (not always observed) appears to be that, as the second incumbrance has *usually* priority over the third, the latter is not concerned that the priority of the first prevails over the second.

## 2<sup>n</sup>. Cases where a Prior Mortgagee is Postponed in Consequence of his Improper Conduct.

Thus, if in England, he voluntarily leaves the mortgagor in possession of the *title deeds*, whereby he enables him to perpetrate a fraud upon a subsequent mortgagee, who is deceived by that *indicium* of unincumbered ownership, the latter will be preferred. In Virginia, as we have seen (*Ante*, pp. 363-'4, 1<sup>m</sup>), in consequence of our registry laws, the possession by the mortgagor of the title deeds could not thus betray any subsequent purchaser or mortgagee, so that the doctrine is justly conceived to be otherwise with us. (1 Lom. Dig. 497; *Berry v. Mut. Insurance Co.* 2 Johns. Ch. R. (N. Y.) 603.)

There is, however, another sort of misconduct on the part of the mortgagee, which here, as well as in England, would postpone him, namely, his resorting to fraud, artifice or misrepresentation, to conceal, or his forbearing to disclose, his own mortgage, in order to induce or encourage another person to lend money on the same lands. His being merely a *witness* to the subsequent mortgage does not of itself prove that he was aware of its contents, which in practice is often not the fact. (Fonbl. Eq. B. L. c. III. § 4, and notes (m), &c.; 1 Lom. Dig. 499-500; *Green v. Price*, 1 Munf. 453-'4; *Dickinson v. Davis*, 2 Leigh, 401; *Beckett v. Cordley*, 1 Bro. C. C. 353.)

## 3<sup>d</sup>. Case where a Prior Mortgagee is Postponed in Consequence of the Subsequent Mortgage being first Recorded.

The registry, supposing it to be in accordance with the law, is notice to all subsequent purchasers and incumbrancers, and the statute expressly enacts

that every mortgage or deed of trust shall be void as to subsequent purchasers for value, and *without notice*, and as to all creditors, *until and except* it shall be duly recorded, (V. C. 1873, ch. 114, § 5; V. C. 1887, ch. 109, § 2465; 1 Lom. Dig. 499-500; Bac. Abr. Mortgage, (E.) 4; Coleman v. Cocke, 6 Rand. 643; Beck's Adm'r v. De Baptist, 4 Leigh, 357; Withers v. Carter, 4 Grat. 407; Lamar v. Hale, 79 Va. 147.)

- 4<sup>n</sup>. Cases where a Prior Mortgagee is Postponed in Consequence of the Acquisition by a Subsequent Incumbrancer of the *Legal Title*.

The acquisition by a subsequent incumbrancer, of the legal title occurs, (1), Where a subsequent mortgagee at common law gets possession of the *title deeds*; (2), Where the first conveyance is *defective*; (3), Where the subsequent mortgagee *acquires the legal title*, or the *best right to call for it*;

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- 1<sup>o</sup>. Where a Subsequent Mortgagee gets Possession of the *Title Deeds*.

The rule of the court of equity is never to deprive a party of any *legal* advantage, unless at the instance of some one having a *superior equity*. And in order that this legal advantage shall avail, it is necessary that the party claiming it should have acquired his incumbrance *without notice* of the prior equity, otherwise such prior equity is the *superior*, and the court will not permit the legal title to prevail against it. It is only where the equities are *equal* that the law prevails. The possession of the title deeds in England amounts to the legal title, or at least they give an important legal advantage, of which the subsequent incumbrancer without notice of a prior lien will not be deprived by a court of equity, unless he is paid his money. Indeed, the first incumbrancer, by voluntarily leaving the title-deeds in possession of the debtor, enables him to commit a fraud, for the consequences of which he should suffer rather than the innocent creditor who has trusted to the usual evidence of ownership. (1 Lom. Dig. 497; Bac. Abr. Mortgage, (E.), 3; Head v. Egerton, 3 P. Wms. 280.)

In Virginia, the registry laws obviate any advantage from the possession of the title deeds. (1 Lom. Dig. 497; Colquhoun v. Atkinson, 6 Munf. 556; Berry v. Mut. Ins. Co. 2 Johns. C. R. (N. Y.) 603; Siter, Price & Co. v. McClanahan, 2 Grat. 301, 304.)



2<sup>o</sup>. Where the *First Conveyance is Defective*.

If a subsequent mortgagee obtain a valid conveyance, he is thereby possessed of the *legal title*, and consequently if, when he advanced his money and took his mortgage, he had *no notice* of the previous defective conveyance, he has priority over it. In this instance, a mortgagee would have the advantage of an incumbrancer *by judgment*; for the latter did not originally take the land as a security, but comes in to charge it *under the mortgage*, who being obliged, in conscience, to make the defective conveyance good, the judgment creditor (and the same is true of the assignees in bankruptcy of the mortgagor), will be postponed to the defective conveyance. 1 Lom. Dig. 497-8; Bac. Abr. Mortgage, E. 3; Withers v. Carter, 4 Crat. 411. *Id.*, p. 41.

3<sup>o</sup>. Where the Subsequent Mortgagee Acquires the Legal Title Generally, or the Best Right to Call for it; *W. v.*1<sup>o</sup>. The General Doctrine.

The general doctrine is, that the mortgagee who *has the legal title*, in whatever order he may stand in the succession, if he took his security *without notice* of prior equities, is entitled to priority of satisfaction. A court of equity will not deprive him of the legal advantage he has gained, save in favor of an equity *superior to his own*. The same proposition is true where, under like circumstances, such subsequent mortgagee or incumbrancer has not the legal title as yet, but has the *best right to call for it*. (1 Lom. Dig. 495; Williamson v. Gordon, 5 Munf. 257; Mut. Assur. Soc. v. Stone, 3 Leigh, 236, 238; Beck's Adm'x v. De Baptist's & al. 4 Leigh, 357; Basset v. Nosworthy, 2 Wh. & Tud. Pt. I. 69, 70 & seq. See Preston v. Nash, 75 Va. 949.)

2<sup>o</sup>. Tacking Subsequent to Prior Incumbrances.

The principle of this kind of *tacking* (which must not be confounded with that already mentioned, *Ante*, p. 359, 2<sup>o</sup>), is, that where the equity *equal the law shall prevail*. Thus, if a third mortgagee, who has advanced his money, and taken his security *without notice* of a second mortgage, shall procure an assignment of the *first* mortgage, he will be allowed to *tack* on his third mortgage to his first, so that equity will constrain the second mortgagee to redeem both, before he can charge his debt on the mortgaged subject.

In the language—more significant than elegant—of Lord Hardwicke, the third mortgagee will thus *squeeze out* the second, at least until the third, as well as the first mortgage, is satisfied. (Marsh v. Lee, 2 Ventr. 337; S. C. 1 Wh. & Tud. L. Cas. 423, 425 & seq.; Edmunds v. Povey, 1 Vern. 187; Wortley v. Birkhead, 2 Ves. Sr. 571; Brace v. Duchess of Marlborough, 2 P. Wms. 491; 1 Lom. Dig. 500 & seq.; 1 Bl. Com. 160, n. (13); 4 Kent's Com. 176 & seq.)

In order that this advantage may be enjoyed by the third incumbrancer, these circumstances must concur: 1st, He must have had *no notice* of the second incumbrance at the time he *advanced his money*; whether he had it before he got in the legal title or not, is not material; 2nd, He must have lent his money on the *faith of the land*, and, therefore, whilst a third incumbrance, being a *mortgage*, may be tacked to a first, being a *judgment*, yet if the third is a judgment, it is not capable of being tacked to the first, being a mortgage, so as to *squeeze out* the intermediate lien; and, 3d, He must acquire, not merely a previous *equity*, but the *legal estate*. (Brace v. Duchess of Marlborough, 2 P. Wms. 491; Marsh v. Lee, 1 Wh. & Tud. L. Cas. 425 & seq.; 1 Lom. Dig. 501 & seq.; Bassett v. Nosworthy, 2 Wh. & Tud. L. Cas. 90 & seq.)

The nature of the notice which will preclude a subsequent incumbrancer from *squeezing out* the intermediate mortgagee has already been stated (*Ante*, p. 233-'4, 4<sup>th</sup>). It is either *actual and direct*, or *constructive*. Direct notice is an actual positive knowledge of a prior incumbrance, formally made known to the mortgagee, not through the medium of *vague reports*, from persons not interested in the property, or on a *former occasion*, but given in the course of the treaty for the lien, by persons whose situation and interests inspire some confidence in their statements. *Constructive* notice is no more than evidence of notice, the presumption being so violent that it may not be controverted. Thus, one has constructive notice of the contents of any instrument under which he claims, or to which he is referred by such instrument; of the actual interest of any tenant *in possession* with whom he deals; and of previously *registered* transfers and liens. To render the notice effectual, it must be given to

the party about to accept the mortgage, or to his agent, attorney, or counsel, before the mortgage is *executed*; or the money is *actually paid*. And everything done after notice is considered as done *malu fide*, and so far from availing to protect the purchaser, will make him a *trustee* for the owner of the prior equity. (1 Lom. Dig. 511 to 515; 1 Tuck. Com. 116-17; Bac. Abr. Mortgage, (L.), 4; Le Neve v. Le Neve, 2 Amb. 436; S. C. 2 Wh. & Tud. L. Cas. (Pt. I.), 122, 130 & seq., 132 & seq., 144 & seq.; Beverly v. Brooke & als. 2 Leigh. 446; Powell v. Bell, 81 Va., 222; V. C. 1873, ch. 114, §§ 4 to 8; Id. ch. 182, §§ 3 to 8; V. C. 1887, ch. 109, §§ 2463 to 2468; Id. ch. 174 §§ 3559, 3560.)

The notice through the *medium of the registry* is made as complete in Virginia as can be desired. The extent of the registry policy has already been set forth (*Ante*, p. 363-4, 1<sup>m</sup>), and it is obvious that the effect is, *practically*, to cut up this doctrine of tacking by the roots, where any of the liens have been recorded, since in those cases, no subsequent incumbrancer can affect to be without notice. It will suffice here to state a single qualification, prescribed by the statute, in pursuance of the case of Doswell v. Buchanan, 3 Leigh. 356. It is that a purchaser (which includes a mortgagee) shall not be affected by the registry of any instrument made by a person under whom his title is *not derived*; nor of any instrument executed prior to the date of the duly recorded conveyance, or contract under which the grantor of the purchaser claims. (V. C. 1873, ch. 114, §§ 5, 7, 12; V. C. 1887, ch. 109, §§ 2465, 2466, 2467, 2473; 4 Kent's Com. 168; 2 Lom. Dig. 484; Siter, Price & Co. v. McClanahan & als. 2 Grat., 299, 300, 304, 305 & seq.)

## 2<sup>d</sup> The Effect of Lapse of Time on the Mortgagor's Right to Redeem.

Redemption is not allowed without some regard to the lapse of time; not that the case is within the statute of limitations, but although the mortgagor is indulged with considerable latitude in point of time for redemption, because property is usually mortgaged for much less than its real value, and that when a mortgagor receives his principal, interest, and costs, he cannot complain of an injury, yet to this indulgence there is a necessary limit. And as it is extremely difficult for a mortgagor who has been long in possession to

render an account of profits, the courts of equity have laid it down as a rule, that where the mortgagor has suffered the mortgagee to continue for *twenty years* after forfeiture in the quiet and uninterrupted possession of the lands mortgaged, the right of redemption *shall be presumed to be abandoned*. (Jones v. Comer, 5 Leigh, 353 '4; Hughes v. Edwards, 9 Wheat. 497; Demarest v. Wyncoop, 3 Johns. C. R. 135; Shee v. Manhattan Co. 1 Pai. (N. Y.) 48; 2 Rob. Pr. (1st ed.) 253; Aggas v. Pickerell, 3 Atk. 225.)

It has sometimes been supposed that this period of *twenty years* was adopted by analogy to the statute of limitations, which bars a *right of entry* after the lapse of that time; but the better opinion seems to be, that it is founded on a *presumption of the relinquishment* of the right to redeem, just as, after the lapse of the same time, payment of a bond is presumed. If it were not so, then, as the period of limitation is shortened by statute, so should the time be within which to assert the equity of redemption; and in the case of mortgages of personal chattels, the time should be *five years*, whereas neither of these results occurs. (Ross v. Norvell, 1 Wash. 14; Jones v. Comer, 5 Leigh, 354.) Indeed, a very marked distinction is established by a number of cases, between the personal obligation of the debtor and the security furnished by a lien expressly reserved, or a mortgage. Thus, in Hanna v. Wilson, 3 Grat. 245, it was held that, although an action at law might be barred by the statute of limitations, yet the right of the creditor to resort to the lien, in that case the vendor's lien, being a right in equity, is not affected by any lapse of time, short of the period sufficient to raise a presumption of payment. The same doctrine was applied in the case of a mortgage, in Thayer v. Mann, 19 Pick. (Mass.) 535, and is confirmed by Magruder v. Peter, 11 Gill & J. (Md.) 217; Borst v. Corey, 15 N. Y. 505; Bank of Metropolis v. Guttischlick, 14 Pet. 29; Coles v. Withers, 33 Grat. 196; Smith v. Wash. City, Va. M. & G. S. R. R. 33 Grat. 620; Ang. Limit'n (6th ed.), § 73. But now it is provided by statute, that the obligation of a mortgage, deed of trust, or vendor's lien shall be limited by twenty years from the time when the right to enforce it accrued, save in case of a deed of trust or mortgage *executed by a corporation*. (V. C. 1887, ch. 139, § 2935.)

2<sup>i</sup>. The Character of the Mortgagee's Estate, or Interest, after Default.

The *character* of the mortgagee's estate after default made in the payment of the money, will best be pre-



control by observing: (1), The mortgagee's own estate in the land; (2), The interest of the mortgagee's assignee; and (3), The mortgagee's remedies to get his money;

1<sup>st</sup>. The Mortgagee's Estate in the Land; w. c.

1. The Mortgagee's Estate, *at Law, after Default.*

After default in performing the condition, the mortgagee is, to all intents and purposes, the *legal owner* of the land, in whom the legal estate is vested, and who is entitled to the possession. (1 Lom. Dig. 432 & seq.; Bac. Abr. Mortgages, (C.); 1 Tuck. Com. 109, 110, B. II.)

2<sup>nd</sup>. The Mortgagee's Estate, *in Equity, after Default.*

The mortgagee is, in equity, reckoned a mere trustee for the mortgage, accountable, as we have seen for rents and profits, and for waste, and to be allowed for expenses *actually incurred*, but not a compensation for his trouble. (1 Lom. Dig. 435 & seq.; Bac. Abr. Mortgage, (C.); 1 Tuck. Com. 112 & seq. B. II.; *Ante*, p. 455, 471.)

2<sup>nd</sup>. The Interest of the Mortgagee's Assignee.

A mortgage being a mere security for the debt, and collateral to it, an assignment of the debt, which is the principal, will, in equity at least, carry with it the mortgaged property, which is only the accessory, and which cannot exist independently of the debt to which it is the incident. And, on the other hand, an assignment of the mortgage will *prima facie* transfer the debt. In either case, however, the assignee takes only an equity, and hence is entitled merely to what is really due (but he is entitled, in general, when not a fiduciary, to all that is due), and must allow all payments made to the assignor before notice of the assignment, and also all other equities as between the mortgagor and mortgagee, accruing prior to such notice. The *mode* of assignment may be very various. Whatever would give the money will carry the estate in the land along with it to every purpose; and so whatever will extinguish the debt will extinguish the mortgage. On the other hand, as long as the *debt remains*, however changed may be the security (as in case of negotiable notes secured by mortgage, and renewed from time to time), the mortgage continues to subsist. When there are several notes, secured by one mortgage, assigned to successive assignees, and the mortgage is insufficient to pay all, it is the better opinion that they are to be paid in the order of *priority of assignment*. For upon the first assignment the assignee, upon a deficiency of the fund, would naturally be preferred to the assignor, and any

subsequent assignee of any other of the notes could only take subject to all equities; and standing in the same position with the assignor, be excluded, like him, from coming in on the security until the claim of the first assignee is satisfied. It will be observed that this principle is analogous to that which prevails when the land, subject to a prior lien, is sold to successive purchasers. (1 Lom. Dig. 440 & seq. 438; Row v. Dawson, 2 Wh. & Tud. (Pt. II.), L. Cas. 233 & seq.; Howard v. Harris, 2 Wh. & Tud. L. Cas. (Pt. II.), 446-7; Gwathmeys v. Ragland, 1 Rand. 466; Schofield v. Cox, 8 Grat. 535-6; *Ante*, p. 306-7.)

### 3<sup>k</sup>. Mortgagee's Remedies to get his Money.

The mortgagee's remedies to get his money may be discussed under the heads following, namely: (1), The effect of the lapse of time on the *mortgagee's* remedies; (2), The mortgagee's remedies in a *court of law*; and (3), The mortgagee's remedies in a *court of equity*; W. C.

#### 1<sup>l</sup>. Effect of Lapse of Time on *Mortgagee's* Remedies.

The mortgagee's right to *foreclose* the debtor's equity of redemption, where the latter has been permitted to retain possession, is, after twenty years, *presumed* to have been either discharged or released, unless such presumption can be repelled by contrary proof, as by an acknowledgment by the mortgagor that the debt is still subsisting, payment of interest, or of part of the principal, or the like. (2 Rob. Pr. (1st ed.) 254-5; 1 Lom. Dig. 522; 2 Stor. Eq. § 1028, b; Giles v. Baremore, 5 Johns. C. R. (N. Y.) 552; Livingston's Ex'ors v. Livingston, 5 Johns. C. R. 287; Hughes v. Edwards, 9 Wheat. 497; Ross v. Norvell, 1 Wash. 14; Hanna v. Wilson, 3 Grat. 245; Coles v. Withers, 33 Grat. 196; Smith v. Wash. Cit. V. M. & G. S. R. R. Co. 33 Grat. 620; Bank of Metropolis v. Guttschlick, 14 Pet. 32; Thayer v. Mann, 19 Pick. (Mass.) 535; Magruder v. Péter, 11 Gill & J. (Md.) 217; *Ante*, pp. 355, 1<sup>i</sup>, 370, 2<sup>k</sup>.)

It may be doubted by some whether this limitation to the creditor's enforcement of his lien stands on the mere *presumption* of satisfaction, and whether, on the other hand, it is not controlled by the positive bar of the statute of limitations, in which event the period, if the mortgage were under seal, would now be ten, and if not under seal, three to five years; but the doctrine above stated is believed to be the better founded, and in Virginia is unquestionable. (Cases *supra*; Howard v. Harris, 1 Vern. 190; S. C. 2 Wh. & Tud. L. Cas. (Pt. II.), 425 & seq.; 1 Lom. Dig. 454 & seq.; V. C.

1873, ch. 146, §§ 8, 10, 15; V. C. 1887, ch. 139, §§ 2920, 2922, 2927.)

Where the creditor seeks to recover his money by *action ex debt*, there can be no reason to doubt that the positive bar of the statute of limitations would be applicable: that is, a period of ten years if the *promise* be under seal, or if it be *in writing*, but not under seal of *five years*, and if not in writing of *three years*. (V. C. 1873, ch. 146, §§ 8, 10, 18; V. C. 1887, ch. 139, §§ 2920, 2922, 2931.) But it does not follow in such a case that because the *action* on the *promise* is barred by the terms of the statute, that a *specific tie* upon property which has been created to secure the debt will also be extinguished. The statute of limitations bars the *remedy*, but it leaves the *debt* in full force, and the lien along with the debt. The lien, therefore (independently of statute), is not affected by the lapse of any time short of the period which is sufficient to raise the presumption of payment, that is, twenty years. And this doctrine applies (apart from the statute presently to be mentioned), not only to deeds of trust and mortgages, but to the vendor's lien, and in general to all specific liens on property. (Ang. Limit. (6th ed.) § 73; *Ante*, p. 371; Thayer v. Mann, 19 Pick. (Mass.) 535; Borst v. Corey, 15 N. Y. 505, &c.; Elkins v. Edwards, 8 Geo. 325-6; Miller v. Trustees, 5 Sm. & Marsh. (Miss.) 651; Hopkins v. Cockerell, 2 Grat. 96; Hanna v. Wilson, 3 Grat. 242; Coles v. Withers, 33 Grat. 196; Smith v. Wash. City V. M. & G. S. R. R. 33 Grat. 620; Magruder v. Peter, 11 Gill & Johns. (Md.) 217; Bank of Metropolis v. Gutschlick, 14 Pet. 19.)

But the statutes of Virginia now interpose a peremptory bar to the enforcement of deeds of trust or of mortgage, or of a vendor's lien after the lapse of twenty years from the time when the right to enforce the same first accrued. But this provision does not embrace any deed of trust or mortgage executed *by a corporation*. (V. C. 1887, ch. 139, § 2935.)

## 2. Mortgagee's Remedies at Law; w. c.

### 1<sup>m</sup>. Action for the Money.

The creditor, instead of enforcing his claim against the mortgaged subject, may bring an action at law to recover the money, unless it has been expressly stipulated that he shall look to the *pledge only*. Even though there be no promise to pay contained in the mortgage itself, yet, as we have seen, every *pledge* implies a debt, and a promise to pay it. If the promise to pay is express and *under seal*,

whether contained in the deed of trust or mortgage, or in some other *specialty*, the proper action for the money is debt or covenant; if not under seal, whether express or implied, the action is debt or trespass on the case in *assumpsit*. (1 Lom. Dig. 520; 1 Tuck. Com. 118, B. II.; 4 Kent's Com. 182 & seq.; *Ante*, p. 362, 3<sup>l</sup>.)

The mortgagee may pursue his remedy thus at law, upon the promise to pay, whether express or implied, and his remedy in equity upon the mortgage, concurrently; and it seems he may proceed in equity, at the same time to foreclose the debtor's equity of redemption, and to obtain a personal decree against him for any surplus which may remain unsatisfied by the proceeds of the mortgaged subject. (4 Kent's Com. 183; 1 Lom. Dig. 536; *Ante*, p. 362, 3<sup>l</sup>.)

## 2<sup>m</sup>. Action of Ejectment for the Land.

The mortgagee may institute an action of ejectment to recover the land whilst he has a bill of foreclosure depending. But if, subsequent to the forfeiture of the legal title, the debtor has paid the debt, and entitled himself in equity to a re-conveyance, although in general the plaintiff in ejectment must show a legal title, yet in this case, he is allowed by statute in Virginia to set up that defence even in the court of law. (V. C. 1873, ch. 131, §§ 21, 22; V. C. 1887, ch. 124, §§ 2742, 2743; *Davis v. Teays*, 3 Grat. 288 & seq., *Suttle v. R. F. & P. R. R. Co.*, 76 Va. 284, 290.)

## 3<sup>m</sup>. Taking Possession of the Premises Mortgaged, and Receiving the Rents and Profits.

The mortgagee may, at any time, enter and take possession of the land, and if need be, may maintain an action of ejectment therefor, though he cannot make the mortgagor account for the past or by-gone rents, for he possessed in his own right, and not as *receiver*. (*Mead v. Ld. Orrery*, 3 Atk. 244; *Higgins v. York Building Co.* 2 Atk. 107; *Wilson Ex parte*, 2 Ves. & B. 253.) He may, by distress or action, recover the rents and profits from a lessee existing *prior* to the mortgage, on giving him *notice* of his mortgage, and requiring the rent to be paid to him; but for rent due from a tenant of the mortgagor, whose lease was made *subsequent* to the mortgage, he can neither sue nor distrein, for *want of priority*, at least without attornment on the part of the tenant. (4 Kent's Com. 164 & seq.; 1 Lom. Dig. 520 & seq.; 1 Tuck. Com. 118, B. II.; 2 Bl. Com. 159, n. (11); See *Ante*, p. 355.)



1<sup>st</sup>. Sale by Mortgagee.

A power of sale is now not unfrequently inserted in English mortgages of lands, as well as of chattels, it having been persistently pronounced to be valid in many cases. In Virginia, as we have seen, such a power in mortgages *of lands*, has not been recognized, but the language of disapprobation has unfortunately not always been as decisive as it was at first, and as a provision so tending to fraud and oppression would seem to demand. (1 Lom. Dig. 433; 1 Trak. Com. 404, B. II.; *Idem*, p. 351, 2<sup>k</sup>.)

In mortgages of *chattels*, it seems that there is no necessity for a bill of foreclosure; but the mortgagee, *on the notice*, may sell the property as he could under the civil law. (2 Stor. Eq. §§ 1031 & seq.; 2 Rob. Pr. (1st ed.) 56-7.)

3<sup>d</sup>. Mortgagee's Remedies in Equity.

The mortgagee, as soon as default of payment occurs, may file a bill to *foreclose* (as the technical phrase is), the mortgagor's equity of redemption; that is, to appoint a time, usually six months, although it may be less, within which, if the money be not paid, the mortgagor shall be for ever foreclosed, or barred of his right to redeem. In England the practice is to decree foreclosure of the equity of redemption, and that the mortgagee have the *absolute right* of property; but in Virginia a sale of the property is decreed, and, after payment of the debt and costs, the residue, if any, is returned to the debtor or his assignee, which is surely the more just and reasonable mode of proceeding. (2 Rob. Pr. (1st ed.) 57-8; 2 Stor. Eq. §§ 1025 & seq.; 1 Lom. Dig. 520; 4 Kent's Com. 180; Mayo v. Tompkins, 6 Munf. 520; Crews v. Pendleton, 1 Leigh, 297.)

We are to observe, (1), The proper parties to a bill to foreclose; (2), The decree of foreclosure; and (3), The doctrine touching costs in such suits;  
W. C.

1<sup>m</sup>. The Proper Parties to a Bill to Foreclose.

All incumbrancers existing at the filing of the bill (including, of course, the junior as well as the prior incumbrancers), are to be made parties, partly in order to prevent multiplicity of suits, and that the proceeds of the mortgaged estate may be duly and finally distributed, and partly in order to give security and stability to the purchaser's title, since he can take a title only against the parties to the suit. Among the incumbrancers, all persons are likewise to be parties who are materially interested, either in

the mortgage or in the mortgaged estate. This will ordinarily include the mortgagor, or if he be dead, his heir or devisee, or assignee, and the personal representative of the mortgagor, and perhaps others. The bill is usually filed in the name of the creditor, or his assignee, or his personal representative. (4 Kent's Com. 185 & seq.; 1 Lom. Dig. 527-8; 1 Tuck. Com. 119, 121.).

## 2<sup>m</sup>. Decree of Foreclosure.

The practice in England and in Virginia, respectively, touching decrees of foreclosure, has been already contrasted (*Ante*, p. 376, 3<sup>1</sup>); and now it will be proper to survey the method of proceeding in Virginia more narrowly. It is the settled practice with us, unless it be rendered needless by agreement, to have, first, an interlocutory decree, directing a commissioner to *take an account* of the principal and interest due; and the commissioner's report being confirmed, another decree follows, appointing a day, which ought to be a *reasonable time*, and is usually *six months* from the date of the decree, but may be less (having been in several cases four and three months, and in others sixty, and even so little as thirty days), and *perhaps*, in rare cases, more (*Perine v. Dunn*, 4 Johns. Ch. R. (N. Y.) 141; *Harkins v. Forsyth*, 11 Leigh, 299), on or before which date the party wishing to do so may redeem, by paying the amount due, with costs; and in the event that the premises are not so redeemed, decreeing that they shall be sold at public auction, in the manner and upon the terms therein set forth. The sale of land ought to be decreed to be at public auction, on credit, at least as to the greater part of the price, after due advertisement, by one or more commissioners appointed for the purpose, or by the sheriff, etc., whose proceedings being reported, the sale is either set aside and a re-sale ordered, or it is confirmed. In the latter event, when the terms are complied with, the court gives the purchaser possession, and ultimately causes a conveyance to be made to him, although in general not until the purchase-money is fully paid; and this, like a final foreclosure in England, is conclusive as against (but only as against) the *parties to the suit*, and *pendente lite* claimants under them. The court also compels the purchaser (if there is need of compulsion), to pay the purchase-money, and directs its distribution, as far as it will go, first, to defray all the costs and charges of the proceeding; secondly, to satisfy the arrears of interest, and

then the principal of the debt; and lastly, to pay whatever may remain to the party entitled to redeem. If the proceeds are not sufficient to extinguish the entire debt, it seems that a *personal decree* for the residue may and ought to be made against the mortgagor, and that without any condition of setting aside the sale, notwithstanding the mortgagee himself may be the purchaser. (1 Lom. Dig. 526-'7, 534 & seq.; 4 Kent's Com. 181 & seq.; Howard v. Harris, 2 Wh. & Tud. L. Cas. (Pt. II.), 422 & seq.; Mr. W. Green's note, App'x Wythe's Rep. (Minor's ed.), 413 & seq., which last is an exhaustive survey of the subject as the law is in Virginia.)

Whether the mortgagor, in ascertaining the amount due upon the mortgage, shall account for the rents and profits received by him during his possession of the premises, is a question in general of no practical moment with us, since a personal decree goes against him at all events, for any balance remaining unpaid. If, however, his heir or devisee, having succeeded him in the possession, has received such profits, it may be of interest to the mortgagee to raise that point, which, in England, is perfectly settled in the negative. And although with us there is more diversity of authority, yet the better opinion seems to be in favor of the English doctrine, and upon this ground, namely, that the mortgage being in equity *only a security* for the debt, with the right in the mortgagee to assume possession whenever he will after default, and to apply the profits towards the debt, the *beneficial ownership* meanwhile remains in the mortgagor, or his assigns, who in receiving the profits, takes only what, by the equitable theory of the transaction, is his or their own. (Howard v. Harris (1 Vern. 190), 2 Wh. & Tud. L. Cas.

Pt. II.), 428; 1 Lom. Dig. 432; Mr. W. Green's note, Appendix, Wythe's Rep. (Minor's ed.) 426 & seq.)

A decree of foreclosure may be made against an infant, or a *feinfamé*. But a day is always given the infant to show cause against it within six months after attaining his age, which, if he fails to do, it is thenceforward absolute. Formerly, to omit to reserve this privilege in such a decree to an infant party was error, for which the decree must have been reversed, but very wisely we have now a statute making the reservation in all cases, whether it is so mentioned in the decree or not. (1 Lom. Dig. 522 & seq. 524; V. C. 1873, ch. 174, §§ 7, 10; V. C. 1887, ch. 167, § 3418-3424.)

But it is worthy of special observance, that all

proceedings against an *alien enemy*, who cannot lawfully appear to defend his interests, are *inoperative and void*. A notice addressed to him, and published in a newspaper, is a mere idle form. Without a violation of law, he cannot even *see* much less *obey* it. Hence, a decree to foreclose a mortgage within the *Union lines*, during the late war, is of no effect as to the *mortgagor*, who had been forced to go, or had always been, within the *Confederate lines*. (Dean v. Nelson, 10 Wal. 172; Lasere v. Rochereau, 17 Wal. 438; Dorr v. Rohr, 82 Va. 359, 362-'3.) This is, indeed, only one exemplification of that universal and obvious principle of reason and justice, that no one should be condemned, as to person or property, without an opportunity to be heard. (McVeigh v. U. States, 11 Wal. 267; The Marg. 9 Cr. 126; Windsor v. McVeigh, 93 U. S. 274; Underwood v. McVeigh, 23 Grat. 409; Earle v. McVeigh, 91 U. S. 503; Galpin v. Page, 18 Wal. 350; Exp. Langer, Id. 163; Fultz v. Brightwell, 77 Va. 742.)

This principle, however, does not apply where one *voluntarily leaves his residence* to engage in hostilities against his country. Such an one cannot complain that legal proceedings are prosecuted against him *as an absentee*. (Ludlow v. Ramsey, 11 Wall. 589.) Nor does it apply where no judicial process is required to effect a sale, as in the case of a *deed of trust*. (University v. Finch, 18 Wal. 168.) But see *contra*, Walker v. Beauchler, 27 Grat. 516-'17, upon the ground that when the debtor and creditor live on opposite sides of hostile lines, the debtor is in no default in not paying the money, and therefore the deed does not allow a sale.

The courts in Virginia are empowered to appoint commissioners to sell property decreed to be sold, and also to execute any writing decreed to be executed; and ample provision is made for the validity of the acts of such commissioners within the sphere of their duty. And the court will vigilantly superintend sales made under its decrees, and will prevent its authority from being abused to the injury of the parties concerned. (1 Lom. Dig. 530; V. C. 1873, ch. 174, §§ 1 to 3, 5, 6; V. C. 1887, ch. 167, §§ 2397, 2398, 2403, 2404; Merch. Bank v. Campbell, 75 Va. 462-'3.)

The commissioner is required to report whatever sale he may make to the court, whose confirmation is necessary to the consummation of the purchase. Hence, if any material change occurs in the value of the property on the one side or the other, by the



falling in of lives, or by flood or fire, before confirmation, the court will not sanction the sale, unless in the case of appreciation, the purchaser will make compensation for the increased value, or in the other, shall assent to take the property as it is. (1 Lom. Dig. 531 & seq.; Heywood v. Covington, 4 Leigh, 370; Taylor v. Cooper, 10 Leigh, 317; Cocke v. Gilpin, 1 Rob. 20.) However, when the inchoate purchase is ratified by the court, the confirmation relates back to the sale, and entitles the purchaser to everything as if the confirmation and conveyance had been contemporaneous with the sale. And as the whole proceeding is *in fieri* until the sale is confirmed, and a deed made to the purchaser, it follows that the court may and ought to take whatever steps may be requisite in order to carry its decree into effect. Hence, if the mortgagor, or a *pendente lite* purchaser, refuse to surrender possession to the purchaser under the decree, the court, on motion, ought, by summary order, to compel the delivery of the premises; and so, if the mortgagor's creditors attempt to levy their executions on the crops which were growing on the premises at the period of the sale (which pass with the land to the purchaser), it is the duty of the court to interpose by injunction to prevent. (1 Lom. Dig. 534-5; 1 Tuck. Com. 122, B. II.; 4 Kent's Com. 192; Newman v. Chapman, 2 Rand. 106; Crews v. Pendleton, 1 Leigh, 297.)

In England it is the practice, if an opportunity presents itself of selling the estate to greater advantage before confirmation of the sale, to "open the biddings," and subject the property to re-sale; upon which Lord Eldon observes, that instead of benefiting, it is really injurious to the parties concerned in getting the best price; half the estates sold by the court of chancery, says he, being thrown away upon the speculation that there will be an opportunity of purchasing afterwards by opening biddings. The practice, until recently, has not prevailed in Virginia. On the contrary, the usage and the general sentiment with us is to consider that the sale is a valid and binding contract as soon as the *hammer is down*, subject only to the subsequent intervention of the court, should it appear that the sale was unfairly conducted, or that, in consequence of some extraordinary casualty, the property has been materially changed in value for the better or the worse. (1 Lom. Dig. 535; 4 Kent's Com. 192, & n. a; White v. Wilson, 13 Ves. 153.) The contrary usage, so justly

deprecated by Lord Eldon has not as yet received full countenance in Virginia from the court of appeals, although it is said to have gained a footing of late years in some of the circuit courts. And the writer is concerned to note a like tendency in the court of appeals. See *Effinger v. Ralston*, 21 Grat. 430; *Hudgins v. Lanier*, 23 Grat. 494; *Brook v. Rice*, 27 Grat. 812; *Curtis v. Thompson*, 29 Grat. 474; *Rondabush v. Miller*, 32 Grat. 465; *Berlin v. Melhorn*, 75 Va. 642; of which cases the two last-named afford not a little support to the practice, having *due regard*, it is said, to the rights and interests of all concerned.

It hardly needs to be said that in a *judicial sale*, if it be made to appear, either before or after the sale has been ratified by the court, that there has been any injurious mistake, misrepresentation or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sold (*Rorer, Judicial Sales*, §§ 566, 570 to 572, 578, 584; *Livingston v. Penn. Iron Co.* 2 Paige (N. Y.), 390, 391-2; *Goodenow v. Ewer*, 16 Cal. 461), 76 Am. Dec. 547; *Merchants Bank v. Campbell*, 75 Va. 455, 460; *Hickson v. Rucker*, 77 Va. 138; *Redd v. Dyer*, 83 Va. 335.)

In Virginia a judicious precaution has been taken by statute to assure purchasers under decrees in equity, as far as possible, that they will not be deprived of their purchase by any change in the future aspect of the cause, by reversal of the decree, or the like. It is provided that, if a sale of property be made under a decree or order of court, after *six months* from the date thereof, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser shall not be affected thereby; but there may be restitution of the *proceeds of sale* to those entitled. (V. C. 1873, ch. 174, § 11; V. C. 1887, ch. 167, § 2425; *Cooper v. Hepburn*, 12 Grat. 569; *Young's Adm'r v. McClung & als.* 9 Grat. 358.)

### 3<sup>m</sup>. Doctrine Touching Costs in Decrees of Foreclosure, and to Redeem.

In a bill to foreclose, if the mortgagee succeeds, he is of course entitled to his costs, except where his conduct has been improper or oppressive. But where the mortgagor files a bill to redeem, the redemption being a favor to him, and the proceeding wholly for his benefit, he is always decreed to pay the costs, if any balance appear to be due upon the mortgage. Lastly, if a subsequent mortgagee be made a

party to a bill to foreclose, he is not entitled to his costs, if the fund prove deficient, unless he disclaims, or offers to release. (1 Tuck. Com. 122, B. II.; *Thompson v. Davenport*, 1 Wash. 128; *Turner v. Turner*, 3 Munf. 68.)

2. To whom Mortgage Money is Payable.

The doctrine as to the *person* to whom mortgage money is payable was settled so early as the reign of Charles II., by Lord Nottingham, in the leading case of *Thornborough v. Baker*, 3 Swanst. 628 (2 Wh. & Tud. L. Cas. 403 & seq.), upon the principle that the mortgage was only a security for the money due, which came from the personal estate, and therefore, in the absence of any stipulation to the contrary, the proceeds shall return thither again. If there is any direction in the mortgage itself as to who is to receive the money, it is to be respected. If there be no such direction, it is to be paid to the mortgagee, if he be living, or to his assignee. If the mortgagee be dead, not having assigned the mortgage, or debt, the money is to be paid to his *personal representative*, and not to his *heir*, although, in case of default in a mortgage in fee, the legal title descends to the heir. Where the heir is, by the terms of the mortgage itself, designated to receive it, it must be paid to him accordingly; and where it is expressly appointed to be paid either to the heir *or* to the personal representative in the disjunctive, the mortgagor, *at the day* of payment, may pay it to which he will; but if he make default, and pay it not at the day, his election is gone, and he must pay the personal representative. (2 Th. Co. Lit. 55; *Id.* 52, n. (L. 1); 4 Kent's Com. 161; 1 Com. Dig. 438-'9 & seq.)

This proposition is not to be understood as if the mortgagee may not, *by his will*, vest the beneficial interest in the heirs, or in whom he will; but it is apprehended that it will pass as *personally*, and therefore must go into the hands of the personal representative, like any other personally disposed of by will, and be subject to the payment of the decedent's debts, after which the personal representative will hold it as trustee for the person to whom the will gives it. The mortgagee's estate in the land, meanwhile, is a mere incident to the debt, and passes and is extinguished (in equity) by whatsoever transaction passes or extinguishes the debt which it secures. But whilst a release of the debt, which is the principal, discharges the mortgage which is the incident, it will easily be perceived that the converse is not true. A release of the mortgage does not discharge the debt, unless the tenor of the release *proves* such to have been the intent. And so, although an assignment of the debt is an assignment of the mortgage, yet an assignment of the mortgage, unless it seem intended

as an assignment of the debt, as *prima facie* it is, will operate nothing. (1 Lom. Dig. 440-41; *Martin v. Mowlan*, 2 Burr. 978; *Row v. Dawson*, 2 Wh. & Tud. L. Cas. (Pt. II.), 233; *Gwathmeys v. Ragland*, 1 Rand. 467; *Schofield v. Cox*, 8 Grat. 533, 536; *Iaeger v. Bossieux*, 15 Grat. 99; *McClintic v. Wise*, 25 Grat. 536.)

It is important to remark that when several bonds, notes, or other demands are secured by one mortgage, deed of trust or other lien, and are assigned *in succession* to different persons, if the fund proves insufficient to pay all, the assignees are to be satisfied, not in the order of the date or maturity of the bonds or notes, but of the *assignment*; for the assignment to the first assignee carries with it the transfer of so much of the lien as is necessary to pay the demand assigned, and thereby gives to such assignee a preference over the assignor, who then remained the holder of the other claims embraced in the lien; and this preference would not be taken away by subsequent assignments; and so with each assignee thereafter in succession. (1 Tuck. Com. (B. II.), 353; *Gwathmeys v. Ragland*, 1 Rand. 466; *Taylor v. Spiddle*, 2 Grat. 447; *Schofield v. Cox*, 8 Grat. 533, 536; *McClintic v. Wise*, 25 Grat. 454; *Bank of Mobile v. Plant. M. Bank*, 9 Ala. 645; *Cullum v. Eansom*, 4 Ala. 492; *Griggsby v. Hair*, 25 Ala. 327.) The *principle* thus is the very same as that which we have seen applies between successive purchasers of different portions of land subject to a mortgage or other lien, who are to have the land they respectively purchased subjected to the lien in the inverse order of the dates of the purchase, that is, the portion last purchased is to be subjected *first*. (*Conrad v. Harrison*, 3 Leigh, 532; *McClung v. Beirne*, 10 Leigh, 394; *Jones v. Myrick*, 8 Grat. 180, 218; *McClintic v. Wise*, 25 Grat. 456; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 239; V. C. 1873, ch. 182, § 10; *Id.*, p. 306-7; *Harman v. Oberdorfer*, 33 Grat. 497-'8, 501, 505.)

As to assignments of mortgages, notwithstanding that much insisted on, and in its time very wholesome rule of the common law, which, says Lord Coke, "the great wisdom and policy of the sages and founders of our law have provided that *no possibility, right, title, nor thing in action, shall be granted or assigned to strangers*; for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice," (*Lampet's case*, 10 Co. 48 a); yet in the courts of equity such assignments, being for valuable consideration, have been from a very early period admitted, and the rights of the assignee protected and enforced. Even the courts of law have long since so far recognized the assignee's title as to permit him to prosecute his demand in the name of the assignor



without the latter's assent, the court intervening, if need be, to forbid the assignor from denying the use of his name, or in any wise obstructing or interfering with the same. And in Virginia, by statute, the assignee or beneficial owner of any "*bond, note, writing, or other chose in action, not negotiable*," may assert his *equitable* title in a court of law, even *in his own name*. (2 Stor. Eq. §§ 1039, 1040; 2 Rob. Pr. (2d ed.) 256-7 & seq.; Id. 260 & seq.; Row v. Dawson, 1 Ves. Sr. 331; S. C. 2 Wh. & Tud. L. Cas. (Pt. II.), 201, 205; V. C. 1873, ch. 141, § 17; Garland v. Richeson, 4 Rand. 266; Clarkson v. Doddridge, 14 Grat. 44, V. C. 1887, ch. 134, § 2860; Stebbins v. Lawson, 80 Va. 389; Daily v. Warren, 80 Va. 513.)

No particular *form* of assignment is required, nor though the obligation be under seal, is it necessary that it should be *in writing*. If the *consideration* be proved, (as it probably would be *prima facie* by a written assignment), and the intention to assign be apparent, the *equitable* title passes. Hence, the mere delivery of the written evidence of the debt, with intent to transfer it, proves and constitutes an assignment. A valuable consideration, however, seems an indispensable element to a valid assignment, when the *legal title* does not pass—as in mercantile securities and a few other instances it does (2 Rob. Pr. (2d ed.) 222 & seq., 77 & seq.)—because it can only be good as an *executory contract*; and neither law nor equity will enforce an executory contract, unless it be sustained by a valuable consideration. (2 Rob. Pr. (2d ed.) 257 & seq.; Bank of Marietta v. Pindall, 2 Rand. 475-'6; Wood's Adm'r v. Duval, 9 Leigh, 10; 2 Stor. Eq. § 1040 b; Row v. Dawson, 2 Wh. & Th. L. Cas. 231 & seq.) But see *contra* as to the need of a valuable consideration, Elam v. Keen, 4 Leigh, 333.

The assignee of a mortgage or other *chose in action* (not a *mercantile* security), taking, as he does in general, only an *equitable* interest, takes it ordinarily, subject to all the equities which the debtor has, or may acquire against the assignor before he has notice of the assignment, or as it is sometimes expressed, the assignee cannot be in a better condition than the assignor. Nor does it affect the application of this principle that the assignment is for value, and without notice, nor that *after* assignment the debtor acknowledged the demand to be just. (2 Stor. Eq. § 1047; Row v. Dawson, 2 Wh. & Tud. L. Cas. (Pt. II.), 215-'16, 233 & seq.; V. C. 1873, ch. 144, § 14; Norton v. Rose, 2 Wash. 273; Pickett v. Morris, Id. 255; Mayo v. Giles' Adm'r, 1 Munf. 533; Stockton v. Cook, 3 Munf. 68; Remondus & al. v. Rosson & ux. 3 Leigh, 12; Moore & al. v. Hollenback & al. 3 Leigh, 597; Bank of Washington v. Arthur, Id. 3 Gray, 173; Davis v. Miller, &c., 14 Grat. 13.)

But whilst no acknowledgment made *after assignment* will preclude the debtor from proving, if he can, any equity against the assignor, acquired before he had notice of the assignment, he will be estopped from setting up any equity or defence, however well founded originally, if by his assurance *made beforehand* he has *induced the assignee* to acquire the debt. (Feazle v. Dillard & al. 5 Leigh, 39; Jennings v. Pettit, &c., 2 Rob. 676; Bank of Washington v. Arthur, &c., 3 Gratt. 173.) And upon like principles, if, even after notice of the assignment, the debtor expressly or impliedly promise payment to the assignee, he will be concluded thereby, if to allow the retraction of the promise would operate a fraud upon the assignee; as when, relying upon the debtor's promise, the assignee takes no steps which he might otherwise have successfully taken, to get payment or additional security from the assignor, who afterwards becomes insolvent. (Stebbins v. Bruce, 80 Va. 401; 2 Pom. Eq. § 812.)

It should be observed, that whilst the assignee has only an equitable interest, which originally was protected and enforced in a court of equity alone, yet as in process of time a plain and unobstructed remedy at law exists, either in the name of the assignor, or by statute in Virginia in some cases, in the name of the assignee, a resort to equity has long been discouraged, unless some substantial and extraordinary reason for its jurisdiction can be alleged; and this policy is now peremptorily enjoined with us by statute, "unless it appear that the plaintiff had not an adequate remedy at law." (Moseley v. Boush, 4 Rand. 392; V. C. 1873, ch. 141, § 19; V. C. 1887, ch. 134, § 2862.)

It has been already remarked that a *release* of the debt will discharge the mortgage which secures it. As to the *form* of the release, the doctrine at common law was that, wherever the obligation was *under seal*, the release must be *by act as solemn*, that is, under seal, in pursuance of the maxim, *eodem modo quo oritur eodem modo dissolvitur*. If the promise were not under seal, it seems that it was only necessary to have a valuable consideration. But this safe and convenient doctrine is much shaken by the later American adjudications. However, it would be prudent to have the release always under seal. (Blake's Case, 6 Co. 44 a; Bac. Abr. Release, (A.) 1; Fowell v. Forest, 2 Wms. Saund. 47 s. n. (1); Rogers v. Payne, 2 Wils. 276. See Martyn v. Mowlin, 2 Burr. 978; 1 Lon. Dig. 441 (2).)

4<sup>g</sup>. By Whom Mortgage Money is Payable.

The premises mortgaged are a pledge for a debt, which is constituted by the mortgage itself. If there be a covenant in the mortgage deed, or a collateral bond for the payment of the money, it is a *specialty debt*; otherwise a

simple contract debt. Hence, in either case, the mortgagee is a creditor of the mortgagor, and is entitled to be paid out of the personal assets of the mortgagor, as well as out of the mortgaged estate. (1 Lom. Dig. 460: *Ante* p. 362; *Post* p. 363.)

As long as the mortgagor survives, no question arises; but upon his death it becomes an interesting inquiry whether the debt (which the creditor may charge on either fund), shall ultimately be a burden on the mortgaged subject, or on the general personal estate of the debtor. The general principle in equity is, that the fund which received the benefit shall make satisfaction; and as, for the most part, the personal estate was increased by the money secured, so the personal estate shall be first applied towards the payment of the mortgage. Hence, the personal representative of a mortgagor is, in general, compellable to redeem a mortgage for the benefit of the *heir*, and *a fortiori* for the benefit of the *derisee*. This principle is well illustrated by the case of *Dandridge v. Minge*, 4 Rand. 397. In that case the heir and distributee of the mortgagor was a *tenor curseti*, and it was held that it was the duty of the personal representative of the mortgagor to apply the personal assets to redeem the land for the benefit of the married woman and her heirs, and that no arrangement between such representative and the husband would justify the diversion of the assets from that object, because in such case she loses her real estate, unless the husband shall think fit to pay the debt, and he holds the personal assets divested of any claim on the part of her and her heirs. (1 Stor. Eq. § 571; 1 Lom. Dig. 461.)

This, the natural order, may of course, be reversed at the pleasure of the decedent, who may *exonerate* his personal estate, and charge his debts, one and all, first on the real estate, although such an intent must be clearly manifested, which is not sufficiently done by directing his debts to be paid out of his lands, because he may have designed by that to create only an *auxiliary fund*. He must not only charge his real, but must *exempt* his personal property. Such an exemption is effected, not, indeed, as against the creditor, but as against the *real* representative, that is, the *heir* of the testator, by the *specific gift* of a chattel in his will. (1 Lom. Dig. 462-465; Foster & ux. v. Crouchaw & Ex'ors, 3 Munf. 514; McCloud v. Roberts & al. 4 H. & M. 441; Ryder v. Wager, 2 P. Wms. 329, 335; Aldrich v. Cooper, 8 Ves. 382; S. C. 2. Wh. & Tud. (Pt. I.), 179; Alexander v. Mayer, 1 Bro. C. C. 454; S. C. 1 Wh. & Tud. 432, &c. 446, 7, 451, &c.)

Where the mortgage debt was not originally contracted by the decedent, but the lands came to him by purchase or

descent, subject to the mortgage, as the reason for the doctrine above stated no longer exists, the doctrine itself is not applicable. The mortgaged estate is the primary fund for the payment of the debt, and the personal estate, if liable at all, is merely auxiliary. And so it is, *a fortiori*, where one purchases an equity of redemption, unless, indeed, by unequivocal acts he adopts the mortgage debt as *his own*. (1 Lom. Dig. 466, 469-70; *Ancaster v. Mayer*, (1 Bro. C. C. 454) 1 Wh. & Tud. 447-8, 454; *Daniel v. Leitch*, 13 Grat. 207.)

Where an estate under mortgage is vested in a person for life, with remainder to another in fee, the tenant for life will be obliged to pay the annual interest; but he cannot be compelled to contribute towards the payment of the principal where the mortgage is not foreclosed in the life-time of the tenant for life. When there is a foreclosure in the life-time of the tenant for life, the rule formerly was that the tenant for life should *always* pay one-third, and the remainderman two-thirds of the money. This, however, has been substituted by a more equitable procedure, based upon the fact that it is the duty of the tenant for life to keep down the interest during his life. This, together with the life-tenant's expectation of life, derived from the tables of mortality, furnishes a basis of computation, as has been fully explained in connection with the subject of dower. (1 Lom. Dig. 476; *Wilson v. Davidson*, 2 Rob. 384; *Ante*, pp. 143, 3<sup>m</sup>, and note (\*), 145; V. C. 1887, ch. 102, §§ 2281 & seq.)

Payments made generally on a mortgage, without designating how they are to be applied, are in general to be appropriated first to *extinguish any interest* which may be in arrear, that being the recompense to the creditor for the damage sustained by the debtor's default; and it has been said that this application, which is undoubtedly just, cannot be altered even by consent of the parties. This, however, can scarcely be reconciled with principle. The debtor who makes a *voluntary* payment can always direct its application, if he thinks fit so to do, since, if his wishes are not indulged, he may forbear to pay. If, therefore, the debtor shall insist at the time that a voluntary payment made by him shall go to the principal and not to the interest, if the creditor accepts the money on those terms, he must comply with the conditions. This is, indeed, only a branch of the doctrine of the application of payments generally, which may be thus summed up: Where several debts are embraced by the parties in one statement, general payments, unappropriated by the debtor at the time of making them, are to be applied to the demands in the order of priority as they stand in the statement. Where



the demands are several and distinct, payments unapportioned by the debtor at the time are to be applied, not with a view to the particular advantage of either party, but according to the justice of each individual case. (*Pindall's Ex'x v. Bank of Marietta*, 10 Leigh, 484; *Miller v. Prowling*, 2 Rob. 27; *Field v. Holland*, 6 Cr. 27; *Smith v. Lloyd*, 11 Leigh, 516; *Ross' Ex'ors v. McLaughlin's Adm'rs*, 7 Grat. 86; *Howard v. McCall*, 21 Grat. 205, 206; *Cheyman v. The Commonwealth*, 25 Grat. 721, 754; *Lingle v. Cook*, 32 Grat. 272; *Majority v. Shipman*, 82 Va. 784.)

Finally, if the condition be performed by payment within the time stipulated in the condition, then the land returns to the mortgagor, without any re-conveyance, by the simple effect of the condition: but if there be a default to pay within the precise time stipulated, whereby the estate becomes at law absolute in the mortgagee, a re-conveyance of the legal estate will be necessary upon his subsequently discharging the debt: although to be sure, after the lapse of a considerable time, say twenty years, the mortgagor remaining in uninterrupted possession, a re-conveyance may reasonably be presumed. And meanwhile in Virginia, by statute, the mortgagor may defend himself, even at law, against an action of ejectment, by showing that he has discharged the incumbrance, and is entitled in equity to have the premises re-conveyed. (1 *Lom. Dig.* 492; *Faulkner v. Brockenbrough*, 4 Rand. 245; *Suttle v. R. F. & P. R. R. Co.*, 76 Va. 290; 4 *Kent's Com.* 193-4; *V. C.* 1873, ch. 131, §§ 21, 22; *V. C.* 1887, ch. 124, §§ 2742, 2743.)

## CHAPTER XI.

### OF ESTATES IN POSSESSION AND IN EXPECTANCY.

#### § 1. The Time of Enjoyment of Estates.

All estates in lands and tenements consist of such as are,  
1. In possession; or (2), In expectancy;

#### § 2. Estates in Possession.

Of estates *in possession* (which are sometimes called estates *presente*), whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*), there is little or nothing peculiar to be observed. All the estates *presente* spoken of are of this kind; for in laying down general rules we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates *executory* maintains some of the most abstruse learning in the law. (2 *Q. Com.* 163.)

2<sup>o</sup>. Estates in Expectancy.

Of estates *in expectancy* there are three sorts; two very well known to the common law, namely *remainders* and *reversions*, and a third called *executory limitations*, originating in those statutes whereby estates of freehold may be created without actual livery of seisin; that is, the statute of *Uses* (27 Hen. VIII., c. 10; V. C. 1873, ch. 112, § 14; V. C. 1887, ch. 107, § 2426), the statute of *Wills* (32 Hen. VIII., c. 1, explained by 34 Hen. VIII., c. 5; V. C. 1873, c. 118, §§ 2 to 5; V. C. 1887, ch. 112, §§ 2512 to 2515); and the much more recent statute of *Grants* (8 and 9 Vict. c. 106; V. C. 1873, c. 112, § 4; V. C. 1887, ch. 107, § 2417.)

At common law no estate of *freehold* in lands could be created to commence *in futuro*, otherwise than by way of remainder or reversion, because no such freehold could pass without *livery of seisin*; which, from its nature, must operate immediately, or not at all; and because, moreover, if the livery operated to divest the freehold out of the grantor as it must do, if it operated at all, the freehold would be in *abeyance* before the time came for it to vest in the grantee, which would have been fraught with these serious mischiefs: 1st, That the superior lord would not have known on whom he was to call for the military services due for the feud; whereby the defence of the realm would have been weakened; and 2dly, That a stranger who claimed a right to the lands would not have known against whom to bring his *precipe*, or real action, to recover them; as no real action could be brought against any person but the actual freeholder. Similar, but less potent considerations of policy led the courts also to discountenance as much as possible, but not peremptorily to forbid, the *abeyance of the inheritance*, of which more will be said presently. (3 Th. Co. Lit. 103, n. (C.); 2 Bl. Com. 165 '6); Let us note the doctrines applicable to, (1), Remainders; (2), Reversions; and (3), Executory limitations: W. C.

1<sup>d</sup>. Remainders.

The doctrine of remainders may be exhibited under the heads of, (1), The definition of a remainder; (2), Examples of remainders; (3), The essential characteristics of a remainder; and (4), The several species of remainders;

W. C.

1<sup>e</sup>. The Definition of a Remainder.

A remainder is what is left of an entire grant of lands or tenements after a preceding part of the *same grant or estate* has been disposed of, whose regular expiration the remainder *must await*. (2 Th. Co. Lit. 126; Fearn's Rem. 3, n. (C.); 2 Bl. Com. 164.)

2<sup>e</sup>. Examples of Remainders.

A grants lands to Z for ten years, and afterwards to W

for 10, and after W's death, to X in fee-simple. Here the estate granted is the *whole fee*, out of which is first carved a *particular* estate for ten years, which is given to Z; and then a further portion is carved out and given to W, which, relatively to Z's estate, is a remainder; and when those previous interests have been disposed of, the *remnant* of the *contemplated estate* is given by way of remainder to X; W's estate awaiting the regular determination of Z's, and X's that of both Z's and W's.

Again, if A, seised in fee-simple, proposes to make an estate in the aggregate of one hundred years, and gives the land to Z for twenty years, and after the determination of that estate, to W for eighty years, W's estate is a *remainder*, being the *remnant* of the entire estate of one hundred years, after the disposition made of the preceding particular estate of twenty years given to Z, the regular expiration of which particular estate the remainder awaits.

After the expiration of both Z's estate and W's the land returns or *reverts* to the grantor, and so the interest remaining thus in the *grantor*, is styled a *reversion*.

The student will perceive, therefore, that whilst a remainder is the remnant of the estate which the grantor *parts with*, the reversion is the remnant left in him, which he *does not part with*.

The term *remainder* is a relative term, having relation to the *whole estate* which the grantor has it in mind to dispose of, and also to the part which is given to the *particular tenant*, whilst the remainder goes to the remainderman.

### 3. The Essential Characteristics of a Remainder.

It is very important that the student should familiarize himself with the essential characteristics of a remainder, and particularly that he should observe how immediately they all arise out of the definition above stated. Those characteristics are as follows: (1), That there must be a *precedent particular estate*, whose regular determination the remainder must await; (2), The remainder must be *created by the same conveyance*, and at the same time as the particular estate; (3), The remainder must vest *in right*, during the continuance of the particular estate, or *eo instanti* (at the very instant), that it determines; and (4), No remainder can be limited *after a fee-simple*;

#### 1. There must be a *Precedent Particular Estate*, whose Regular Determination the Remainder *must Await*.

This necessary feature in a remainder arises, as all the ~~rest to be mentioned do~~, *out of the definition*. The definition describes a remainder as the remnant of the whole

contemplated gift after a *part has been disposed of*. It follows, therefore, of course that there must be *that precedent part*, in order to fulfil the definition. The *particular* estate is so called (from *particular*, as being, in general, only a *small part* of the whole estate granted, of which the *remainder* is another, and commonly a *greater part*; the two together, or the *several parts*, making up *the whole*. But it is equally called the *particular* estate, though it should be much the greater part of the whole. Thus, in case of a grant to A for ninety-nine years, and then to Z for *one year*, Z's interest would be a *remainder*, and A's the *particular* estate, though consisting of ninety-nine parts in the one hundred of the whole. It is customary to say that the particular estate *supports* the remainder, but this is a mere figure of speech, which leads to inaccurate deductions, and should be eschewed. There is no such relation between the particular estate and the remainder as that of a support and thing supported, but simply of *two parts of one whole*, the existence of the latter of which necessarily, *ex vi termini*, supposes that of the former. (2 Bl. Com. 165.) And therefore, a *vested* remainder is in nowise affected by the destruction of the particular estate after the remainder has once vested by good title. (2 Th. Co. Lit. 134-'5, *Post*, p. 392.)

The last clause of the proposition, that the remainder awaits the *regular expiration* of the particular estate, is simply a part of the definition of a remainder. It is said to follow, moreover, from a doctrine formerly explained (*Ante*, p. 267, 1<sup>k</sup>; 2 Th. Co. Lit. 97), that an estate of freehold once vested, cannot, at common law, be determined, save by the re-entry of the grantor or his heirs, in pursuance of a condition broken, which re-entry revests the land in the grantor or his heirs, as of their original estate, thereby defeating all subsequent limitations, as well as the first estate. This, however, is true only where the particular estate is an estate of *freehold*; and it surely suffices to refer the proposition to the definition of a remainder. (Fearn's Rem. 249, 261.)

As to the *quantity* of the particular estate, it is worth while to observe that it must be less than a fee-simple, being carved out of it, and that at present in Virginia, as at common law, *two* sorts of particular estates only can be created, namely, an estate *for years*, and an estate *for life*, but not an estate *at will*, which is looked upon as too slender and precarious for the purpose. In England there is a *third*, to wit, an *estate-tail*, growing out of the statute *de donis*, 13 Edw. I., c. 1. And where the whole estate intended to be conveyed, taking its several parts together, that is, the particular estate and the remainder



of remainders amounts to a *freehold*, there must have been at common law *livery of seisin* made to the particular tenant, although he were only tenant *for years*; not, indeed, for his own benefit, for his estate alone did not require it, but for the benefit of them in remainder, to whom livery could not be directly made, as they were not entitled to the immediate possession, but all the parts being *one estate*, the livery to the tenant for years enured to the whole succession of interests. Thus, where one leases to A for three years, with remainder to B in fee, and makes *livery of seisin* to A: here, by the livery, the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees, and the remainderman is seised of his remainder at the same time that the termor is possessed of his term. The *enjoyment* of it is indeed deferred till hereafter; but it is to all intents and purposes an estate commencing *in presenti*, though to be occupied and enjoyed *in futuro*. (Fearn's Rem. 3, n. (c); 2 Th. Co. Lit. 127; 2 Bl. Com. 166.)

Whether the particular estate shall be an estate for life or an estate for years is not material, except in the case of a *contingent remainder of freehold*, which must always be preceded by a particular estate of *freehold*; because, as we have seen, the freehold must pass out of the grantor, by the *livery of seisin*, at the time when the remainder is created, and must vest somewhere, the law not permitting it to be in *abeyance*; but when the remainder is contingent, it cannot vest in the remainderman during the suspense of the contingency, and therefore it must vest in the particular tenant, or nowhere; and hence the estate of such tenant must be of a *freehold nature*. And this proposition is as true of remainders created by way of devise, use, or grant, as those arising out of conveyances at common law. (Fearn's Rem. 281; 2 Bl. Com. 168, n. (9).)

- 2° The Remainder must be Created by the *Same Conveyance* and at the *Same Time* as the Particular Estate.

This characteristic is the inevitable result of the definition of a remainder. The remainder and the particular estate cannot possibly be *one and the same estate*, as the definition requires, unless they are created by the *same conveyance*, and commence or pass out of the grantor at the *same time*. Hence (and because also the first trait above named would not be otherwise fulfilled), if the particular estate be void in its *creation*, the remainder is always defeated. But when the remainder is *vested* in interest, and *not contingent*, the *subsequent destruction* of the particular estate (the same having been good when

created), does not affect the estate in remainder, of which Lord Coke gives several instances. Thus, if the lessor disseise A, tenant for life, and make a lease to B for the life of A, remainder to C in fee, albeit A re-enter, and defeat the estate for life, yet the remainder to C, being once vested by good title, shall not be avoided; for it were against reason that the lessor should have the remainder again against his own livery. (2 Bl. Com. 167; 2 Th. Co. Lit. 134-5.)

- 3<sup>d</sup>. The Remainder must *Vest in Right* during the Continuance of the Particular Estate, or *Ex Instanti* (at the very Instant) that it Determines.

This characteristic, like those which have gone before it, is the necessary consequence of the definition of a remainder. How can the particular estate and the remainder constitute the *same estate*, unless they subsist, and are *in esse* at one and the same instant of time, so that no other estate shall come between them? Any interval whatsoever must destroy that continuity which is indispensable to their identity. This feature it is upon which especially depends the doctrine of *contingent* remainders. The liability of the particular estate to determine, before the remainder is ready to *vest in right*, does, indeed, *ipso facto* constitute a remainder *contingent*; and every contingent remainder is subject to that liability, which sometimes is the only circumstance of contingency about it. Hence, if land be granted to A for life, remainder to Z in fee, Z's remainder is vested in him at the creation of the particular estate to A for life; so if the grant were to A and Z for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, but is suspended upon the contingency of which shall be the survivor, yet on the death of either of them the remainder vests instantly in the survivor; wherefore both these are good remainders. But if the grant were to A for life, remainder to Z's oldest son unborn, in fee, and A dies before Z has any son, the remainder will, at common law, be void, for it did not vest in any one, either during the continuance nor at the determination of the particular estate; and even though Z should afterwards have a son, yet should he not, at common law, take by this remainder; for as it did not vest in interest at or before the end of the particular estate, it can never vest at all, but is gone forever. (2 Bl. Com. 168; Fearn's Rem. 307-8; 2 Th. Co. Lit. 137, and n's (1) and (K.); Id. 128.)

When a remainder is limited to a person unborn, as to Z's oldest son, the strict rule of the common law held it needful that the remainderman should be *actually born*

and not merely *ex ante, sed in re*, at or before the determination of the particular estate. The contrary, however, having been held by the House of Lords, in the case of a *devise*, in *Reeve v. Long* (3 Lev. 408; 1 Salk. 227), against the opinion of all the judges, but upon the advice of Lord Somers, the statute 10 and 11 Wm. III., c. 10, was enacted, declaring that posthumous children should be capable of taking in remainder, by *deed* also, as if born in the father's life-time. (2 Bl. Com. 169, and n. 113; 1 Lom. Dig. 570-71.)

To guard against the contingency of the particular estate determining before the remainder is ready to vest, it is usual, in England to interpose trustees to preserve remainders; the idea being that the estate shall vest in the trustees, should the particular estate come prematurely to an end. In Virginia this result is, in all cases, accomplished, and the end of the statute above named, of 10 and 11 Wm. III., also attained, by a statutory provision that "a contingent remainder shall, *in no case, fail* for want of a particular estate to *support* it." (V. C. 1873, ch. 112, § 12; V. C. 1887, ch. 107, §§ 2424, 2425; 1 Lom. Dig. 595 & seq.; 2 Bl. Com. 171-2.)

The student will not understand this enactment as meaning that there may be a *remainder* enacted without a particular estate going before it, which would be a contradiction in terms, and contrary to the fundamental idea of a remainder; but that the extinction or determination of the particular estate shall not, *in any case*, affect the validity of a remainder, that is, no more in the case of a *contingent* remainder, and before it is ready to vest, than in the case of a *vested* remainder.

#### 1<sup>o</sup>. No Remainder can be Limited *after* a *Fee-Simple*.

This results from the very *nature of things*, as well as from the definition of a remainder. What *remnant* can there be *after* a *fee-simple*, which is the whole? And this proposition is true as well of a *fee qualified* as a *fee absolute*. If there be a grant of land to A and his heirs, remainder to B and his heirs, it is plain that B's remainder is nothing. And so, if the grant were to A and his heirs, *as long as Z has heirs*, remainder to B and his heirs, B's remainder is equally void. (2 Bl. Com. 164; 2 Th. Co. Lit. 126, and n. (B.); 1 Do. 505, and n. (W.); Fearn's Rem. 12.)

The same proposition seems to hold of *fees conditional*, namely, that no remainder can be limited *after* them, because it is a grant of the whole fee, and there is no remnant left to be limited over. (Fearn's Rem. 13, n. (H.); William v. Boukley, 1 Plowd. 242, 242 a, 247, 252; Stafford v. Boukley, 2 Ves. Sr. 180.) But see 2 Prest. Est. 353.

It is possible, however, even at common law, to limit two *concurrent fees*, by way of remainder, as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail to *vest in interest*; although, if the first does vest in interest, the subsequent limitation is immediately avoided. Thus, in case of a grant to A for life, remainder to Z's heirs, and in case A should die, living Z, then to W and his heirs, the remainder in fee to W is to *take the place* of the remainder limited to Z's heirs in fee, in the contingency that Z survives A, but in the opposite contingency of A's surviving Z, the fee-simple remainder to Z's heirs becomes vested in interest, and cannot be divested by any contrivance known to the common law, so as to let in a subsequent *remainder*. Such a limitation as the one above stated is called a limitation on a *contingency in a double aspect*, and, sometimes a *remainder on a double contingency*. (Loddington v. Kime, 1 Ld. Raym. 203; Doe v. Burnsall, 6 T. R. 30; Doe v. Fonnereau, 2 Dougl. 505, note; Cooper v. Hepburn, 15 Grat. 558-'9; Fearn's Rem. 373.)

The impossibility of limiting *one fee-simple upon another* is inherent in the nature of things, and can no more be effected at present than at any past time. But it is now practicable to do what at common law was impossible, namely, to *substitute* one fee-simple for another, not only in the event of the first *failing to vest* (which was all that could be accomplished at common law), but also after the first *has vested*, by putting an end thereto, and transferring the land, on some appointed contingency, to another person, provided only the subsequent limitation shall take effect, if at all, within a *life or lives in being, and ten months, and twenty-one years* thereafter, so as to prevent a perpetuity. This may be done by means of those *conditional limitations* of which mention has before been made, and which owe their being, it will be remembered, to the statutes of wills, of uses, and of grants, whereby any estate of freehold may be created without *actual livery*, and therefore may be determined *without re-entry*, and thus may be shifted upon a future event from one owner to another. (1 Th. Co. Lit. 505, and n. (W.); V. C. 1873, ch. 118, §§ 2, 3; Id. ch. 112, §§ 14, 4; V. C. 1887, ch. 112, §§ 2512, 2513; Id. ch. 107, §§ 2426, 2417; Fearn's Rem. 373.)

#### 4°. The Several Species of Remainders.

Remainders are either, (1), Vested; or (2), Contingent;  
w. c.

1<sup>f</sup>. Vested Remainders; w. c.

1<sup>g</sup>. Definition of a Vested Remainder.



A *vested remainder* is a remainder limited to a certain person, and on a certain event, so as to possess a *present capacity to take effect in possession*, should the possession become vacant. (Ferne's Rem. 216.)

#### 1<sup>st</sup> Requisites and Instances of a Vested Remainder.

It should be observed, that it is not the uncertainty of *ever* taking effect in possession that makes a remainder *contingent*, for to that every remainder is and must be liable, since the remainderman may die, and die without heirs, before the determination of the particular estate. The *present capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. Thus, in case of a lease for life to A, remainder to Z for life, Z's remainder may never take effect in possession, because Z may die before A; but being *capable of taking effect* in possession, if the possession were to fall by the death of A, it is a *vested remainder*. On the other hand, in case of a lease for life to A, remainder after the death of W, to Z in fee, Z's remainder, although limited to a *certain person* (Z), and upon a *certain event* (W's death), is not capable of taking effect in possession *during the life of W*, although the possession should fall by the determination of A's estate; and therefore, whilst W lives, Z's remainder is contingent, and not vested; although upon W's death, living A, it ceases to be contingent, and becomes vested. (Ferne's Rem. 216; 2 Bl. Com. 169, n. 10.)

#### 2<sup>nd</sup> Contingent Remainders.

The doctrine of contingent remainders will be expounded in connection with the topics following, namely: (1), The definition of a contingent remainder; (2), Instances of such remainders; (3), The several classes thereof; and (4), Certain general principles applicable to contingent remainders; w. c.

##### 1<sup>st</sup> Definition of a Contingent Remainder.

A contingent remainder is a remainder limited to an *uncertain person*, or on an *uncertain event*, or so limited to a certain person, and on a certain event, as *not to possess the present capacity to take effect in possession*, should the possession become vacant. (Ferne's Rem. 116-17; 2 Bl. Com. 169, n. (10).)

##### 2<sup>nd</sup> Instances of a Contingent Remainder.

The *grand criterion* of a contingent remainder is its *want of capacity to take effect in possession*, should the possession become vacant. Thus, in the case last above stated, of a lease for life to A, remainder after the death

of W, to Z in fee, it has been seen that, although the remainder is limited to a *certain person* (Z), and on a *certain event* (W's death), yet because it *lacks the present capacity to take effect in possession*, it is contingent, and not vested. On the other hand, as we have formerly seen (*Id.*, p. 171-2 1<sup>k</sup>), a grant to H for life, and if, by any means, that estate shall come to an end in H's life-time, remainder to Z for the residue of H's life, gives Z a *vested* remainder (although his enjoyment of it is most improbable), because there is in him a *present capacity* to take effect in possession, should the possession become vacant. (Ferne's Rem. 216 to 218; 2 Bl. Com. 169, n. (10).)

### 3<sup>g</sup>. The Several Classes of Contingent Remainders.

The several classes of contingent remainders are thus enumerated by Mr. Ferne, in his masterly work on the subject, namely: (1), Remainders depending on a contingent determination of the particular estate; (2), Remainders depending on a contingency not connected with, but collateral to, the determination of the particular estate; (3), Remainders depending on an event which must happen some time or other, but may not happen during the continuance of the particular estate; and (4), Remainders limited to a person not ascertained, or not in being at the time when such limitation is made. (Ferne's Rem. 5 & seq.) w. c.

#### 1<sup>h</sup>. Remainders Depending on a Contingent Determination of the Particular Estate.

This sort of remainder may be illustrated by a grant to A until Z return from abroad, and after such return of Z, remainder to W in fee. Here the particular estate is limited to determine on the return of Z, and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen, and therefore the remainder, which depends entirely upon the determination by it of the preceding estate, is dubious and contingent. (Ferne's Rem. 5; Boraston's Case, 3 Co. 20 a.)

It must be particularly observed, that the contingency which brings a remainder within this first class must be such as makes it uncertain, not only whether the event on which it depends for becoming vested determines the preceding estate, but whether that event will ever happen. Consequently, all cases where the contingency depends on the determination of the particular estate by the *death* of the party (which is an event that *must happen*), are excluded from the first class. (Ferne's Rem. 5, n. (c).)

#### 2<sup>h</sup>. Remainders Depending on a Contingency not Connected with, but Collateral to, the Determination of the Particular Estate.

An illustration of this sort of remainder is afforded by a grant of lands to A for life, and if Z die before X, remainder to W for life; here the event of Z's dying before X does not in the least affect the determination of the particular estate, nevertheless it must precede and give effect to W's remainder; but such event may or may not happen, and the remainder for that reason, and because of its *present incapacity* to take effect in possession, is contingent. (Ferne's Rem. 6, &c.; Boraston's Case, 3 Co. 20 a.)

3. *Remainders Depending on an Event which must Happen some Time or Other, but may not Happen During the Continuance of the Particular Estate; w. c.*

1. *Instances of Contingent Remainders of the Third Class.*

Grant to A for life, remainder after the death of W, to Z in fee; where the *event* is certain, namely, W's death, and the *person* certain, that is, Z; but W's death may not happen till after the determination of A's particular estate by his death, and therefore, and because, moreover, there is a *want of the present capacity* to take effect in possession, the remainder is contingent. So a grant to A for twenty-one years, if he shall so long live, and, after his death, to Z in fee, makes a contingent remainder, since A may outlive the twenty-one years, whereby the particular estate would determine before the remainder could commence. And as A's estate is not a *freehold*, the contingent remainder is *void*. (Ferne's Rem. 8; Boraston's Case, 3 Co. 20 a.)

2. *Exception to Contingent Remainders of the Third Class.*

Where there is a *practical certainty* that the event will occur *during the continuance* of the particular estate, the remainder, notwithstanding it falls literally within the third class, is nevertheless ranked among vested estates; e. g., grant to A for one hundred years, if Z shall so long live, remainder after the death of Z, to W in fee. The mere *possibility* that a life in being may endure for one hundred years to come, does not amount to a degree of uncertainty sufficient to constitute a contingent remainder. If the term were short enough to create a common possibility of the life's exceeding the term (as if it were only for twenty-one years), the remainder is contingent, and if a *freehold*, would, as already observed (*supra* 1\*), be *void*, because not preceded by a *freehold*. (Ferne's Rem. 21 & seq.; Boraston's Case, 3 Co. 20 a; Beverley v. Beverley, 2 Vern. 131.)

3. *Remainders Limited to a Person Not Ascertained, or Not a Being, at the Time when such Limitation is Made;.*

1<sup>i</sup>. Instances of Contingent Remainders of the *Fourth Class*.

Grant to A for life, remainder to Z's *heirs*. Here there is no ascertainment of who is the heir of Z (for *nemo est heres viventis*), until Z's death: and as that event may not happen until after the determination of the particular estate by the death of the tenant for life, and also because there is no *present capacity* to take effect in possession, the remainder is contingent. So, also, and for like reasons, it is contingent where it is limited to the first son of B, who has then *no son* born. (Fearn's Rem. 9; Boraston's Case, 3 Co. 20.)

It is observable that a remainder over may be so limited as to depend for its vesting on the happening of every kind of event, constituting the four sorts of remainders mentioned by Mr. Fearn:

As a grant to A until Z returns from abroad, and after the return from abroad of Z and X, and the death of W, to the son of A who shall first attain the age of twenty-one years, in fee. In this case, the remainder to the son of A, so far as it depends on Z's return from abroad, partakes of the nature of the *first class* of contingent remainders; so far as it depends on the return of X also, it partakes of the nature of the *second class*; so far as it depends on the decease of W, it partakes of the nature of the *third class*; and so far as it depends on A's having a son (as yet unascertained, perhaps unborn) who shall attain the age of twenty-one years, it partakes of the nature of the *fourth class*. (Fearn's Rem. 9, Mr. Butler's note, (g).)

2<sup>i</sup>. Exceptions to Contingent Remainders of the *Fourth Class*.

These exceptions are more numerous than were found to exist to the third class of contingent remainders, being in number *three*. They depend, on the one hand, on a general rule of law respecting limitations to the heirs, where the ancestor takes an estate of freehold in the same conveyance; and on the other, upon the respect which is paid to the *intent* of a testator, where it can be plainly collected from his will, that he used the word *heirs* as *descriptio personæ*; whilst yet a third arises from the fact that a limitation of a so-called remainder to the *heirs of the grantor* continues in himself, as the *reversion* in fee. (Fearn's Rem. 27, 50.)

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1<sup>k</sup>. Remainders Limited to the *Heirs of the Grantor*.

An instance of this sort of remainder is exhibited in a grant to Z for life, remainder to the heirs of the grantor. This limitation, although denominated a *re-*



remains in the grant, really is not such. It does not devolve on the heirs of the grantor as purchasers, as it would do if it were a remainder, but remains in the grantor himself, as his old *reversion* in fee. (Fearne's Rem. 30-31; 2 Th. Co. Lit. 142, 128, n. (E.); Chudleigh's case, 1 Co. 130 a; Bingham's Case, 2 Co. 91 b; Counden v. Clarke, Hob. 30 a; Godolphin v. Abingdon, 2 Atk. 57.)

- 2°. Remainders Limited to the Heirs of a Living Person, but with some Qualification Annexed, which Designates the *Individuals Intended*.

This sort of remainder is illustrated by a grant to Z for his life, remainder to W's heirs, *now living*; meaning W's heirs *apparent* or *presumptive*, at the time of the grant, who are ascertained persons, making the remainder *vested* instead of *contingent*. (Fearne's Rem. 290; 2 Th. Co. Lit. 128, n. (E.).)

- 3°. Remainders Limited to the *Heirs* of the Taker of the Particular Estate (being an *Estate of Freehold*.)

Grant to A for the life of Z, remainder to A's heirs.

The so-called *remainder* to A's heirs is at common law not a remainder, but is a *part of the estate of A*, the ancestor. The word "*heirs*" in such a case, is said to be a word of *limitation* (ascertaining the *limits* of A's estate, namely, as an estate of inheritance), and not a word of *purchase* (carrying a *contingent* remainder to the heirs of A, as purchasers.) (2 Th. Co. Lit. 128, n. (E.); Fearne's Rem. 28-9, and n. (1).)

This is the famous rule of law known for centuries as the *rule in Shelley's case*, first clearly propounded in the year-book, 18 Edw. II., 85, and acknowledged, in *argument*, to be an important canon of real property, in Shelley's case, 1 Co. 104 a. (Fearne's Rem. 28-9 & seq., and n. (1); 2 Th. Co. Lit. 128, n. (E.).)

Let us note in connection with this rule, (1), Its *precise terms*; (2), The circumstances necessary to concur, in order that it may operate; (3), The reasons and policy of the rule; (4), Its effect when applicable; (5), Its application; and (6), The doctrine in *Virginia* touching the rule;

1. The *Precise Terms* of the *Rule in Shelley's Case*.

Wherever the ancestor, by any will, gift or conveyance, takes in *estate of freehold* in lands or tenements, and in the *same will, gift or conveyance*, an estate is afterwards limited by way of *remainder*, either mediately or immediately to *his heirs*, or to the *heirs of his body*, the words "*heirs*," or "*heirs of the body*," are words of

*limitation* of the estate, carrying the inheritance to the ancestor, and not words of *purchase*, creating a contingent remainder in the heirs. (2 Th. Co. Lit. 143; Fearn's Rem. 29, 28, n. (1); Shelley's Case, 1 Co. 793 b, 106 b, n. (I., 5), Thomas's ed.)

2<sup>l</sup>. The Circumstances Necessary to Concur, in Order to the Operation of the *Rule in Shelley's Case*; w. c.

1<sup>m</sup>. There must be an Estate of Freehold in the Ancestor.

It is immaterial, however, whether the ancestor takes the freehold by express limitation, by resulting use, or by implication of law; and the possibility that it may determine in the ancestor's life-time, does not prevent the subsequent limitation to his heirs from attaching in himself as a vested interest. The rule is also admissible though the freehold be limited to two or more persons jointly, or as tenants in common, although, in that case, there are various distinctions as to the effect of the subsequent limitation to the heirs, some of which will be adverted to under another head. (2 Th. Co. Lit. 145, n. (P.); Id. 147, n. (P.); 1 Prest. Est. 309, 313, 320; Fearn's Rem. 33, 35 & seq.; Pybus v. Mitford, 1 Ventz. 322; Hayes v. Foorde, 2 Wise, 698; Shelley's Case, 1 Co. 106 b, n. (I. 5), Thomas's ed: *Post* 404-5.)

2<sup>m</sup>. The Ancestor must take the Estate of Freehold by, or in Consequence of the *Same Assurance*, which Contains the Limitation to his Heirs.

This requirement is satisfied if the limitations to the ancestor and to the heirs be parts of the *same transaction*, although contained in several instruments; as a deed or will *creating a power*, and an *appointment* exercising the power, or a will and a codicil supplemental thereto. (1 Prest. Est. 309; Shelley's Case, 1 Co. 106 b, n. (I. 5), Thomas's ed.)

3<sup>m</sup>. The Interest Limited to the Ancestor, and to his Heirs, must be *of the Same Quality*; that is, both Legal, or both Equitable.

If there was an union of the limitations to the ancestor, and to the heirs, when one is legal and the other equitable, the confusion and embarrassment in determining the quality and properties of the resulting estate would be extreme. Would it be a legal estate? Surely not, since one part of the limitation is equitable. Would it be an equitable estate? That would be inconsistent with the fact that a part of the limitation is legal. The two limitations, therefore, cannot coalesce, and that to the heirs, or heirs of the body, is a *contingent remainder*. (Fearn's

Rem. 52, 58-'9, and n. (d); 1 Co. 106 b, n. (I. 5),  
 Thomas's ed.

- 1°. The Words "*Heirs*," or "*Heirs of the Body*," must be used in the *Technical Sense*, as Importing a Class of Persons to *Take Indefinitely in Succession*.

Hence, if it appears that the words were not employed in this sense, but inaccurately, as designating *particular individuals only*, as if the limitation were to the heirs *now living*, the rule in Shelley's case would not be applicable; but the persons who, at the time of the limitation, were the ancestor's heirs apparent, or presumptive, would take a *vested remainder*. (Ferne's Rem. 210, and n. (a.) See Taylor & Cleary, 29 Grat. 448.)

3. The Reasons and Policy of the Rule in Shelley's Case.

The rule is not a mean to *discover the intention* of the grantor or testator, but supposing the intention ascertained, the rule *controls it* so far as it is repugnant to the policy of the law, giving effect to the *general and legal*, rather than to the *more particular and particular* intent. The party making such a limitation has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate, the other to limit the land to his heirs collectively, and in indefinite succession. These two intents cannot stand together, without more or less of general mischief to the public welfare; and the rule prevails simply to subordinate the particular, and apparently less important design of limiting the ancestor's interest to a life-estate, to the more comprehensive, and probably the preferred purpose of transmitting the inheritance in the manner indicated. (2 Th. Co. Lit. 143, n. (P.); Id. 151, n. (P.); Ferne's Rem. 183 & seq.; Harg. Law Tracts, 551; 3 Lom. Dig. 327; 4 Kent's Com. 217.)

The reasons for the rule may be stated as follows, namely: (1), To prevent the lord from being deprived of the feudal incidents of wardship and marriage; (2), To prevent the inheritance from being in *abeyance* during the ancestor's life; (3), To prevent the non-alienability of the inheritance during the ancestor's life-time; and (4), To preserve the marked distinctions between descent and purchase:

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- 1°. To Prevent the Lord from being Deprived of the Feudal Incidents of *Wardship and Marriage*.

These incidents existed, by the feudal law, only when the heir claimed *by descent*, so that, if he had

taken by way of remainder as a *purchaser*, they would have been lost to the lord. And although this be a purely feudal reason, yet the rule to which a feudal reason gives birth does not cease because the original reason has ceased, as is exemplified in very many doctrines of the law, *e. g.*, the right of distress for rent, apportionment of common, etc. (1 Th. Co. Lit. 151 n. (1); 2 Do. 143, n. (P.); *Ante*, pp. 72 '3, 4<sup>r</sup> & 5<sup>r</sup>.)

2<sup>m</sup>. To Prevent the Inheritance from being *in Abeyance*, as it was Supposed it would be During the Ancestor's Life, if the Limitation to the Heirs were Construed to be a *Remainder*.

The abeyance of the *freehold*, as we have seen, was never permitted at all (*Ante*, p. 389, 2<sup>c</sup>); nor that of the inheritance, save in case of absolute necessity; because there was thereby created a suspension of various operations of law, particularly of the remedies for the recovery of lands by real actions. (2 Th. Co. Lit. 143, n. (P.); Hargr. Law Tracts, 499.)

3<sup>m</sup>. To Prevent the *Non-Alienability* of the Inheritance During the Ancestor's Life-Time.

If the limitation *to the heirs* was a contingent remainder in them of the inheritance, of course it would remain inalienable during the ancestor's lifetime, because it is not ascertained who his heirs will be until his death; *nemo est hares viventis*. (2 Th. Co. Lit, 143, n. (P).)

This third reason and the second are much insisted on by Mr. Justice Blackstone, in his famous argument in *Perrin v. Blake* (4 Burr. 2579; Hargr. Law Tracts, 499, 500), in which he ascribes the rule, in part, to a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner than if the ancestor were regarded as only tenant for life, and the heir as the purchaser of the inheritance. He likens the case to the ordinary limitation to a *man and his heirs*, which is universally recognized without dispute, as vesting an inheritance in the grantee himself, who, in the quaint language of Lord Coke, "during his life, beareth in his body (in judgment of law) all his heirs," who are so totally in him that, in the case supposed, he may give the lands to whom he will. And with a manliness which does him honor, considering the fashion which just then prevailed, of decrying the rule, the learned commentator declares that, however narrow and illiberal the original establishment of the rule, or the adhering to it in later times, may have been represented



in argument, he was of opinion that those constructions of law which tend to *facilitate the sale* and circulation of property in a free and commercial country, and which make it more liable to the debts of the *visible owner*, who derives a *great credit* from that ownership, are founded upon principles of public policy altogether as open and as enlarged as those which favor the accumulation of estates in private families, by fettering inheritances till the full age of posterity is yet unborn, and which may not be born for half a century. (Hargr. Law Tracts, 500.)

4. To Preserve the Marked Distinctions between *Descent* and *Purchase*, and to Prevent Title by Descent from being Stripped of its Proper Incidents (*e. g.*, Liability for *Debts*), and Disguised with the Qualities of a *Purchase*.

If the heir takes *by purchase*, he is not liable, by virtue of his ownership of the lands, for the ancestor's debts; but if the inheritance is vested in the ancestor, the heir succeeding thereto by descent is, to the extent of its value, answerable at common law for the ancestor's record debts, and the specialty debts binding the heirs, and in Virginia for *all the debts*. (2 Th. Co. Lit. 151, n. (P).)

This fourth reason is particularly insisted on by Mr. Hargrave in his lucid exposition of the rule. (Hargr. Law Tracts, 489, 551; 2 Th. Co. Lit. 151, n. (P).)

4. The Effect of the Rule in Shelley's Case, when it is Applicable.

When the rule in Shelley's Case is applicable, the effect is that, instead of a contingent *remainder in the heirs*, an estate of inheritance is vested *in the ancestor*.

(Fearn's Rem. 28 '9, n. (1).)

5. The Application of the Rule in Shelley's Case; w. c.

- 1<sup>st</sup>. The Cases wherein the Words "Heirs" or "Heirs of the Body," are Considered *Words of Limitation*, and not *Words of Purchase*; w. c.

- 1<sup>st</sup>. Although there is a Possibility of the Estate for Life Determining in the Life-Time of the Ancestor Himself.

*e. g.*, Grant to A and B during their *joint lives*, remainder to Z for life, remainder to A's *heirs*. Here, if B and Z die, living A, it terminates the freehold estate and the subsequent remainder in the life-time of the ancestor A, and yet the rule applies so as to vest the inheritance in A. At least to this conclusion Mr. Fearn comes, with irresistible force of reasoning and authority, against the opinion of Mr.

Sergeant Rolle. (Fearne's Rem. 30, 33; 2 Th. Co. Lit. 143, n. (P.); 2 Rolle's Abr. 418.)

- 2<sup>n</sup>. Where a *Joint Limitation* of the Freehold to Several is followed by a *Joint Limitation* to the *Heirs of the Same Parties*,

*e. g.*, Grant to A and B for their *joint lives*, remainder to C for life, remainder *to the heirs of A and B*. Here both limitations being of the same quality, that is, both joint, the fee vests in them *jointly*. So it does, also, where the limitation of the freehold is to husband and wife, remainder to their heirs. (1 Th. Co. Lit. 743-'4; Fearne's Rem. 35-'6.)

- 3<sup>n</sup>. Where a *Joint Limitation* of the Freehold to Several is followed by a *Limitation to the Heirs of One of Them*.

*e. g.*, Grant to A and B for their lives, and after their deaths, to the *heirs of B*, or to the *heirs of the survivor*. The inheritance is said to be executed *sub modo*; that is, to some purposes, but not to all. For though the inheritance is so far blended with the possession as not to be grantable by way of remainder, away from or without the freehold; yet it is not so executed in possession as to sever the jointure. (Fearne's Rem. 36; 1 Th. Co. Lit. 745-'7; Wiscot's Case, 2 Co. 61 a. & n. (G.). (Thomas's ed.).)

- 4<sup>n</sup>. Where the Limitation of the Freehold *is not Joint*, but *Successively* to Two or More, with Remainder to their *Heirs*,

*e. g.*, Grant to A for life, remainder to B for life, remainder to the *heirs of A and B*. The ultimate limitation is not executed in possession *jointly*, but the rule applies, and A and B take *several inheritances*, and are tenants in common thereof. (2 Th. Co. Lit. 743-'4; Fearne's Rem. 36; Stephens v. Brittridge, 1 Lev. 36.)

It may not be amiss to add, that in England, if A and B were a *man and a woman* who could *intermarry legally*, and the limitation were to the *heirs of their bodies*, they would take a *joint inheritance in tail*. (Fearne's Rem. 36; 1 Th. Co. Lit. 743-'4.)

- 5<sup>n</sup>. Where a *Contingent Limitation Intervenes* between the Particular Estate to the Ancestor, and the Subsequent Limitation to the Heirs.

*e. g.*, Grant to A for life, remainder to Z for life, if he should survive W, remainder to *A's heirs*. The limitation to the heirs of A unites with A's freehold only *sub modo*, opening, if necessary, to

let in the intervening estate. (Fearne's Rem. 37; Lawe Bowles' Case, 11 Cr. 80 a.)

6. Where the Limitation is of a Freehold to the Ancestor and a Subsequent Limitation to his *Heir*, in the Singular Number, without Words of Limitation Superadded.

7. Grant to A for life, remainder to *A's heir*. Notwithstanding the word is in the singular number, yet without superadded words of limitation, such as existed in Archer's case (1 Co. 66 b), it is *non collectivum*, and embraces the whole succession of heirs, so that the rule applies and the ancestor takes an estate in fee simple. (Fearne's Rem. 178-9; Burley's Case, 1 Ventr. 230; White v. Collins, Com. 301; Richards v. Bergavenny, 2 Vern. 325, and n. 1; Dubber v. Trollope, 2 Amb. 453, and n. (2); Blackburn v. Stables, 2 Ves. & B. 370, 71; Stokes v. Van Wyck, 83 Va. 731.)

In Archer's case the limitation was to "R. A. for life, and afterwards to the next heir male of R. A., and to the *heir male of the body of such next heir male*." These words of superadded limitation were held to prevent the application of the rule, and to vest in R. A.'s heir male a contingent remainder in tail-male. (*Post*, p. 410, 4<sup>n</sup>.)

But if the intent appear to be that the persons who are to take the so-called remainder shall be the heirs, or heirs of the body, etc., of the first taker, *in absolute succession*, the rule is applicable, notwithstanding words of modification are superadded which are inconsistent with the estate of inheritance in the ancestor which the rule gives. Thus, in the leading case of Jenson v. Wright, 2 Bligh's P. C. 1, the devise was in substance to William for life, and then to the heirs of his body, *share and share alike, in tail male in common*; and it was determined, after great consideration, by the House of Lords, that William took an estate tail, out of regard to the general intent. So, in Moore v. Brooks, 12 Grat. 135-143 & seq., a devise to M and B during their natural lives and no longer, and then to be *equally divided* between their heirs, lawfully begotten, was held, by reason of the rule in Shelley's case, to vest the inheritance in M and B. And in Hall v. Smith, 25 Grat. 70, 72 & seq., a bequest of chattels to M for life, and after her death to the lawful issue of her body, *to them and their assigns for ever*, was construed to give M an absolute interest in the chattels; the case being considered as ruled by Jenson

son v. Wright, and Moore v. Brooks, with many others of similar import, collected and reviewed in 2 Jarm. Wills, 271.

The earlier Virginia cases are reviewed by Judge Allen in delivering the opinion of the court in Moore v. Brooks, 12 Grat. 148 & seq.

In Taylor v. Cleary, 29 Grat. 448, 453, the limitation was “to R *for his life only*, and after the death of R, to such person as shall, *at that time*, answer the description of heir or heirs at law of R,” and it was held that the words “*at that time*” showed that the grantor did not contemplate an indefinite succession of heirs, and that the rule, therefore, was *not applicable*.

7<sup>n</sup>. Where the Ancestor takes the Freehold *by implication*.

*e. g.*, Devise to Z for life after the death of A (*devisor's heir*), remainder to W for life, remainder to A's heirs. A takes an estate for life *by implication*, for since Z is not to have the land until *after A's death*, and A is the heir of the deviser, there would be no one to whom it could go unless A took it; and this estate for life by implication unites with the limitation to A's heirs as readily as if it had been granted in express terms. (Fearn's Rem. 40 & seq.)

8<sup>n</sup> Where an Estate of Freehold is Limited to One by Deed, and afterwards, in his Life-Time, under an Execution of a *Power of Appointment* Contained in the same Deed, there is a Limitation to *his Heirs*.

*e. g.*, Limitation to the use of A for life, and after his decease to such uses as Z *shall appoint*, who afterwards, in A's life-time, appoints the use to the *heirs of A*. It being a well understood principle that an appointee claims always *under the instrument which created the power*, it follows that the heirs of A stand in the same position as if the instrument limiting the use to A had afterwards itself made the limitation to his heirs. (Fearn's Rem. 74; Venables v. Morris, 7 T. R. 342, 347.)

9<sup>n</sup>. Where the Subject of the Limitation is a Term for Years, or any other Chattel-Interest.

The rule in Shelley's case is applied in limitations of terms for years, and of personal chattels, nearly as in case of freeholds in lands, *by analogy* thereto. Thus, if a term for one hundred years be given to A for life, and afterwards to A's heirs, these latter words are construed generally to be words of *limitation*, and the whole property vests in A. The only diversity seems to be that a less circumstance is al-



lowed in case of chattels, to show the intention that the lands were intended to take as *purchasers*. (Fearne's Rem. 492 & seq., and n. (a); 3 Lom. Dig. 338.)

The rule has also been applied in limitations of estates *pur autre vie*. Thus, if an estate for *three lives* be given to M for life, and afterwards to *M's heirs*, M takes the whole property. (3 Lom. Dig. 338-'9; Fearne's Rem. 496.)

#### 109. The Application of the Rule in Shelley's Case to *Wills*.

There seems to be no essential difference in the application of the rule to *wills* and to *deeds*. The rule is not a *medium* for ascertaining the intent, but supposes the intent to be ascertained by the methods usually employed therefor. Wills being, for the most part, more complicated in their provisions, and less formal in their phraseology, a difficulty is more frequently experienced in determining the intention in them than in the case of deeds; and this appears to be the only diversity between the two classes of assurance in this particular. Where the estate is so given, that after the limitation of a freehold to the ancestor, it is to go to every person who can claim *as heir to the ancestor*, the word *heirs* must be a word of limitation. That is, if the limitation to the heirs is so calculated and directed that the person claiming under it must entitle himself merely under the description of *heir* to the first taker, in the technical sense of the word; and if there is nothing to restrain the same words from equally extending to, and comprehending all other persons successively answering the same description, or from entitling them alike under it, and *eo nomine* only; then, whether the limitation be contained in a deed or a will, the rule applies, and the ancestor takes an estate of inheritance. (Fearne's Rem. 186 & seq., 194 & seq., 199 & seq.; 2 Th. Co. Lit. 147, n. (P.); Jones v. Morgan, 1 Bro. C. C. 219, &c.; Roe v. Bedford, 1 M. & S. 364, &c.; Taylor v. Cleary, 29 Grat. 448, 452-3.)

#### 110. The Application of the Rule in Shelley's Case to *Trust Estates*.

The important distinction here is between *trusts executory*, where, as generally happens in *marriage articles*, the completion of the limitation is referred to a future conveyance or settlement, which is directed to be afterwards made, and *trusts executed*, where the limitation is finally settled as it is to

stand, and no such executory medium is contemplated. In *executed trusts*, the rule in Shelley's case is applied with scarcely less uniformity than in legal estates; whilst in *executory trusts*, the court regards the end and consideration of the transaction, and will construe the projected limitation to the heirs to carry the inheritance to the ancestor, or to give an estate by way of contingent remainder to the heirs, as will best subserve the apparent intent. (Fearne's Rem. 55, 90 & seq., 114 & seq., 136 & seq., 143 & seq.; 1 Prest. Est. 382 '3 & seq., 387 & seq.; 2 Th. Co. Lit. 145, n. (P.).)

2<sup>m</sup>. The Cases Wherein the Words "Heirs," or "Heirs of the Body," are Considered Words of *Purchase*, and not of *Limitation*, and Wherein, Consequently, the Rule in Shelley's Case *Applies not*; w. c.

1<sup>n</sup>. Where the Ancestor's Freehold is *Equitable*, and the Limitation to the Heirs is *Legal*; or *Vice Versa*.  
*e. g.*, Grant to trustees, *in trust for* A during his life, and after A's death, *in trust for* Z for his life, and after Z's death, to the heirs of A. There can be no union of these limitations. And so there could be no union if the grant were to A for life, and then to Z for life, and after Z's death, to trustees *in trust for* A's heirs. (*Ante*, p. 401, 3<sup>m</sup>; Fearne's Rem. 52, 58 '9, and n. (d); Shelley's Case, 1 Co. 106 b, n. (L, 5), Thomas's ed.) In these cases the heirs take a contingent remainder.

2<sup>n</sup>. Where a Limitation of the Freehold to the Ancestor is Followed by a Remainder to the Heirs of the Ancestor, and of *Another*.

*e. g.*, Grant to A for life, remainder to the heirs of A and B. This is a *contingent remainder* in the heirs of A and B, and not a vested estate of inheritance in A; for though every person may so far be supposed to carry his own heirs in himself, during his life, as that a limitation to them where he takes a preceding freehold may vest in himself, yet no person, as it is quaintly said, can be supposed to include in himself his own heirs, and also those of *somebody else*. (Fearne's Rem. 38, 312; 2 Th. Co. Lit. 144, n. (P.); Denn v. Gillot & als. 2 T. R. 435.)

3<sup>n</sup>. Where the Limitation of the Freehold to the Ancestor is by one Conveyance, and the Limitation to the Heirs is *by Another*.

*e. g.*, Grant to A for life, remainder to the heirs of B, and afterwards grant by A of his life-estate to B, whereby he becomes tenant for the life of A, remainder to his own heirs. The estate to B's heirs

is not executed in B, but is a *contingent remainder* in his heirs. (Fearne's Rem. 71-72.)

It will be remembered, that where an estate is limited by deed to one for life, and afterwards there is a limitation in his life-time to his heirs, under an execution of a *power of appointment* contained in the same deed, the appointment is looked upon as taking effect under the *original deed*, and therefore as giving the inheritance to the ancestor. (Fearne's Rem. 71; *Ante*, p. 407, 8<sup>o</sup>.)

- 4<sup>th</sup>. Where the Limitation of the Freehold to the Ancestor is followed by a Limitation to his *Heirs*, but Accompanied by *Words of Qualification*, or Super-added Limitation.

*e. g.*, Grant to A for life, remainder to the heirs of A *now living*; or remainder to the heirs of A, *who shall then have attained the age of twenty-one years*; or remainder to the *sons of A and their heirs*; or remainder to the *heir of A*, and the *heirs male of the body of such heir*; or remainder to such persons as shall, *at the life-tenant's death*, answer the description of heirs at law of the life-tenant. In all these cases, the subsequent words of limitation are, in general, *words of purchase*, creating a remainder in the party to whom the limitation is made, which will be *vested* if the person is ascertained, and *contingent* if he is not ascertained. (Fearne's Rem. 150 & seq.; *Id.* 178-9, 210; 2 Th. Co. Lit. 145, n. 1<sup>st</sup>; 1 Kent's Com. 220; Archer's Case, 1 Co. 66 b; Lewis Bowles' Case, 11 Co. 30 a; Doe v. Laming, 2 Burr. 1100; Taylor v. Cleary, 29 Grat. 448, 452-3.)

Let it be remembered, however, while such is *in general* the construction of the foregoing limitation, that where a clear manifestation of an intent that the persons who are to take the so-called remainder are the heirs or heirs of the body of the first taker, in *indefinite succession*, the rule in Shelley's case is applicable, notwithstanding the superadded words of modification. (*Ante*, p. 406; Jesson v. Wright, 2 Bligh's P. C. 1; Moore v. Brooks, 12 Grat. 135, 143 & seq.; Hall v. Smith, 25 Grat. 70, 72 & seq.)

- 5<sup>th</sup>. Where the Limitation of the Freehold to the Ancestor is followed by a Limitation to his *Sons*, *Children*, etc.

*e. g.*, Grant to A for life, remainder to the *sons* or *children* of A. These words, *sons* or *children*, do not betoken that indefinite succession which the rule in Shelley's case supposes, and which the words *heirs* or *heirs of the body* import; and they are

therefore words of *purchase*, and not of limitation, vesting a remainder in the *sons*, etc., and not an inheritance in the ancestor. (Fearne's Rem. 150-'51, 153; 2 Th. Co. Lit. 145, n. (P.); Moon v. Stone, 19 Grat. 130, 328-'9; *Ante*, p. 84.)

6<sup>n</sup>. Where the Ancestor takes *no Preceding Estate*, or *not an Estate of Freehold*.

*e. g.*, Grant to A for life, remainder to *Z's heirs*, or grant to A for *ten years*, remainder to A's heirs. In both these cases (and also when the ancestor is dead at the time of the grant), the *heirs* take *by purchase* a contingent remainder, or, in the latter case (when the ancestor is dead), a *vested estate in presenti*, and the words, heirs, or heirs of the body, in such cases fulfill the double function of indicating the *persons to take*, and also of marking the *duration of the estate*. (2 Th. Co. Lit. 145, n. (P.); Fearne's Rem. 82, n. (P.); Id. 80.) But in the case of the grant to A for *ten years*, remainder to A's heirs, the remainder is void. The illustration means only that the word "heirs," in such a case, is not a word of *limitation*, but of *purchase*.

7<sup>n</sup>. Where the Subsequent Limitation is not in the Nature of a Remainder, but of an *Executory Limitation*.

The rule in Shelly's case applies only where the subsequent limitation is after the similitude of a *remainder*, and not when it is an *executory limitation*. The reason seems to be, that an executory limitation is not a part of the same disposition with the preceding estate, but is a distinct and alternative disposition. (Fearne's Rem. 276.)

6<sup>l</sup>. The Doctrine in Virginia Touching the Rule in Shelley's Case.

The statutes of Virginia, imitating those of New York, have very much circumscribed the application of this famous, and, upon the whole, judicious, rule of property. The statute, as contained in the Code of 1887, enacts that, "Wherever any person, by deed, will, or other writing, takes an *estate of freehold* in land, or takes such an estate in personal property as would be an estate of freehold if it were an estate in land, and in the same deed, will or writing, an estate is limited by *way of remainder*, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, the words 'heirs,' 'heirs of his body,' and 'issue,' or other words of like import used in the deed, will, or writing in the limitation therein by way of remainder, shall not be construed as *words of limitation*, carrying to such person the inheritance to the



land, or the absolute estate as to the personal property, but they shall be construed as *words of purchase*, creating a *remainder* in the heirs, heirs of the body, or issue." (V. C. 1887, ch. 107, § 2423.)

The intent of this statute as contained in the Codes of 1849 and 1873, was to abolish the rule, but as originally transcribed from the New York Code into ours, it imperfectly accomplished the result. The rule applies to all cases where the ancestor takes *any estate or freehold*, with remainder to his heirs, etc., whilst the statute, until the Code of 1887, prescribed a different construction only in those cases where the limitation to the ancestor is *for his life*. The terms of the statute, therefore, were not applicable where the limitation was to the ancestor *for the life of another*, nor, indeed, for any other freehold estate, save only *for his own life*. But the present statute obviates this incongruity, being co-ordinate with the rule itself.

#### 18. Certain General Principles Applicable to Contingent Remainders.

These general principles relate to (1), The character of the particular estate which must precede a contingent remainder; (2), The period within which a contingent remainder must vest in interest; (3), The nature of the contingency upon which it must be limited; (4), The disposition of the inheritance pending the contingency; (5), The effect of the intervention of a contingent remainder between the particular estate and the remainder over; (6), The effect of a contingency annexed to a precedent estate, on the ulterior limitations; and (7), The transmissibility of contingent remainders;

W. C.

##### 1<sup>h</sup>. The Character of the Particular Estate which must Precede a Contingent Remainder.

Supposing the contingent remainder to be one of *freehold*, we have already seen (*Ante*, p. 391, 1<sup>f</sup>) that it must be preceded by an estate of freehold, or else there would be none to whom, at common law, the *livery of seisin* could be made. (Ferne's Rem. 281; 2 Bl. Com. 168, n. (9).)

##### 2<sup>o</sup>. The Period within which a Contingent Remainder must Vest in Interest.

We have already seen (*Ante*, p. 393, 3<sup>f</sup>, &c.) that it must vest in *interest* or *right*, during the continuance of the particular estate, or *eo instanti* that it determines; because else there would be an interval between the *two parts* of the estate, namely, the particular estate and the remainder, which would prevent them from being one and the same estate, as the definition of a remainder re-

quires. It will be remembered that our statute in Virginia obviates any failure of the remainder from this cause, without the device of trustees to preserve it, by providing that "a contingent remainder shall in no case fail for want of a particular estate to *support it*." (V. C. 1873, ch. 112, § 12; V. C. 1887, ch. 107, § 2424; 1 Lom. Dig. 595 & seq., 570-71; 2 Bl. Com. 171-2, 169, and n. (13), 168; Fearn's Rem. 307-8.)

3<sup>h</sup>. The Nature of the Contingency upon which a Contingent Remainder must be Limited.

Let us observe (1), The dependence of the contingency upon an illegal event; (2), The remoteness of the contingency; (3), The contingency's enuring to defeat the particular estate; and (4), Words importing time, and not contingency;

W. C.

1<sup>i</sup>. The Dependence of the Contingency upon an *Illegal Event*.

The law will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law, for that, says Lord Coke, is "*potentia remotissima et vana*, which, by intendment of law, *nunquam venit in actum*." Hence, a remainder to an *unborn*, or rather to an *unbegotten bastard*, it is said, is void, for "the law does not favor such a generation." The legality of a contingency on which a remainder is limited becomes sometimes a question in connection with limitations over, by way of remainder, upon attempts to alien, charge, or otherwise dispose of the subject, or in the event of insolvency or bankruptcy, being taken in execution, or in any way becoming liable to be vested in a stranger; and such limitations seem to be recognized as legal, notwithstanding they may operate to screen the subject from the debts of the owner. So far as that result is concerned, however, it would appear that the property must not move *from the party* for whose benefit the stipulation is made, who cannot be permitted to hedge his effects about with exemptions from liability for his own debts, however a stranger may so contrive that what he gives to another shall be thus exempt from the debts of the donee. (Fearn's Rem. 249, and n. (a); Cholmley's Case, 2 Co. 51 b; 2 Th. Co. Lit. 128, n. (F.); Lockyer v. Savage, 2 Stra. 947; Kidney v. Coussmaker, 1 Ves. 436, Sumner's note; *ex parte* Cooke, 8 Ves. 353, and Sumner's note; Shree v. Hale, 13 Ves. 407, and Sumner's note; Higginbotham v. Holme, 19 Ves. 91.)

2<sup>i</sup>. The Remoteness of the Contingency.

It is requisite that the possibility upon which a remainder is to depend should be a common possibility,

and *potentia propinqua*, as death, or death without issue, or conveyance, or the like, and not *potentia duplex aut remota*. Hence, a remainder to a *named* corporation *not coming* at the time of the limitation is void, although it be created during the continuance of the particular estate. So a lease for life, remainder *to the heirs of A*, is good, because, by common possibility, A may die during the particular estate; yet if there be *no such person* as A at the time of the limitation, the remainder is void, although such a person as A should be born, and die during the life of the tenant for life, yet his heir shall not take by virtue of such limitation. So, also, a remainder limited to the *first-born son of B*, who has no son then born, is valid because dependent upon a common possibility; but if limited to the *first-born son of B, named Thomas*, B having then no son, this is void. In each of these cases, the possibility upon which the void remainders are limited amounts to the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it. Thus, in the instance secondly above-stated, that such a person as A should come into being is a very contingent event, and that he should die during the particular estate is another uncertainty grafted upon the former. This is called a *possibility upon a possibility*, which is never admitted. And thus future limitations by way of *remainder* are kept within very narrow limits in respect to inalienability, in no case by possibility exceeding a life or lives in being, and a few years over. (Fearn's Rem. 250; 1 Th. Co. Lit. 128, n. (F.); Cholmley Case, 2 Co. 51 b. But see Wms. R. Prop. 253, and n. 2.)

### 3. The Contingency's Enuring to Defeat the Particular Estate; &c.

- (1) Cases where the Contingency is Repugnant to some Rule of Law or Contrariant in Itself, or Inconsistent with the Nature of the Particular Estate.

Those cases where the *contingency* upon which the subsequent limitation is intended to take effect is *repugnant to some rule of law*, or *contrariant in itself*, or *inconsistent with the quality or nature* of the particular estate, and where, consequently, the remainder is void, demand special attention.

Thus, a contingency upon which a remainder is limited must determine or avoid *the whole*, and *not a part only*, of the estate to which it is annexed; and, therefore, a limitation whereby a preceding estate for life or in tail is interrupted for a certain period, to be again afterwards revived, with a remainder following,

is not admissible, and the remainder is void. Suppose, for instance, that there is a grant to A *in tail*, provided that if A make any attempt to *alien or discontinue* the estate-tail, the same shall absolutely cease *during his life*, as though A were *naturally dead*, and thereupon the premises shall *remain* to B for the residue of A's life, and after A's death shall remain and descend to the heirs of A's *body*, as if no interruption had occurred; the remainder limited to B is void, because it is limited upon a contingency *repugnant to the rule of law* above-mentioned, namely, that the *whole*, and not a *part only*, of an estate must be avoided by a proviso, or else the same is of no effect. The remainder is further void, because the proviso is *repugnant to the nature and quality* of an estate-tail in prohibiting the alienation thereof, even *by fine*, etc. And again, the remainder is void, because the proviso is *contrariant in itself*, proposing to determine the estate-tail *as if tenant in tail were dead*, whereas such an estate is not determined by the tenant's *death*, but by his death *without issue*. And, finally, the remainder is void, because the proviso upon which it is limited proposes to *defeat* the preceding estate, so that the remainder *does not await the regular expiration* of that estate. (Ferne's Rem. 252 & seq.; Corbet's Case, 1 Co. 84 a. and n. (T.), 85 a.; Mildmay's Case, 6 Co. 40 b. 41 a.)

2<sup>k</sup>. Those Cases where the Contingency Enures to *Defeat the Particular Estate*.

The remainder, by its definition, must await the *regular expiration* of the preceding estate, and cannot take effect *in derogation* thereof. Under the preceding head (1<sup>k</sup>), an instance of such a case was mentioned. In case of a gift *in tail* to A, with condition not to alien in fee *by feoffment*, remainder to B in fee, the condition, prohibiting, as it does, not *fine*, etc., which are legitimate modes of aliening a fee-tail, and cannot lawfully be restrained, but a conveyance which is wrongful, is a lawful and valid condition; yet the remainder limited thereupon *is void*, because it can only take effect in derogation of the preceding estate, and also because, at common law, A's estate can only be determined by the re-entry of the grantor, &c., which, as we have seen, defeats the remainder, as well as the particular estate. Further to illustrate this proposition, suppose a grant to A *until Z returns from abroad*, and then remainder to W's unborn son, in fee. This is a valid remainder; but if the limitation had been to A *for life*, and if Z return from abroad, remainder *immediately* to W's unborn son in fee, the



remainder would have been void for the cause stated. (*Tourne & Rom.* 261 & seq.; 2 Th. Co. Lit. 28, 128, n. (F.); *Colthirst v. Bejushin*, 1 Plowd. 24, and 24 a.)

But whilst no remainder can be valid which is limited to take effect in derogation of the particular estate, it must be observed, that if the contingency has no effect in abridging the particular estate, the remainder may be good; and this consideration will sometimes control the construction (*ut res valeat*, etc.) so as, in a doubtful case, to justify the inference that the words of contingency were not intended to limit the estate of the particular tenant, but to mark the taking effect of the remainder. Thus, if land be granted to A for life, and if Z marry W, then remainder to B, the contingency shall not be understood as shortening A's life estate (for that would avoid the remainder), but as constituting the event upon which B's remainder is to *vest in interest*: awaiting, however, the expiration of A's life estate before it comes into possession. (*Fearne's Rem.* 362-3; *Colthirst v. Bejushin*, Plowd. 23 & seq.)

F. Words Importing *Time*, and not *Contingency*.

—*q.*, Grant to A until B attains the age of twenty-one years, and *when B attains that age* then to B and his heirs. The words "when B attains that age," might seem to import a contingency, and to amount to a condition precedent that B shall attain that age, but in fact they only denote *the time* when the remainder to B, which is a *vested remainder*, is to *vest in possession*. *Boraston's case*, 3 Co. 21 a & b, illustrates this doctrine. It was a devise of land for eight years, remainder to testator's executors until H. B. should *attain the age of twenty-one years*: and *when the said H. B. shall come to his age of twenty-one years, then* to him in fee. The remainder in H. B. was regarded as a vested remainder, the words *when* and *then* importing, not contingency, but only the *time* when H. B.'s remainder should come *into possession*: so that, although H. B. died before attaining his age of twenty-one, yet his remainder *passed to his heirs*. It seems that wherever these adverbs *when* and *then* refer to events which *must of necessity happen* (as in *Boraston's case*, the end of the executor's term), there they make *no contingency*, but mark only the *time* of vesting in possession. (*Fearne's Rem.* 242 & seq.; *Brimfield v. Crowder*, 1 Bos. & Pul. (N. R.) 313; *Doe v. Norwell* 1 M. & S. 334; *Goodright v. Parker*, 1 M. & S. 695; *Doe v. Moore & als.* 14 East. 601.)

When the future limitation is an *immediate one*—that is, not preceded by any prior disposition (in which case it is not a remainder, but an executory limitation)—the

same doctrine applies in the case of *lands* in case of *chattels*, the doctrine is applied with qualifications, 2 Lom. Ex'ors, 111 & seq., and the words *when*, etc., denote *time*, and not *contingency*. (Doe v. Moore & als. 14 East, 601; Doe v. Norvell, 1 M. & S. 334; Edwards v. Hammond, 3 Lev. 132; Bromfield v. Crowder, 1 Bos. & Pul. (N. R.) 313.)

4<sup>th</sup>. The Disposition of the Inheritance *Pending the Contingency*.

Where a remainder of inheritance is limited in contingency by way of use, or devise, or grant (8 & 9 Vict.), the inheritance pending the contingency, if not otherwise disposed of, *remains in the grantor* or his heirs, or in the devisor's heirs, until the contingency happens to take it out of them. Thus, upon a devise to A for life, remainder to Z's heirs, the fee descends upon and remains in the devisor's heirs until by Z's death his heirs are developed and ascertained, and then it devolves on them. (Ferne's Rem. 351 & seq.; Sir Edw. Clere's Case, 6 Co. 17 b; Leonard Lovies' Case, 10 Co. 78, 85 b; Purefoy v. Rogers, 2 Saund. 380.)

Where the limitation of the contingent inheritance is contained, not in a conveyance by way of use, or devise, or grant, but in a conveyance operating at common law, a less uniform doctrine prevails as to the disposition of the inheritance, pending the contingency. Some have held that, in case of a lease to A for life, remainder to the heirs of B (B being living), no estate at all remains in the grantor, and that he cannot enter for the forfeiture, in case of a feoffment in fee by the tenant for life; whilst others, though disinclined to admit that any estate remains in the grantor in such case, still allow him a right of entry for any forfeiture incurred by tenant for life, as well as on the determination of his estate by death before the contingency happens. These opinions are founded on an assumption that the *remainder* must pass out of the grantor *at the time of the livery*; and consequently that no estate shall remain in him after such livery; and, therefore, in the case supposed (of a lease to A for life, remainder to the heirs of B), they say the remainder is in *abeyance*, or *in nubibus*, or *in gremio legis*; though by way of compromise between common sense and the supposition of the inheritance passing out of a man, where there is no person *in rerum natura*, no object, as Mr. Ferne says, besides hard, and hardly intelligible, words for the reception of it at the time of the livery, they are compelled to admit such a species of interest to remain in the grantor as entitles him to enter and re-assume the estate, in the event that the particular estate determines

before the contingent remainder can take place. But if the inheritance passes at all, it seems to be a necessary conclusion that it *passes to somebody*; whilst if it does not *pass to anybody*, one might reasonably suppose that it *does not pass at all*. However profound a solution of this difficulty, as Mr. Fearne observes, may be discoverable by legal adepts, in the expressions “in abeyance,” “*in vacuibus*,” or “*in gremio legis*,” it really seems a more arduous undertaking to account for the operation of a feoffment in annihilating the inheritance, or transferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event, than to reconcile to the principles, as well of common law as of common sense, a suspension of the complete operation of such feoffment, in regard to the inheritance, until the intended channel for its reception comes into existence. The inheritance was in the grantor or testator at the time of making the limitation, and it is confessedly not included in it. The natural conclusion seems to be that it remains where it was, namely, in the grantor, or in the testator’s heirs. When the future disposition takes effect, then the interest passes pursuant to the terms of the limitation; but if such future disposition fails of effect, either by reason of the determination of the particular estate, failure of the contingency, or otherwise, what is there then to draw the inheritance out of the grantor or his heirs, or the heirs of the testator? (Fearne’s Rem. 360 & seq.; 2 Bl. Com. 107, n. 8.)

5. The Effect of the Intervention of a Contingent Remainder between the Particular Estate and the Remainders Over: *W. C.*

1. Where the Intervening Contingent Remainder is *Not in Fee-Simple*.

Where the intervening contingent remainder is *less than a fee-simple*, the remainder limited afterwards will be vested or contingent according to the terms of the limitation. There is no *necessity*, in the nature of things, that it should be *contingent*. (Fearne’s Rem. 223 & seq.)

2. Where the Intervening Contingent Remainder is *in Fee-Simple*.

Where there is a contingent limitation in fee-simple absolute, no estate limited afterwards *can be vested*. Thus, a devise to A for life, remainder to his issue male and *his heirs* for ever, and if he die without issue male, remainder to B in fee, was held to create in B a contingent remainder, because the preceding limitation to the issue of A was contingent and *in fee*. (*Ante*, p. 401; Fearne’s Rem. 225, 229, 30.)

Upon this principle it has been sometimes insisted

that when an estate is subjected to a power of appointment in fee-simple, to be exercised by the first taker, with remainder over in default of such appointment, the existence of the power suspends the effect of the subsequent limitation, and keeps it contingent until the exercise of the power becomes impossible. (*Leonard Lovies' Case*, 10 Co. 85 a; *Walpole v. Ld. Conway*, 3 Barnard. Ch. R. 153; *Smith v. Ld. Camelford*, 2 Ves. Jr. 704-708.) The better opinion, however, is believed to be that any such subsequent remainder, which would not be otherwise contingent, is not made so by the intervention of the power of appointment, but is *vested*, subject, however, to be *divested* by a subsequent execution of the power. Thus, where by marriage settlement lands were limited to the wife, as separate estate, for her life, remainder to the husband for life, and then to such of the children of the marriage for such estates and in such parts and proportions as the husband and wife should appoint, and, in default of appointment, remainder to the children of the marriage, as tenants in common, in fee-simple, it was held that, notwithstanding the power of appointment in the father and mother, the remainder to the children was *vested*, being liable, however, to be divested if an appointment should be made. (*Doe v. Martin*, 4 T. R. 39. See *Fearne's Rem.* 229-232; 2 Sugd. Powers (3d Am. ed.), 2-4; *Idle v. Cooke*, 2 Ld. Raym. 1150; *Madoc v. Jackson*, 2 Bro. C. C. 588; *Vanderzee v. Aclom*, 4 Ves. 787; *Reade v. Reade*, 5 Ves. 748; *Maundrell v. Maundrell*, 10 Ves. 265; *Cholmondeley v. Clinton*, 2 Jac. & Walker, 40; *Osbrey v. Bury*, 1 Ball & Beat. 53, 57; *Campbell v. Sandys*, 1 Sch. & Lefr. 293.) The same doctrine applies also to *personalty*; and where money is absolutely given over in default of appointment, the gift over is *vested*, subject to be divested by the execution of the power. (2 Sugd. Powers (3d Am. ed.), 5; *Gordon v. Levi*, 1 Ambl. 364, 365; *Coleman v. Seymour*, 1 Ves. Sr. 209; *Ld. Teynham v. Webb*, 2 Ves. Sr. 208; *Cholmondeley v. Meyrick*, 1 Eden, 77; *Earl Salisbury v. Lambe*, 1 Eden. 465; *Rooke v. Rooke*, 2 Eden. 8; *Reade v. Reade*, 5 Ves. 748.)

6<sup>h</sup>. The Effect of a Contingency Annexed to a Precedent Estate on the *Ultior Limitations*; w. c.

- 1<sup>i</sup>. Limitations after a Preceding Estate, which is Made to Depend on a Contingency that *Never Takes Effect*.

In this case the contingency affects only that estate to which it was at first annexed, without extending to the ulterior limitations. Thus, there was a devise to Z, the testator's son, for life, remainder to Z's first and other sons, by *any future wife*, in tail, with a *proviso* that if Z



should afterwards intermarry with anybody *akin to M. A.*, *Z's then wife*, the foregoing limitations to the issue of such future marriage should cease and determine, and the estate should pass to the testator's brother's children. After the testator's decease, M. A. died, and then Z. died, without issue, and without having married again. The contingency of the son's marrying again, in the manner prescribed, was held to affect only the estates limited to his future issue, and the limitation to the brother's children was sustained. Again, a testator, who had three sisters, for whom he wished to provide, one of whom, however, was married, and during her husband's life would need, as he thought, no assistance, devised lands to trustees in fee, in trust to receive the rents and profits, and pay the same to his sisters E and M, until the decease of the husband of his sister S, and, *in case S should then be living*, to pay the same thenceforward to the three sisters severally, in thirds, for their lives, with remainder, severally, to their first and other sons in tail, remainder over. The married sister, S, died in her husband's life-time, without issue, and afterwards the other sisters died without issue. It was held that the contingency of *S's surviving her husband* related only to her own life-interest in the rents and profits of the lands, and that the subsequent limitations were not affected thereby, and consequently took effect. (Fearn's Rem. 234 & seq.; Bradford v. Foley, 1 Dougl. 43; Horton v. Whitaker, 1 T. R. 346; Napper v. Sanders, Hutt. 119.)

The construction, in these cases, appears to depend on the testator's *apparent intention* not to extend the contingency beyond the estate to which it is annexed. If he seems to have contemplated no distinction, the contingency will equally affect the whole chain of ulterior limitations. Thus, in case of a devise to W. H., the testator's son, in tail, and *if testator's wife should survive W. H.*, and he die without issue, remainder to her for life, remainder to M. S. for life, and after her decease (the said W. H. *being dead without issue as aforesaid*), remainder over, the testator's wife having died before W. H., it was held that the intent was to make, not the wife's life-estate alone, but the whole train of subsequent limitations, dependent on the contingency of the son's surviving W. H. (as was shown especially by his renewing the mention of it in connection with the last), and that the contingency having failed, the subsequent limitations never took effect. (Davis v. Norton, 2 C. Wms. 393; Doe v. Shepard, 1 Dougl. 75; Fearn's Rem. 236.)

2<sup>d</sup>. Limitations Over upon a *Conditional Determination* of a Preceding Estate, where such Preceding Estate *never Takes Effect*.

In general, the subsequent estates are allowed to take effect, it being supposed that the preceding limitation is not a *condition precedent* thereto. Thus, in case of a devise to trustees *for seven years*, remainder to the first and other sons of B, in tail, *provided they should take the testator's surname*; and if they would not, or should die without issue, remainder to the first son of C, remainder over. B died without having had any son; C had a son at the time of the devise; it was admitted that the limitation to B's sons was good *only as an executory devise*, the preceding estate not being an estate of freehold, and it was held that the limitation to the son of C was valid and effectual. (Fearn's Rem. 237; Scattergood v. Edge, 1 Salk. 229; Doe v. Scott, 3 M. & S. 305.)

3<sup>d</sup>. Limitations Over upon the Determination of a Preceding Estate *by a Contingency*, which (though such Preceding Estate *takes Effect*), *never Happens*.

In general, where the preceding estate takes place, and the condition is *not performed*, the remainder will not take effect at the expiration of such preceding estate, save where the apparent general intention calls for it. Thus, in case of a devise to the testator's wife for life, upon *this express condition only*, that if she should marry again the property should go *forthwith* to his eldest son in tail, remainder over, Lord Hardwicke, chiefly upon the language used in stating the contingency, held that the limitation in tail to the son was not *vested*, but contingent upon the wife's marrying again, which she did not do. (Fearn's Rem. 238 & seq.; Sheffield v. Orrery, 3 Atk. 282; Luxford v. Cheeke, 3 Lev. 125.)

Lord Hardwicke, in Sheffield v. Orrery, seems to have overlooked, or at least to have disregarded, the force of the word *forthwith*, and to have treated the remainder to the son as designed to await the expiration of the wife's life-estate. (*Ante*, p. 415.)

7<sup>th</sup>. The Transmissibility of Contingent Remainders.

A contingent remainder of inheritance is transmissible by descent to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens, supposing the existence of the remainderman not to enter into and make part of the contingency itself, upon which the remainder is intended to take effect. And wherever a contingent remainder is descendible, it is, independently of any statute, *devisable* by will. (Fearn's Rem. 364-5; 1 Lom. Dig. 601-2; V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418.)

As to conveyances *inter vivos*, while vested remainders lying in grant as they do, pass by deed without livery, a contingent remainder is a *mere right*, and except in equity, cannot at common law be transferred before the contingency, otherwise than *by estoppel*, as by matter of record or of deed indented. This matter, however, is assisted in Virginia by statute, which provides that *any interest or claim to real estate may be disposed of by deed or will*; and perhaps it is reasonably susceptible of doubt whether there can be with us any operation of a conveyance by way of *estoppel*, it being declared that no conveyance shall *operate further than as an alienation of such right or interest as the grantor may lawfully convey or assure*. (Fearne's Rem. 365; 1 Lom. Dig. 602; V. C. 1873, ch. 112, §§ 5, 7; V. C. 1887, ch. 107, §§ 2418, 2419.)

Provision is also made by statute with us, for the sale, under the direction of a *circuit or corporation* court of chancery, of all *contingent interests*, at the instance of the person holding the estate subject to such contingent limitation. All the persons living and contingently interested are to be made parties defendant to the bill. The bill, which must be verified by affidavit, is to set forth the facts which are supposed to justify the sale; and it must be proved by witnesses that the interest of all persons directly or contingently interested in the estate will be promoted thereby. Any infant or insane defendant must have a guardian *ad litem*, who, as well as the infant (if over fourteen years of age), shall answer the bill on oath, in proper person; and no deposition can be read in such suit against any infant or insane party unless it be taken in the presence of the guardian *ad litem*, or upon interrogatories agreed on by him. But no decree of sale of such contingent estate is to be made if the deed or will creating the estate forbids it; and in all cases the proceeds of the sale under the devise are to be invested for the use and benefit of the person so holding the estate, subject to the limitations of the deed or will creating the estate. Lastly, it is expressly declared that the decree rendered in such suit shall be as binding upon all persons who may be born thereafter, and become interested in the said estate, in like manner, and to the like extent, as it is upon the parties to the said suit. (V. C. 1873, ch. 112, §§ 20 to 24; V. C. 1887, ch. 107, §§ 2432 & seq.; Faulkner & als. v. Davis, 18 Grat. 651, 667; Troth v. Robertson, 78 Va. 46.)

Doctrine Touching the Destruction of Contingent Remainders.

The destruction or determination of the mere *transfer*

to another), of the particular estate before the remainder is ready to vest *in interest*, always *at common law* defeats the remainder, in pursuance of that characteristic feature already adverted to, that a remainder must vest in right *during the continuance* of the particular estate, or *eo instanti* that it determines. (1 Bl. Com. 171; V. C. 1873, ch. 112, § 12; V. C. 1887, ch. 107, § 2424; *Ante*, p. 392.)

A contingent remainder, therefore, may fail as to one part, and take effect as to another, wherever the particular estate is in several persons, as tenants in common or in severalty, or the remainder is limited to several, some of whom may come *in esse* before the determination of the particular estate, and others not. (2 Th. Co. Lit. 137, n. (K.)) Thus, if lands be limited to A and B as tenants in common, or in separate portions, for their lives respectively, remainder to the heirs of Z, and A dies in the lifetime of Z, the remainder at common law will fail as to A's part of the land, whereas supposing B to survive Z, it will be good as to B's. And so if land be limited to A for his life, remainder to the *unborn children* of Z, the remainder will be good as to so many of Z's children as are born in A's life-time, and void as to those born afterwards.

Let us observe, (1), The modes whereby the particular preceding estate may be brought to an end; and (2), The methods whereby the destruction of contingent remainders is prevented;

W. C.

1<sup>h</sup>. The Modes whereby the Particular Estate may be Brought to an End; w. c.

1. The Regular Determination of the Particular Estate.

See Fearn's Rem. 316; 2 Bl. Com. 171.

2. Forfeiture of Particular Estate by Tenant Thereof.

This forfeiture may ensue from various acts of the tenant, calculated to prejudice the reversioner or remainderman; *e. g.*, the alienation by *feoffment*, or other *tortious* conveyance, of a greater estate than the tenant is possessed of (*aliter* in Virginia, V. C. 1873, ch. 112, § 7; V. C. 1887, ch. 107, § 2419); disclaimer in a court of record to hold of the lord, etc. (*Ante*, p. 111, 3<sup>h</sup>; 2 Bl. Com. 274 to 276, 171; 1 Lom. Dig. 820-21; *Id.* 592 & seq., 595; 2 Th. Co. Lit. 138, n. (K.))

Upon the grantor's entry for a breach of the condition *in law* here supposed, he is for some purposes seised *under*, and not *paramount to*, the grantee (*Ante*, pp. 56-7, 131-2, 172, 263, 267-8; 2 Th. Co. Lit. 117); so that he cannot avoid the charges and incumbrances created by the grantee of the particular estate, as he would in the case of a condition *in deed*. (2 Th. Co. Lit. 99, n. (W. 2.); *Id.* 117; Bac. Abr. Conditions, (O.) 4.) But the particu-



my estate is by such entry *defeated* (not merely *transferred*), although it seems the grantor is not seised as of his original estate, but only of an estate of like duration as that of the particular estate which his entry determined. (2 Th. Co. Lit. 117.) Hence, such a forfeiture and consequent entry defeats a *contingent*, but does not affect a *vested* remainder, the latter taking effect in possession, at the time originally proposed.

### 3. Merger of the Particular Estate.

Whenever the particular estate and the inheritance *come together* in the same hands, *by act of the parties* (except where the coalition occurs by the instrument which created the particular estate and the remainder), the particular estate is merged, and ceases to exist, and the intermediate contingent remainders depending on such particular estate are, at common law, destroyed. Thus, if A be tenant for life, remainder after the death of Z to B for life, remainder to W in fee, and whilst B's remainder is in contingency A buys W's remainder in fee, A's life estate is thereby *merged*, and B's contingent remainder is destroyed. (Ferne's Rem. 340; *Purefoy v. Rogers*, 2 Saund. 386.)

## 2. The Methods whereby the Destruction of Contingent Remainders is Prevented; w. c.

### 1<sup>st</sup> The Method Employed in England.

The method formerly employed in England to prevent the destruction of contingent remainders, by reason of the determination or destruction of the particular estate pending the contingency (which is said to have been invented by Sir Orlando Bridgeman and other eminent counsel during the time of the civil wars, A. D. 1643 to 1660), is by the intervention of an estate to trustees for the residue of the period of the particular tenant's estate, and until the remainder is ready to vest in interest, to commence whenever his estate shall come to an end. Thus, an estate is limited to A for life, remainder, in case that estate should come to an end, or be in any wise destroyed before the subsequent remainder is ready to vest in interest, to a trustee, Z, and his heirs, *until* the contingent remainder is ready to vest in interest, remainder to B's unborn son. (2 Bl. Com. 171-2; *Ferne's Rem.* 326 & seq.; 1 Lom. Dig. 595 & seq.; 2 Th. Co. Lit. 137, n. (K.).) But by statute of 1845 (7 & 8 Vict. c. 76), a provision is made very similar to that of our own law, namely, that a contingent remainder shall not be liable to fail, or to be destroyed, or barred, merely by reason of the destruction or merger of any preceding estate before the vesting of the remainder or the determination of such preceding estate, by any other means

than the natural effluxion of time, or some event on which it was in its creation limited to determine. (Hill, Trustees, 490, 491.)

2<sup>d</sup>. The Method in Virginia whereby the Destruction of Contingent Remainders is Prevented.

We have a very comprehensive statutory provision which saves the remainders, in all cases, whatever may become of the particular estate, namely, that “a *contingent* remainder shall *in no case* fail for want of a particular estate to *support* it.” (V. C. 1873, ch. 112, § 12; V. C. 1887, ch. 107, § 2424.)

After so very pervasive a provision as this, it seems unnecessary to have retained the previously devised and more partial enactments looking in the same direction. However, it is provided that “the alienation of a particular estate on which a remainder depends, or the union of such estate with the inheritance by purchase or descent, shall not operate, *by merger or otherwise*, to defeat, impair, or otherwise affect such remainder.” (V. C. 1873, ch. 112, § 13, V. C. 1887, ch. 107, § 2425; 1 Lom. Dig. 598.)

2<sup>d</sup>. Reversions.

The doctrine connected with reversions may be set forth under the several heads of (1), The nature of a reversion; (2), Its incidents; (3), Reasons for distinguishing reversions from remainders; (4), Assistance provided to enable reversioners and remaindermen to ascertain the death of their predecessors; and (5), Merger of the particular estate in the reversion; W. C.

1<sup>e</sup>. The Nature of a Reversion.

A reversion is the remnant of an estate *continuing in the grantor* undisposed of, after the grant of a part of his interest. It differs from a *remainder* in that it arises *by act of the law*, whereas a remainder is *by act of the parties*. A reversion, moreover, is the remnant *left in the grantor*, whilst a remainder is the *remnant of the whole estate disposed of*, after a preceding part of the same has been given away. It is called a *reversion* from the *returning* of the *land* to the possession of the grantor or his heirs, after the estate granted is ended. “A reversion (*reversio*) cometh,” says Lord Coke, “of the Latin word *revertor*, and signifieth a returning again; and therefore *reversio terre est tanquam terra revertens in possessione donatori, sive heredibus suis post donum finitum*,” etc. (1 Th. Co. Lit. 138; 2 Bl. Com. 175.)

From the nature of a reversion it is obvious, as has been said, that it is not *created*, but arises by *construction of law*, and that it supposes that the grantor has not parted with his *whole estate*. Hence, upon the grant of a *fee-simple*, whether absolute or qualified, there can be *no reversion*, for the fee-

people is always the whole: but wherever one assigns his *whole estate*, whether that be in fee, or for life or years, there being no remainder left in him, nor the possession returning to him, there is in like manner no reversion. A distinction is made, however, between a *reversion* which is an estate vested *in presenti*, although to be enjoyed *in futuro*, and capable of being transmitted by descent, devise, or grant, and a mere possibility of *reverter*, such as before the statute *de donis conditionalibus* existed in the case of *conditional fees* (*Ante*, p. 88, 27), and now exists in all cases where the fee is limited in contingency, as in base or qualified fees, and in grants to a perpetuated corporation *during its existence*, or to A for life, remainder to B's *unborn* son in fee. (2 Bl. Com. 175; 1 Lom. Dig. 603, 4.)

Wherever one possessed of lands grants a *smaller estate* than his own, he has a reversion; that is, as soon as his grantee's *estate* is complete and ended, the possession will revert or *return to him*. A lessor seised in fee leases for years; the lessee's *estate* does not begin *until he enters*, and until then, therefore, the lessor has not the reversion. (1 Lom. Dig. 604.)

One cannot be said to be *seised* of a reversion, but *entitled* to it by a *vested* right, which the law is as careful to protect as it is to guard those of the tenant in possession; and we have seen that, at common law, if a particular tenant aliened by a *tortious* conveyance a greater estate than he had, he thereby *divested* the reversion, and converted the reversioner's right of *entry* into a right of *action*, whereby a forfeiture of the particular estate was incurred, and the reversioner was admitted to enter immediately for the *forfeiture*. Another instance of the care with which the law has guarded the reversioner's rights is found in the provision allowing the landlord to appear and be made a defendant with, or in place of, his lessee, wherever the lessee has been sued for the land by one claiming against the landlord's title. (1 Lom. Dig. 603; *Ibid.*, p. 111, 1<sup>st</sup>; V. C. 1873, ch. 131, § 5; V. C. 1887, ch. 124, § 2726.)

In case of *waste* committed upon the premises by the tenant, or by a stranger, the reversioner is always entitled to an action of *some sort* to redress the injury. He can only bring a *suit of waste* against the tenant when he has the *immediate possession in fee*, and when the injury is technically *waste*; that is, a permanent injury to the *inheritance*. Against a *stranger* (not his tenant), or when he has not the *immediate* reversion, or not the *reversion in fee*, or the injury is not technically waste, and yet prejudicial to his interests, and in Virginia in all cases, his remedy at law is by action of *trespass on the case*; and in equity he may have an *injunction*, when the injury, if not prevented, would be irremediable, and in-

capable of compensation by damages, as injuries in the nature of waste are generally assumed to be. (4 Kent's Com. 355, 78 & seq.; 3 Th. Co. Lit. 241 & seq., and n. (M.); V. C. 1887, ch. 126, § 2778.)

## 2<sup>e</sup>. The Incidents to a Reversion.

The incidents to a reversion are (1), Fealty; and (2), Rent;

W. C.

### 1<sup>f</sup>. Fealty.

Fealty is merely the outward token and recognition of the relation of landlord and tenant; and although the outward expression has fallen into disuse with us, the *relation*, of course, may subsist, and indeed, even in England, the *relation* is understood to be referred to, rather than the *ceremony*, when the word is used there. In this sense, as the mere recognition of the fact of the relation of landlord and tenant, it is manifest that fealty is an *inseparable concomitant* of the reversion, *ex vi termini*.

### 2<sup>f</sup>. Rent.

Rent is an *usual*, but not, like fealty, an *inseparable* incident to the reversion. If no rent were originally reserved upon the creation of the particular estate, of course none belongs to the reversion; and even though rent were reserved, yet the reversion may be granted excepting the rent, or the rent excepting the reversion. A grant of the reversion, however, if there be nothing to the contrary in the grant, carries the rent with it, as an incident thereto. (2 Bl. Com. 176; 1 Lom. Dig. 605; 4 Kent's Com. 355-6.)

## 3<sup>e</sup>. Reasons for Distinguishing Reversions from Remainders.

To confound things differing in nature, because of some resemblances, is always undesirable, if for no other reason, because it tends to indistinct habits of thought; but besides this general consideration, there is a particular propriety in making a discrimination here. Let us note (1), The incidents which belong to a reversion, and not to a remainder; and (2), The difference in the modes of descent, and in the liability for the debts of a decedent;

W. C.

### 1<sup>f</sup>. The Incidents which belong to a Reversion, and not to a Remainder.

Fealty and rent are these incidents, which do not attach themselves as of course to a remainder, whilst they belong, as we have seen, to a reversion, the former inseparably, and the latter generally.

### 2<sup>f</sup>. The Difference in the Modes of Descent, and in the Liability for Debts; w. c.

### 1<sup>g</sup>. The Difference in the Modes of Descent of a Reversion and of a Remainder Respectively.

At common law, a reversion descends like the *old inheritance*, of which, indeed, it is a part, in the same line there-



with, and keeping to the blood of the *same first purchaser*; whilst a remainder is a *new estate* acquired by purchase, and passes in the line of the *new purchaser*. (2 Bl. Com. 176, 243.)

This difference does not exist in Virginia. An estate acquired by purchase descends with us precisely like an estate derived by descent, whether it be the old inheritance, or a new purchase. (V. C. 1873, ch. 119, §§ 1, &c.; V. C. 1887, ch. 113, §§ 2548 & seq.; 1 Lom. Dig. 607.)

## 2. The Difference in Respect of the Liability for Debts, between a Reversion and a Remainder.

The remainderman is not liable for the general debts of the grantor from whom he derived it, without a *specific charge*, whilst a reversioner must pay the ancestor's debts to the extent of the value of his reversion; that is, at common law, the ancestor's debts of record, and *specialty* debts, binding the heirs expressly, and in Virginia, all his debts. Reversions expectant on estates *for years* are *present assets* in the hands of the heir; but if expectant on *estates of freehold*, they are only *quasi assets*, to be levied on when they fall in, and in such case the plaintiff may take judgment, *quando acciderint*. (1 Lom. Dig. 605, 6; 2 Th. Co. Lit. 152, n. (R.); V. C. 1873, ch. 127, §§ 3, 5, 6; V. C. 1887, ch. 120, §§ 2665, 2667 to 2669.)

But whilst it is true that the lands of a decedent in the hands of his heir or devisee are liable for the decedent's debts, there is no privity between such decedent's personal representative and his heir or devisee, and therefore a judgment by default against such personal representative, to which the heir or devisee is not a party, is not evidence against the latter, in a suit by a creditor to subject the decedent's real estate to his debt. (Brewis v. Lawson, 76 Va. 40; Watts v. Taylor, 80 Va. 627; Daingerfield v. Smith, 83 Va. 81.)

## 3. Assistance Provided to Enable Persons in Expectancy to Ascertain the Death of their Predecessors.

The statute of 6 Anne, c. 18, enables persons in expectancy to constrain the production in chancery or before commissioners, annually, of the persons on whose lives the estate depends. We have no similar statute in Virginia. (2 Th. Co. Lit. 177.)

## 4. Merger of the Particular Estate; w. c.

### 1. The Nature of *Merger*.

Merger is described to be whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate; whereby the less is immediately *absorbed*, or is said to be *merged*, that is, sunk or drowned, in the greater. Thus, if there be tenant for years, and the *reversion* in fee-simple descends to, or is purchased by him,

the term for years is merged in the inheritance, and shall never exist any more. Its *object* is to accelerate the possession, or at least the enjoyment of the estate in which the *merger* takes place. Its *effect* is to consolidate the two estates, and confound them into one; the *measure* of which is that of the *more remote* of the two, which is not enlarged by the accession of the preceding estate. (2 Bl. Com. 177; 2 Th. Co. Lit. 557, n. (K).)

2<sup>d</sup>. The Circumstances which must Concur in Order to Accomplish the Doctrine of Merger; w. c.

1<sup>a</sup>. Two or more *Estates* (not mere *Rights*), in the Same Lands, etc., *must Meet in the Same Person*.

This proposition leads Lord Coke to discriminate between *several estates* (e. g. grant to A for life, remainder to B for life), and one estate *with several limitations* (e. g. grant to A for the life of Z, X, & W.) In the latter case, there is no room for the application of the doctrine of *merger*; in the former, if A *surrenders* to B, or B *releases* to A, a *merger* takes place. (2 Th. Co. Lit. 557, n. (K.); 3 Prest. Conv. 55 & seq.; Ross's Case, 5 Co. 14.)

2<sup>a</sup>. Doctrine as to the *More Remote Estate*.

The more remote estate must be the *next vested* estate in remainder, or reversion, without any intervening vested estate; and also without any intervening interest by way of contingent remainder, *created at the same time*, or *by the same act* with the other estates.

See 2 Th. Co. Lit. 557, n. (K.); 3 Prest. Conv. 107 & seq.

3<sup>a</sup>. The Estate in Reversion or Remainder must be as large as, or larger than, the Preceding Estate.

Thus, an estate at will may merge in an estate for years; estates for years may merge in each other, or in estates of freehold or inheritance; estates for life may merge in each other; estates in fee qualified, or fee conditional, may merge in any estate of like estate with themselves, and *a fortiori* in the fee-simple absolute. But by the express provision of the statute *de donis*, estates-tail are generally privileged from merger. (2 Th. Co. Lit. 557, n. (K.); 3 Prest. Conv. 166 & seq.)

4<sup>a</sup>. The Rights in which the several Estates *are to be Held*.

The several estates must be held in the same legal right; or when held in different legal rights, one of them must not be an accession to the other by the mere *act of the law*; i. e., it must be *by purchase*.

Hence if a husband possessed of a term in right of his wife, *purchases* the inheritance in reversion or remainder; or if an executor possessed of a term in right of his testator, *purchases* the reversion in fee: in both these instances the term will merge. But when the accession of one estate to the other is merely by *act of the law*, as by mar-

merge by descent, by executorship, &c., no merger will ensue where the estates are held in different rights, that is, one of them in one's own private right, and the other in *trust deo*. 3 Prest. Convey. (3d ed.), 285-'6 & seq., 309, 40; *Bracebridge v. Cook*, 2 Plowd. 418-'19; *Platt v. Shoop*, 3 Cro. (Jac.) 375, 1.

See 2 Th. Co. Lit. 557, n. (K.); Id. 563, & n. (L.); Id. 566, & n's (H.) & (I.).

## 24. Doctrine when the Several Estates are Limited by the Same Instrument.

The doctrine of merger will not alter the quality of one of two estates in the same person, or destroy a contingent remainder, when the several estates are limited *by the same instrument*, and some other person is concerned in the merger. Thus, in case of a limitation to A & B for their joint lives, remainder to Z's unborn son for life, remainder to A's heirs, A's life estate does not merge in his fee-simple, for that would dissolve the jointure, exclude B's life estate, and defeat the contingent remainder of Z's unborn son.

See 2 Th. Co. Lit. 557, n. (K.); 1 Th. Co. Lit. 744, 746, & notes; 3 Prest. Conv. 376 & seq.

## 25. Doctrine as to Effect of Intention in Preventing Merger.

The doctrine of merger does not apply when the union of the two estates arises from the joint act of their respective owners, with an *intention* that the estate of their assignee should continue for the *collective time of their several estates*.

See 2 Th. Co. Lit. 557, n. (K.); 3 Prest. Conv. 50, 51, 409, 410, 441; *Bredon's Case*, 1 Co. 77 a; *Treport's Case*, 6 Co. 15 n.

## 26. The Effect of the Concurrence of a Legal and an Equitable Estate in the Same Person.

A legal estate cannot merge in an equitable one, but an equitable estate may, and generally does, merge in a legal one, although not without reference to the *intention* of the parties. The *legal fee* governs the order of succession; indeed, the *legal title* determines the order of succession, as far as the same person has the legal estate, and is the equitable owner; and therefore equitable interests will be absorbed in, and extinguished by, the legal interests as far as they are united, but not beyond the measure of the legal interest. (2 Th. Co. Lit. 557, n. (K.); 3 Prest. Conv. 567-'70.)

## 27. Executory Limitations; w. c.

### 1. The Definition of an Executory Limitation.

An executory limitation is such a limitation of a future estate or interest in lands as is *contrary to the rules of limitation* in force at common law, but is practicable under the Statute of Uses, of Wills, and of Grants, by reason of their *discontinuing the actual livery of seisin*. (Fearn's Rem. 386,

& n. (6); Id. 382, n. (a); Id. 10 & seq., & n. (d); V. C. 1873, ch. 112, §§ 4, 14; Id. ch. 118, §§ 2, 3; V. C. 1887, ch. 107, §§ 2417, 2426; Id. ch. 112, §§ 2512, 2513.)

It follows from this definition, that if a future interest is so limited under these statutes, or otherwise, that it can take effect as a *remainder*, it cannot be an *executory limitation*. (Fearn's Rem. 385, n. (b); *Purefoy v. Rogers*, 3 Saund. 388 & note.)

It will be observed, that the definition of an *executory limitation* includes a *conditional limitation*, the only difference between them being that a conditional limitation is an *executory limitation* which is made to depend as to its taking effect upon the happening or not happening of a *condition*. See *Ante* p. 269.

## 2°. The Instances of Executory Limitations.

The instances of *executory limitations*, as commonly stated, are the following, namely, (1), Limitations of *freehold estates* in lands, to commence *in futuro*; (2), Limitations of the *whole fee-simple*, but upon some future contingency, qualifying that disposition, and giving the estate to some other person; and (3), Limitations of chattels (real or personal), to take effect after a life estate therein. And although the last-named class does not properly belong to what are in law denominated *executory limitations*, yet as the cases embraced in it are subject to similar rules as those which govern *executory limitations proper*, and as it is customary to range them together, the usual order is (under protest) observed:

W. C.

### 1°. Limitations of *Freehold Estates in Lands* to Commence *In Futuro*.

At common law a freehold estate in lands to commence *in futuro* cannot be created, because, as we have seen, it cannot arise without *livery of seisin*, which must in its nature take effect immediately, or not at all; and if it should take effect so far as to pass the freehold out of the grantor, the same would be vested *in nobody*, but would be *in abeyance*, contrary to the established policy of the law as to *freeholds*, (3 Th. Co. Lit. 102, n. (G.); 2 Bl. Com. 165-6); but in conveyances operating under the statutes above-named (*supra*, 1°), which pass the freehold *without livery of seisin*, this reason does not apply. The freehold remains in the grantor, or in the deviser's heirs, until the time appointed for it to take effect, and then passes to the grantee or devisee, by the force and effect of the several statutes. The future limitation may be either appointed to arise upon a contingency (*e. g.*, a devise to the *heirs of A*, who is yet living, or to the *unborn son of A*), or at a period certain (*e. g.*, a grant to A for life, or in fee, to commence *five years* from the date); but in either case, in order to constitute an



*executory limitation*, there must be no preceding particular estate to give it effect *as a remainder*, for the rule admits of no exception, being indeed, as we have seen, of the essence of the definition, that no estate can be construed to be an executory limitation which is capable of taking effect as a remainder. (Fearn's Rem. 395 & seq., & n. (d); Id. 382, & n. (c); Id. 394 & seq.; 1 Th. Co. Lit. 646, n. (C).)

In Virginia it is further provided by statute, that any estate may be made to commence *in futuro* by deed, in like manner as by will, which either is without meaning, or applies to conveyances at common law, as by feoffment and the like; and in the latter aspect makes very radical innovations upon the common law doctrine of conveyances. (V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418.) In devises, such limitations are not otherwise known than as *executory devises*, but when they occur in conveyances operating under the statute of Uses, they are called *springing devises*. No name has yet been bestowed on them under the statute of Grants (8 and 9 Vict.), but they might very well be denominated *springing grants*, and such limitations in general might be called *springing limitations*. However created, they must be so limited as *necessarily to take effect*, if at all, within the period prescribed, of a life or lives in being, and ten months and twenty-one years thereafter. (Fearn's Rem. 382, and n. (a); Id. 373, 392; 2 Bl. Com. 172-73; Id. 434, and n. (51); Gilb. Uses, 78, Sugden's Note, (51).)

## 2. Limitations of the *whole Fee-Simple*, but upon some Future Contingency, *Qualifying that Disposition*, and giving the Estate to *Some Other Person*.

This is sometimes described as the *limitation of a fee upon a fee*, but inaccurately, it being manifestly the *substitution of one fee for another*. At common law, as has been repeatedly shown, it is impossible to *divest* a fee, or indeed any *freehold*, once vested, and substitute *another limitation* in its place (Ante, pp. 270-71, 29); the nearest approach to it being what has been previously described as a *concurrent limitation*, or as a limitation of a remainder *upon a double contingency*, or *upon a contingency upon a double aspect* (Fearn's Rem. 373, and n. (a); 2 Th. Co. Lit. 128, n. (E).) wherein it will be remembered, that if the first fee *vests in fact*, all succeeding limitations are void.

The possibility of limiting the whole fee by means of an *executory limitation*, and afterwards, upon some contingency, *qualifying that disposition*, and giving the estate to *some other person*, arises out of the fact that the several Statutes (of Uses, Wills and Grants), which give birth and effect to such limitations, dispense with *livery of seisin* to create a freehold, and thereby dispense with the corres-

*pending notoriety of entry* to determine it. (*Ante*, p. 270-'71, 3<sup>k</sup>; 2 Th. Co. Lit 87, n. (L. 2), 768, Butler's Note, II.)

Thus, if a *devise* were made to A and his heirs, and in case A should die, leaving no issue at his death, to Z and his heirs, the limitation to Z and his heirs would be valid as an *executory limitation*, and would give to Z the fee, of which the event designated (*viz.*, his *death without issue*), had divested A. So, where a testator devised lands to the child of whom his wife was then supposed to be *enroute* in fee, provided that if such child should die under twenty-one, leaving no issue at the time of his death, the land should go to Z in fee, the limitation to Z is valid and effectual to give him the land in fee, whether no child were born, or it died under twenty-one and without issue, etc. (2 Bl. Com. 173 '4; 3 Com. Dig. 403 & seq.; Fearne's Rem. 399 & seq., and n. (d); Pells v. Brown, Cro. Jac. 540; Gulliver v. Wicket, 1 Wils. 105.)

A limitation of a *freehold* which thus shifts from one person to another, upon a subsequent contingency, is denominated, when the conveyance is under the statute of Uses, a *shifting use*. Under the statute of *Wills*, it might be properly styled a *shifting devise*; and under the statute of *Grants*, a *shifting grant*; and generically, in any case, a *shifting limitation*.

In order to prevent *perpetuities*, these future limitations are required to be so expressed that they *must of necessity* take effect, if at all, within the compass of a life or lives in being, and ten months and twenty-one years thereafter, or else they are void, as being *too remote*. (2 Bl. Com. 174, and n. (21); 2 Th. Co. Lit. 646, n. (C.); *Ante*, p 271, 3<sup>l</sup>.)

3<sup>l</sup>, Limitations of Chattels (Real or Personal) to take Effect *after a Life Estate Therein*.

A gift of a term of years, or of any other chattel, after a previous disposition for life, or indeed for any time, was formerly void, because it was thought that, being by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade, moreover, requiring a free circulation thereof, it would tend to quarrels and strifes, and to obstruct the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet, in process of time, in last *wills*, such limitations of chattels in remainder, even after a life estate therein, were permitted; though originally that indulgence was shown only when the *use merely* of the chattels, and not the chattels themselves, was given to the first taker, the *property* being supposed to continue all the time in the executor of the testator. That distinction, however, as also the distinction between such limitations *by will and by deed*, have long been disregarded, and remainders, both by deed and

by will have for more than a hundred years past been as freely allowed in case of terms for years, and of other chattels, as in case of freehold estates in lands, with two qualifications only, namely: 1st, That the things given shall not be such as are *consumed in the use* (in which case the first taker becomes the *absolute owner* of the subject); and 2ndly, That even in England, and much more with us, an *anti-tail* to the first taker carries with it the *fee-simple*. 2 Bl. Com. 398; Id. 174-5; 2 Kent's Com. 352; 2 Th. Co. Lit. 646, n. (C); Dunbar's Ex'ors v. Woodcock's Ex'or, 10 L. J. Ch. 628; Fearn's Rem. 402 & seq.; Bradley v. Mosby, 3 Call 51, 64.

Having reference to the foregoing explanation, the limitations *in futuro*, of terms for years, or other chattels, can hardly be classed with propriety, in modern times, amongst *executory limitations*. Not when they are merely *remainders*, since as remainders they are equally good by deed as by will. Nor when they want the attributes of remainders, for they do not owe their validity and effect to either of the statutes which give rise to executory limitations, nor to any statute whatsoever, but simply to the principles of the common law. Thus, if the owner of a term for one hundred years, or of a horse, gives the same, whether by deed or will, to A for life, and afterwards to Z, the limitation to Z, according to the modern view of the common law, is a vested remainder in fee, governed by rules closely analogous to those which control remainders in case of freehold estates in lands. And so, also, if the owner of a term for one hundred years, or of a horse, gives it by deed or will to A, to take effect *five years hence*, or to A in fee, and *if he should leave no issue living at his death*, to Z in fee, there is no occasion to invoke anything but the common law, nor, indeed, is there anything else to invoke, in order to give full effect to the limitations. There being no livery of seisin required in the transfer of chattels, and no similar notoriety to determine any interest in them, A's future limitation, in the first instance, may *spring up* at the appointed time, and Z's *shift* from A to himself, upon the appointed contingency, without the aid of any statute, just as in freehold estates may be the case by the force and effect of the several statutes of Uses, of Wills, and of Grants.

Such limitations of chattels, however, are, for the most part, controlled by the same rules which govern executory limitations proper; and, without inconvenience, may be styled by the same name, noting the few differences which exist as they occur. (3 Lom. Dig. 420 & seq.)

One of the most prominent differences between future limitations of chattels (which, however, applies only to *chattels personal*), and of freehold estates in lands, relates

to the *consumability* of the subject. The doctrine seems to be, that gifts for life of things *consumed in the use*, such as provisions needed for subsistence during the current year, admit of no subsequent limitation, but vest the absolute property in the donee; but that, as to other subjects of personality, not consumed in the use, a limitation, even after a life-estate, is allowable, with a varying degree of responsibility in the life-tenant, or his representatives, for the forthcoming and condition of the several articles, according to their character. Thus, as to things which are intended for use, and are not reproductive, such as agricultural implements and work-cattle, the life-tenant's estate is answerable only for the forthcoming of such of them as were *in existence* at the life-tenant's death, in the state in which they then were, although worn and impaired, supposing such deterioration or destruction not to have been brought about *by his default*; commodities adapted to reproduction, such as brood-mares, flocks of sheep, and the like, the tenant for life is bound to keep up *in kind*, and his estate is accountable for them accordingly, unless destroyed or impaired *by casualty*; and money, whether given directly, or the proceeds of chattels which either were sold, or in the ordinary course of business were subjects of sale, the life-tenant's estate must account for as of his death. Of these principles the case of *Dunbar's Ex'ors v. Woodcock's Ex'or*, 10 Leigh, 628, 653, affords a remarkable illustration. (3 Lom. Dig. 436 '7; *Randall v. Russell*, 3 Meriv. 194 '15. But see *Madden v. Madden*, 2 Leigh, 377, 389, 392.)

### 3<sup>o</sup>. Differences between Executory Limitations and Contingent Remainders.

It must be remembered, that *by the definition* of an executory limitation an estate can never be construed to be such if it is possible that it should take effect *as a remainder*; for which, also, there are reasons of policy which a close study of the differences, presently to be mentioned, will disclose. (*Purefoy v. Rogers*, 3 Saund. 388, and note; *Doe v. Morgan*, 3 T. R. 763; *Goodtitle v. Billington*, 2 Dougl. 758; *Fearne's Rem.* 393-'4; 3 Lom. Dig. 405.)

In order to understand the differences between executory limitations and contingent remainders we must have regard to, (1), The necessity for the existence of a *preceding* particular estate; (2), The proper subject of executory limitations and of contingent remainders, respectively; (3), The modes of creating them respectively; (4), The difference between them in respect to the liability to be barred or destroyed; (5), The difference in respect to liability to dower and curtesy, respectively; and (6), The applicability to them respectively of the rule in *Shelley's case*;

W. C.



1<sup>st</sup> The Necessity for the Existence of a Preceding Particular Estate.

In an executory limitation no preceding estate is needed; the estate, though a freehold (since no livery of seisin is required), may *spring up* at any future period not too remote. And if there be a preceding estate, it is not necessary that the executory limitation should vest when such preceding estate determines. To a contingent remainder, on the other hand, a preceding estate is by the definition thereof indispensable, and its determination before the remainder is ready to vest is, at *common law*, fatal thereto. (Ferne's Rem. 399, 400 & seq., and n. (d); Id. 382, n. (a), 416 n. (a), 418; 2 Wash. R. Prop. 356; V. C. 1873, ch. 112, § 12; V. C. 1887, ch. 107, § 2424.)

2<sup>nd</sup> The Proper Subject of Executory Limitations and of Contingent Remainders, Respectively.

Executory limitations relate to both real and personal property, and are governed by the same general rules, whatever the subject. Contingent remainders originally existed in *lands only*. But this difference has in modern times virtually ceased to exist, contingent remainders being allowed in chattels with scarcely less freedom than in freehold estates in lands. (2 Bl. Com. 398, 174-5; Ferne's Rem. 5, n. (e), 401, n. (e), 416, n. (a), 418; 2 Lom. Dig. 311, 313; 1466, p. 133, 37.)

3<sup>rd</sup> The Modes of Creating Executory Limitations, and Contingent Remainders, Respectively.

Executory limitations of freehold estates in lands, can be created only by conveyances operating under the statutes of Uses, of Wills, and of Grants, whereby *livery of seisin* is dispensed with, and not by conveyances operating at common law. Contingent remainders may be created by either class of conveyance. (Ferne's Rem. 416, n. (a); *Ante*, p. 430-31, [8].)

4<sup>th</sup> The Difference between Executory Limitations and Contingent Remainders, in Respect to *Liability to be Barred or Forfeited*.

Executory limitations are incapable of being barred by the alienation, or any other act, or by any omission of the person seized of the preceding estate; because the title of the executory devisee or grantee is not *through*, or as *privy* to the immediate taker, but quite independent of him; nor are such executory limitations affected by a *recovery* suffered by the first taker, because the supposed recompense, which to the principal ground for the operative effect of a recovery, cannot consistently be presumed to extend to the future devisee or grantee whose title is independent of such first taker; nor are they liable to *merger* when the defeasible estate and the future limitation become vested in the same

person. Contingent remainders, on the other hand, may be destroyed at common law by fine or recovery, by *merger* of the particular estate, or by any *displacement* thereof. And this is stated to be in England the *great and essential* difference; but in Virginia, remainders are no more destructible than executory limitations. (Fearne's Rem. 416, n. (a), 418; Hargr. Law Tr. 518; 3 Lom Dig. 407; 2 Washb. R. Prop. 356; V. C. 1873, ch. 112, § 12; V. C. 1887, ch. 107, § 2424; *Ante*, pp. 422 '23, 5<sup>g</sup>, 425, 2<sup>i</sup>.)

5<sup>e</sup>. Difference in Respect to Liability to *Dower and Curtesy* Respectively.

According to the better opinion, executory limitations (that is, as to the *first or defeasible estate*, supposing it to be an *inheritance*), are liable to dower and curtesy, which are not defeated by its actual determination. But no remainder, whether contingent or vested, if it comes after a *freehold*, admits of dower or curtesy: Nor can there be dower or curtesy in the future limitation, for a like reason. Nor, of course, in case of a remainder, does the preceding particular estate admit of dower or curtesy, for that with us, since the abolition of estates-tail, can never be an estate of *inheritance*. (3 Lom. Dig. 412; 2 Washb. R. Prop. 374; Cocks's Ex'or v. Phillips, 12 Leigh, 248; *Ante*, pp. 132, 5<sup>i</sup>, 155, 5<sup>i</sup>, 127, 1<sup>i</sup>, 150-51.)

6<sup>e</sup>. Applicability of the Rule in Shelley's Case to Executory Limitations, and to Limitations in the Nature of Contingent Remainders Respectively.

The rule in Shelley's case is not applicable to executory limitations, as we have seen that it is in case of *nominal* contingent remainders, apparently because the limitation to the ancestor and the heirs are not *parts of the same estate*, but are distinct and independent dispositions of the subject. (Fearne's Rem. 276.)

4<sup>e</sup>. The Period within which an Executory Limitation *Must Finally Vest*; w. c.

1<sup>f</sup>. The Principle upon which a Fixed Period is Prescribed.

A fixed period is prescribed in order to prevent *perpetuities*. It having been held that executory limitations were incapable of being barred or destroyed by any alienation, or other act, of the tenant of the preceding estate, and these limitations being released from all the restraints which attached to remainders, and which kept them within due bounds, it was observed that, without some established rule to the contrary, there might be an indefinite succession of estates limited one after another, which would arrest the alienation of lands, and still more disastrously, of chattels, and which would be of even more signal prejudice to the well-being of society than the statute of entails had been prior to *Taltarum's case* (*Ante*, p. 93, 1<sup>b</sup>). Accordingly, it

was settled that, although such future interests might be limited to as many persons successively as the testator or grantor might think proper, yet they must all be *in esse* during the life of the taker of the first estate: for then, as it was said, the candles are *all lighted and consuming together*, and the ultimate remainder is in reality only to that person who happens to survive the rest; or according to the canon established upon this subject, every executory limitation, in order to be valid, shall be so limited that it *must vest in interest*, if at all, within a life or lives in being, and the utmost period of gestation (reckoned in Virginia at ten months—V. C. 1873, ch. 119, § 8; V. C. 1887, ch. 113, § 2555), and twenty-one years thereafter, the period of gestation being allowed only in cases where gestation may be contemplated. (2 Bl. Com. 174, & n. (21); Fearn's Rem. 429, & n. (f), 444, n. (a); 2 Lom. Dig. 311 & seq.; 3 Do. 407; Washb. R. Prop. 357 & seq.; Long v. Blackall, 7 T. R. 100; Cadell v. Palmer, 10 Bingh. (25 E. C. L.) 140; *Ante*, p. 271, § 1 Jarm. Wills (5th Am. ed.) 250 & seq.)

## 2<sup>d</sup> The Period Prescribed.

The doctrine touching the period prescribed will lead us to note, (1), The precise period; (2), The considerations which led to the adoption of that period; and (3), The instances of limitations too remote, or too contingent, and therefore void;

W. L.

### 1<sup>st</sup> The Precise Period.

The precise period which has, after some fluctuations, but all looking to the same principle, been finally established is that just stated, namely, that every executory limitation, whether of real or of personal estate, in order to be valid, must vest *in interest*, if at all, *within a life or lives in being, and the utmost period of gestation (ten months in Virginia), and twenty-one years thereafter*, *Supra* P.

### 2<sup>d</sup> The Considerations which Led to the Adoption of that Period.

The period was adopted by analogy to the utmost period during which, at common law, land could be *kept inalienable*, by way of *restraint*, &c. Thus, in marriage settlements (where the effort is to preserve the estate as long as possible within the limits of one or two families), the estate may be limited to H and W, during their joint lives, remainder to the survivor for life, remainder to the first and other sons of the marriage successively in tail, remainder to the daughters in tail, remainder in fee to H's right heirs, and until the first person to whom a remainder *in tail* is limited comes of age, the land is incapable of being aliened in fee-simple. And as that person may, at the death of H, be *en*

*ventre sa mere*, the time *in such case* would be prolonged for the term of gestation, making the utmost period of inalienability of the inheritance at common law, one or more lives in being, the limit of gestation, and twenty-one years afterwards, which has, therefore, for more than two centuries constituted the "*rule against perpetuities*," in respect to lands, and *a fortiori* as to chattels. (*Long v. Blackall*, 7 T. R. 101; *Pleasants v. Pleasants*, 2 Call. 336; 2 Bl. Com. 174, n. (21); 2 Lom. Dig. 311; Fearn's Rem. 444, n. (a); *Howard v. Duke of Norfolk*, 2 Swanst. 454.)

3<sup>g</sup>. Instances of Limitations *too Remote*, or *too Contingent*, and therefore Void.

These instances may be enumerated as follows: (1), Limitations over upon a failure of heirs or heirs of the body, or issue, etc.; (2), Limitations over after a devise or grant in fee, with unlimited power *in the first taker* to dispose of the subject; and (3), Limitations in contemplation of an *act of the legislature*, or of incorporation, to make the disposition designed legal and valid;

W. C.

1<sup>b</sup>. Limitations over upon a *Failure of Heirs, or Heirs of the Body, or Issue*, etc.

It will be necessary, under this head, to advert to, (1), The doctrine *at common law* touching limitations over upon a failure of heirs, or heirs of the body, etc.; and (2), The doctrine, *by statute in Virginia*, touching similar limitations;

W. C.

1<sup>i</sup>. The Doctrine at Common Law; W. C.

1<sup>k</sup>. The General Doctrine, at Common Law, Touching Limitations over upon a "*Dying without Heirs*," etc.

It is very clear that any limitation, which is only to take effect upon a failure of one's heirs, or heirs of the body, or issue, or descendants, etc., at *any period whatsoever*, may, in the event, be postponed beyond the prescribed term of a life or lives in being, and twenty-one years and a few months, and will, therefore, be void for *remoteness*. Thus, where lands are given by will or grant, to A and his heirs, and *upon the failure of his heirs*, to Z in fee, one has no difficulty in perceiving that the limitation to Z is inconsistent with the rule against perpetuities, and is invalid. The mind easily accepts the same conclusion where the limitation to Z is to take effect upon the failure of the *heirs of A's body*, or of *A's issue*, or of *A's descendants*, since any of those events may, in the course of nature, be postponed for many generations, or may never occur at all. But when the limitation is to A and his heirs, and if A *dies without heirs*, then to Z in fee, it is not so plain that an



*indefinite failure of heirs* is contemplated. On the contrary, one would think it the more legitimate construction (Mr. Hargrave calls it the *vulgar*, in contradistinction to the *technical* construction), that the limitation over to Z was to occur, in case A had no heirs *at the time of his death*; in which event it would be good, and would take effect in possession in case it turned out that A did leave no heirs *at his decease*. But these and similar phrases (*e. g.* "if he *die* without heirs," or "without heirs of his body," or "without issue," or "without descendants"; or "upon his dying without heirs," etc.; or "leaving no heirs," etc.) have long been settled (unless there be other words of qualification), to refer to a *general and indefinite failure* of heirs, etc., at *any future time*. So that every executory limitation, limited to take effect on such words, *is* at common law *void*. Nor is it material in such cases how the fact actually turns out. The possibility that the event may, in point of time, exceed the limits allowed, vitiates the limitation *ab initio*; and also defeats all the limitations that may succeed it, although not themselves too remote. (*Beauclerk v. Dormer*, 2 Atk. 308; *Hargr. Law Tr.* 519; 2 Th. Co. Lit. 646, n. (C); 3 Lom. Dig. 410; *Doe v. Fomereau*, 2 Dougl. 487; *Thompson v. Griffith*, 1 Leigh. 321; *Riddick v. Cohoon*, 4 Rand. 547; *Bells v. Gillespie*, 5 Rand. 276; *Broadbuss v. Turner*, Id. 308; *Callis v. Kemp*, 11 Grat. 85; *Tinsley v. Jones*, 13 Grat. 289; *Stone v. Nicholson*, 27 Grat. 8.)

The generality of the words *heirs*, or *heirs of the body*, etc., may be restrained to the *period prescribed*, by any other words sufficient for the purpose, and then the devise over will be good. Thus, if the limitation were to A in fee-simple, but if he die without heirs *living at his death* (or *leaving no heirs behind him*) to Z in fee, the failure of heirs would be *tied up* and restricted to the *death of A*, and so the limitation to Z would be good. But the word *lend* applied to the first taker, or a direction that the estate limited over upon the failure of issue of the first taker, shall, in the event of his leaving issue, be distributable to such issue *as he may think fit*, will not confine the failure of issue within the prescribed limits, and consequently will not save the subsequent limitation from being too remote, and, therefore, void. (3 Lom. Dig. 410, 411; *Porter v. Bradley*, 3 T. R. 143; *Roe v. Jeffery*, 7 T. R. 589; *Williamson v. Ledbetter*, 2 Mudd. 521; *Bully v. Payne*, 6 Rand. 73; *Deane v. Hansford*, 9 Leigh. 253; *Callis v. Kemp*, 11 Grat. 85.)

2<sup>d</sup> *Exceptions to the General Doctrine at Common Law*

Touching Limitations over, upon a "*Dying without Heirs*," etc.; W. C.

- 1<sup>1</sup>. Devise or Grant of a *Reversion*, Expectant on an Estate-Tail, after Failure of the Issue in Tail.

*e. g.*, Reversioner after an estate-tail in A, grants or devises the lands (*i. e.*, the reversion in them), to Z in fee after failure of issue of A. This is merely the grant of the reversion, which does not fall into possession until the issue of tenant in tail is extinct, but it takes effect, in point of right, immediately, so that it is, of course, good. (2 Th. Co. Lit. 646, n. (C.); 3 Lom. Dig. 417-'18 & seq.)

- 2<sup>1</sup>. Devise, in Default of Issue, etc., of the Devisor.

This is not *executory* at all, but a conditional devise, to take effect at testator's death. Thus J. F., by his will, devised certain lands, in default of issue of his body, to P. It was adjudged a good devise, because at J. F.'s death, when it took effect, if it took effect at all, it was a devise in possession, and not executory. (3 Lom. Dig. 419; Wellington v. Wellington, 1 W. Bl. 645.)

- 3<sup>1</sup>. Devise or Grant over after Failure of Heirs, etc., for the Life of a Person in *Esse*.

The future limitation being only for the life of a person in *esse*, it must necessarily take place during that life, or not at all. (2 Th. Co. Lit. 646, n. (C.); 3 Lom. Dig. 419; Doe v. Lyde, 1 T. R. 598; Fearn's Rem. 488-'9.)

- 4<sup>1</sup>. Devise Over upon Failure of Issue, after an Estate-Tail by Implication.

Thus, in a case of devise to R in fee, after the death of W. (the testator's heir), if he should die without issue, W takes an estate-tail by implication, and the devise to R is supported as a remainder expectant, on the determination of the estate-tail. (2 Th. Co. Lit. 646, n. (C.); 3 Lom. Dig. 419-'20; Walter v. Drew, Com. 372; Jiggetts & ux. v. Davis, 1 Leigh, 368, 393, 400, &c.)

- 5<sup>1</sup>. Limitations of Chattels, Real and Personal.

Limitations of chattels are, in general, subject to the same rules and restriction as those of freeholds. But as touching this present point, namely, the effect of limitations over after the failure of heirs, etc., the courts have, from an early period, been more disposed, in future limitations of chattels than of freeholds, to lay hold upon slight circumstances and expressions, in order to repel the construction that an indefinite failure of heirs, etc., was contemplated, and to bring the disposition within the required compass of a *life*.

*or lives in being*, etc.; but the rulings upon the subject have been far from uniform. (3 Lom. Dig. 423-4 & seq.)

Limitations over of *chattels*, upon a *dying without issue*, or *issue of the body*, etc., are sometimes considered as sufficiently restricted by certain expressions, whilst other expressions will not have this effect. Let us note some instances under each head;

1<sup>m</sup>. Expressions which Restrict the *Dying without Issue*, etc., to a *Life or Lives*, etc.

If T die without issue male, *in the life of H*, limitation over to C. (Howard v. Duke of Norfolk, 2 Swinft. 151; Lamb v. Archer, 1 Salk. 225.)

In case, at the *time of the death of A*, there should be no issue male of A, nor any descendants of such issue male *then living*, limitation over to P. L. in fee. (Long v. Blackall, 7 T. R. 100.)

In case W should die and *leave no issue*, limitation over to D in fee. (Forth v. Chapman, 1 P. Wms. 663; Bamford v. Lord, 14 Com. B. (78 E. C. L.) 738; Cadogan v. Ewart, 7 Ad. & El. (34 E. C. L.) 194; Dunn v. Bray, 1 Call, 338; Hill v. Burrow, 3 Call, 342; Tinsley v. Jones, 13 Grat. 293.)

In default of such issue of S. P.'s body, *then after his decease*, limitation over to T. W. in fee. (Wilkinson v. South, 7 T. R. 555; 3 Lom. Dig. 428.)

In case A should die *without having children*, limitation over to M in fee. (Weakley v. J. Rugg, 7 T. R. 325-6.)

The *quality of the property* as being *in esse*, and yet *perishable within a life or lives*, etc. (Royall v. Eppes, 2 Munf. 479.)

To L and *certain heirs of her body*, but upon *her committing certain designated acts*, her estate to cease, and limitation over to E, etc. (Pryor v. Duncan, &c., 6 Grat. 27.)

In all these cases the limitation over *is good*.

2<sup>d</sup>. Expressions which *do not* Restrict the *Dying without Issue*, etc., to a *Life or lives*, etc.

Neither the word *then*, by itself, nor when coupled with the fact that the property is said to be *lent*, is sufficient to confine the limitation to the first taker's death. Thus, where by will a testator "*lent to his grand-daughter A certain chattels, for her and her heirs and executors for ever, but if she should die without lawful heir of her body, then to return to his son, and his heirs for ever,*" it was held that the limitation to the son was upon an indefinite failure

of issue, and therefore void. (Williamson v. Ledbetter, 2 Munf. 521; Dean v. Hansford, 9 Leigh, 253; Callis, &c. v. Kemp, &c. 11 Grat. 85.)

Neither will the word *then*, accompanied by the words *in that case*, have the effect so to confine the limitation. (Lynch v. Hill, 6 Munf. 114.)

Nor does the want of a limitation of chattels to the *representatives* of the taker of the executory interest suffice to limit the failure of heirs to the death of the particular tenant, as was once thought. Thus, a limitation of chattels to A and his heirs for ever; but *if he die without heirs*, then limitation over to M is void as to M for remoteness, although limited to him personally, and not to him and his heirs, etc., or to him and his executors, etc. (Thompson v. Griffith, 1 Leigh, 321; Callava v. Pope, 3 Leigh, 103; Deane v. Hansford, 9 Leigh, 253; Wilkins v. Taylor, 5 Call, 150; Stone v. Nicholson, 27 Grat. 1, 8.)

These cases have *discredited*, although the judges insist that they have not *overruled*, a series of cases which went before, beginning with Higginbotham v. Rucker, 2 Call, 312, and terminating with Dillake v. Hooper, Gilm. 194, including Timberlake v. Graves, 6 Munf. 174; Gresham v. Gresham, Id. 187; James v. McWilliams, Id. 301; Cordle v. Cordle, Id. 435; wherein it had been held that the fact of the subsequent limitation being made to the *party himself*, omitting words of limitation (*i. g.*, heirs, or executors, etc.), was a sufficient restriction in case of *personalty*.

- 2<sup>i</sup>. The Doctrine by Statute in Virginia, Touching Limitations Over upon a "*Dying without Issue*," or "*without Heirs of the Body*," or "*without Heirs*," etc.

"Every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or children, or offspring, or descendant, or other relative, shall be construed a limitation, to take effect when *such person shall die not having such heir or issue, or child or offspring, or descendant, or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter*, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." (V. C. 1873, ch. 112, § 10; V. C. 1887, ch. 107, § 2422.)

- 2<sup>h</sup>. Limitations Over after a Devise or Grant in Fee, or for life, with *Unlimited Power in the First Taker, to Dispose of the Subject*.

*i. g.*, Devise of real and personal estate to A and the



highest of his body, and if he should die leaving no heirs of of his body *then living*, so much of devisor's *real and personal estate as A shall be possessed of at his death*, to C. Here it is uncertain whether *anything will remain* to be the subject of the limitation over, which for that reason is void. And it is void also for repugnancy to the estate of the first taker, which is either expressly or by construction a fee-simple. (*Atto. Gen. v. Hall*, 8 Vin. Abr. 103, pl. 50; *Miller v. Moore*, 9 Vin. Abr. 248, pl. 21; 1 Rep. Leg. 642; *Bull v. Kingston*, 1 Meriv. 314; *Spermer v. Spermer*, 1 Wash. 266; *Riddick v. Cohoon*, 4 Rand. 550; *Brown v. George*, 6 Grat. 424; *May v. Joynes & als.* 20 Grat. 692; *Missionary Soc. v. Calvert*, 32 Grat. 363-4.)

In *May v. Joynes*, above cited, the limitation was to M for life, with power to sell all or any part of the property, and invest the proceeds, or use them at M's pleasure, with only this restriction, that whatever remains at M's death, after paying her debts and legacies, shall be divided amongst the testator's children, etc. M was held to take a fee-simple; and the limitation over to the testator's children was void for repugnancy. But see *Brant v. Va. Coal, &c. Co.*, 93 U. S. 333; *Smith v. Bell*, 8 Pet. 80; *Bradley v. Westcott*, 13 Ves. 445.

3. Limitations in Contemplation of an Act of the Legislature, or of Incorporation, to make the Disposition Designed Legal and Valid.

Such limitations must be tied up by some accompanying provision, to take effect within the period prescribed, or else they will be void *for remoteness*. Thus, if the act is to redound to the *personal* benefit of parties *in esse*, or if it is to be procured by *persons designated*, as the testator's executors, or within a *reasonable time*, or as *soon as possible*, the contingency is not too remote, and the limitation is valid. (*Porter's Case*, 1 Co. 24; *Pleasants v. Pleasants*, 2 Call. 337; *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 115 & seq.; *Lit. Fund v. Dawsons*, 10 Leigh, 152; 8 C. 1 Rob. 418-19; *Kinnard v. Miller*, 25 Grat. 107.)

4. Certain General Principles Touching Executory Limitations.

The principles touching executory limitations which are chiefly to be noted, may be stated thus, (1), If one future limitation in a conveyance be *executory*, all subsequent ones are in general so likewise, and *not remainders*; (2), Any number of executory limitations, even of the fee-simple, may succeed one the other, if *not too remote*; (3), No subsequent occurrence can make a limitation good which was void (for remoteness or otherwise) at its creation; (4), A limitation which in the beginning was a contingent remainder, may become an executory limitation, and *vice versa*; (5), Limita-

tions shall not upon a future contingency cease as to part, and vest and re-vest; (6), A limitation to a non-existing person may be valid; (7), Disposition of the property in case of a devise, before the vesting of an executory limitation; (8), Transmissibility of executory limitations; (9), Protection against waste to persons entitled to executory limitations; and (10), Trusts of accumulation allowed to a certain extent; W. C.

- 1<sup>f</sup>. If one Future Limitation in a Conveyance be an *Executory Limitation*, all Subsequent Ones are in General so Likewise, and *not Remainders*.

An executory limitation may confer either an estate in fee-simple, or a less estate. On every estate conferred by an executory limitation, another executory limitation may be limited; and if the estate conferred by an executory limitation be an estate for life or for years, it may be followed by a *quasi* remainder; but whilst the executory estate, after which the remainder is to arise, is in suspense, it is not properly a remainder, but a right, which is to be converted into a remainder on a particular event. Thus, if land be devised to A and his heirs, and if A should not leave issue *living at his decease*, to B for life, and after B's decease to C in fee, C would have during A's life (whilst the contingency is in suspense), only an *executory fee*; but if A should die without issue in B's life-time, C would take a *vested remainder*, and an estate in fee-simple *in possession*, if A should survive B, and then die without issue. (Fearn's Rem. 503, & n. (g).)

The proposition is founded on the very nature of executory limitations, which, it will be remembered, are either limitations of *freeholds* to commence *in futuro*, without any preceding estate, or of estates to take the place of *fees already vested*. No estate following such a limitation, therefore, can be a remainder; not in the first instance, because a remainder must, by the definition thereof, be preceded by a *particular estate* in possession; nor in the second, because no remainder can be limited *upon a vested fee-simple*. (Fearn's Rem. 504: 1 Lom. Dig. 438 & seq.)

This proposition does not exclude the possibility (as is seen in the illustration in the last paragraph but one), that what was at first an executory limitation may in the course of events become subsequently vested *in possession*, by the failure to take effect of the preceding limitation, or may take effect by way of *remainder*, and then it will be liable to the same modes of destruction as other remainders of the same kind. Thus, in *Brownsword v. Edwards*, 2 Ves. Sr. 247, which was the case of a devise to A *and his heirs* in trust to receive the rents and profits until B should attain twenty-one; and *if B should attain twenty-one or have*

then to B and the heirs of his body; but if B should happen to die before twenty-one, *and* (which was read as if it were *or*) without issue, remainder over to S, etc., the inheritance, being vested in A, the trustee, subject to be divested in case B attained the age of twenty-one, or had issue, made the subsequent limitations at first *executory*; but when B had satisfied the contingency, as he did by attaining the age of twenty-one, whereby the land vested in him in possession for an estate-tail, the limitation to S became a *remainder*. (Ferne's Rem. 506; 3 Lom. Dig. 440.)

Now does the proposition suppose that, because the subsequent limitation is future and executory, it is therefore of necessity *contingent*. It may be so limited as from the beginning to be certain of taking effect (saving only the possibility of its expiring before the former estate vests or falls), either in default of the foregoing estate taking effect at all, or by way of remainder after it, if it should take effect. Thus, in *Southby v. Stonehouse*, 2 Ves. Sr. 613, where the devise was, in substance, of the profits of the lands to S for life, and after his death, of the lands themselves to the testatrix's children in tail, and in *default of issue* of the testatrix, to J. H. in fee; and the testatrix died leaving an infant daughter, who shortly afterwards died: the limitation to the children in tail, without a particular estate going before, was *executory*, and thus made the interest of J. H. also *executory*, but *not contingent*. Had the testatrix left no children he would have taken a vested interest expectant on S's death, as in the event that happened he took a vested interest, by way of *remainder*, after the estate-tail of the daughter. (Ferne's Rem. 507; 3 Lom. Dig. 440.)

It will be readily perceived that the subsequent limitation can never take effect *by way of remainder* when the foregoing estate is a fee-simple; and it must be remembered that what is an *estate-tail* in England is a *fee-simple* in Virginia. (V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107 § 2421.) And it is necessary, furthermore, to observe that, when the first limitation is a fee, since those following cannot be remainders, they are liable at common law to be defeated by the remoteness of the contingency whereon they are limited, supposing that to be the *indefinite failure of issue*. With us, indeed, there would be no such liability, in general, to be defeated in such a case, it having been provided by statute taking effect 1st January, 1820, that every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, &c., shall be construed a limitation to take effect when such person shall die not having such heir, &c., *living at the time of his death*, or born to

him *within ten months thereafter*, unless a contrary intention be plainly declared on the face of the deed or will. (V. C. 1873, ch. 112, § 10; V. C. 1887, ch. 107, § 2422; 3 Lom. Dig. 440-41.)

- 2<sup>d</sup>. Any Number of Executory Limitations, even of the *Fee-Simple*, may Succeed One the Other, if *not too Remote*.

If one of the fees, however, chance to vest *in right*, not subject to a contingency which may divest it, all the rest are defeated. Thus, in case of a devise to A and his heirs, and if he die without a son living at his death, then in fee-simple to the first son of B who attains twenty-one, and, if he has no son, then in fee-simple to his first daughter who lives to twenty-one, and if no daughter, then in fee-simple to C; all the limitations are good, but if that to B's son vests in right, it defeats all that follow, etc. (Ferne's Rem. 514, n. (1); 3 Lom. Dig. 444.)

- 3<sup>d</sup>. No Subsequent Occurrence can Make a Limitation Good which was Void (as being *too Remote* or otherwise) at its Creation.

Hence where the preceding limitation is not executory, but vested, or there is no preceding limitation at all, if the expiration of that preceding estate, or if the future event upon which the subsequent limitation is to take effect be of too remote a nature, the future limitation is void *in its inception*, and no subsequent accident can make it good. Thus, a limitation after *failure of the heirs male of the body of C*, to D in fee, is an absolute future limitation to take effect on a *dying without issue*, and therefore, at common law, though no heirs male of the body of C should ever exist, such event will not make good the limitation to D, which was too remote in its creation. (Ferne's Rem. 524.)

- 4<sup>d</sup>. A Limitation which, in the Beginning, was a Contingent Remainder, may become an Executory Limitation, and *Vice Versa*.

Thus, in case of a devise to B for life, and after his decease to the first and other sons of B, successively in tail, remainder to the future sons of C for life successively, remainder over,—where B died without issue before the testator, and at the testator's death, C had no sons, the estates which were meant to take effect as remainders were supported as executory limitations. It is agreed, however, that when a preceding freehold has *once vested*, no subsequent accident will make a contingent remainder entire as an executory limitation, its character as a remainder having then been finally established, it being a part of the definition of an executory limitation that it is one which cannot take effect as a remainder. (Ferne's Rem. 525 '6; 2 Washb. R. Prop. 348.)



Of the converse proposition, namely, that limitations made as executory limitations may take effect as contingent remainders, or at least as remainders contingent or vested, we have seen several instances, *e. g.*, *Brownsword v. Edwards*, 2 Ves. Sr. 247, *1 Ante*, pp. 445-46, 1<sup>st</sup>; *Fearne's Rem.* 526.)

5. Limitations shall not, upon a Future Contingency, Cease as to Part, and Vest and Re-Vest.

This doctrine seems to be founded in the main, upon considerations of convenience and policy. The uncertainty of ownership which would result from such limitations, and the consequent difficulty of determining against whom proceedings should be had touching the title of lands so situated, and in order to subject them to debts, as well as other inconveniences, constitute a very sufficient reason for adhering to the principle, which is a very ancient one, although its application to executory limitations is, of course, modern, as the limitations themselves are. The doctrine has always existed in respect to conditions and common law limitations, as to which it has ever been a maxim that they must defeat the *whole estate*, and cannot determine it for a part only. Thus, a condition annexed to a feoffment in fee, that if the feoffee die, his heir being under age, his estate shall cease *during the minority of the heir*, is utterly void; so also is a condition that an estate-tail shall, upon a contingency, cease as if *tenant in tail were dead*, which, if it had any effect, would only suspend it during the tenant's life, to re-vest in his issue; and so, in like manner, it is with executory limitations. An attempt to *suspend* an estate during the infancy of the party succeeding to it, or upon any other contingency, and again to re-vest it, is futile, and the limitation is void. (*Fearne's Rem.* 526, 530, and n. (r); *Id.* 274-5; *Corbet's Case*, 1 Co. 87 a and b; *Jermyn v. Arscot*, cited 1 Co. 85 a; *Lade v. Holford*, 3 Burr. 1416; *S. C.* 1 W. Bl. 428, and 2 Amb. 479; *Fearne's Rem.* 530, n. (r).) But see 1 Th. Co. Lit. 506, which, however, is explained by Mr. Preston, in consistency with the doctrine as above stated. (*Id.* n. X.; 1 Prest. Est. 257-8.)

A rent, common, or other incorporeal hereditament, *newly created*, may be limited to cease for a time, and again to re-vest, as with the proviso that if the grantee die, his heir within age, the *tenure-tenant*, should, *during the minority*, be quit of the rent. The reason seems to be that, as it is a *newly created subject*, no adverse claim to it can exist, for the same latitude is not allowed in limitations of rents, etc. previously existing. (*Fearne's Rem.* 529; *Corbet's Case*, 1 Co. 87 a; *Kempe's Case*, 1 Ld. Raym. 52.)

6. A Limitation to a Non-Existing Person may be Valid.

In the infancy of executory limitations, before their limits

were ascertained, and whilst yet they were scarcely distinguished from limitations in conveyances at common law, there was sometimes, naturally enough, an absurd rigor of construction resorted to, in order to guard against too great a latitude in what was justly esteemed a violent innovation upon the old common law. Amongst the instances of this excessive jealousy, none is more remarkable than the principle which was at one time asserted, that whilst a limitation to a non-existing person *per verba de futuro*,—that is, when the party came into being,—was valid, yet if the limitation were *per verba de presenti*,—that is, mentioning the party as a person in present existence,—it was void. Upon this principle, it was insisted that a devise to an infant *in ventre sa mere* could not be sustained, although it was admitted that if the limitation were to the child *when born*, it would be unquestionably good. At present, however, this needless distinction between limitations to non-existing persons, *per verba de presenti*, and *per verba de futuro*, is very little regarded, and is allowed to affect those cases only where there is not the least circumstance from which to collect the testator's or grantor's intention of anything else than an immediate limitation to take effect *in presenti*. (Fearn's Rem. 553 & seq.; 3 Lom. Dig. 449-50.)

A limitation to a child *in ventre sa mere*, although by words *de presenti*, is now subject to no other doubt than the *uncertainty* of the description; and there can never be any uncertainty if it be described as the child of which such a woman is *envelope* (without reference to the *paternity*, even though it be illegitimate. If, however, it be a bastard, it cannot be described as the child of *such a man*, since that can never be certain, although, if described as the child of the mother, it does not vitiate the description that the limitation assumes such an one to be the father. But in no case, it is said, upon principles of public policy, can a limitation be validly made to an illegitimate child, neither born, nor *in ventre matris*,—that is, *not yet begotten*,—when the will or deed is executed, so that, although such a child be afterwards born, yet it cannot take. (2 Lom. Ex'ors, 35; Earle v. Wilson, 17 Ves. 528; Gordon v. Gordon, 1 Meriv. 150-53; Metham v. Devon, 1 P. Wms. 529.)

7<sup>f</sup>. Disposition of the Property in Case of Devise, before the Vesting of an Executory Limitation; w. c.

1<sup>g</sup>. The Doctrine as to the Disposition of *Lands*.

It is a rule that wherever there is an executory devise of real estate, and the freehold is not in the meantime disposed of, the freehold and inheritance descend to the testator's heirs at law. And so, where a preceding estate is limited, with an executory devise over of the land, the

the immediate profits between the determination of the first estate, and the vesting of the limitation over, will go to the heir at law, if not otherwise disposed of. Indeed, every interest and all profits, *not disposed of*, out of real estate, pass to the heir, and that not by the will of the testator, but by the act of the law. Hence, in case of a devise to A in fee, to commence six months after testator's death, during those six months the estate descends to and continues in the heirs; and hence, also, where a testator devised lands to B for life, remainder to B's sons successively, remainder to the unborn sons of C; and provision was made for the disposition of the rents and profits during the minorities of those who were to take in future; B died in the testator's life-time, whereby B's life-estate, and the remainders to his sons, failed; the limitations to C's sons ensued as executory devises, and the profits from the testator's death till the birth of a son to C, went to the testator's heirs at law. (Fearne's Rem. 537; Hopkins v. Hopkins, Cas. Temp. Talbot, 51-'2.)

But it should be observed, that a devise of *all the rest and residue* of the real estate will pass as well the profits from the testator's death to the time of the estate's vesting, as from the determination of the first estate to the vesting of a subsequent one. (Fearne's Rem. 144; Stephens v. Stephens, Cas. Temp. Talbot, 228.)

## 2°. The Doctrine as to the Disposition of *Chattels* before the Vesting of an Executory Limitation.

Where there is no residuary devise, or other particular disposition of it, it seems that personal property and its profits, between the testator's death and the vesting of an executory estate, or between the determination of the first limitation and the vesting of a subsequent one, will accumulate for the *benefit of the person next to take by virtue of the limitations*. Thus, where a testator bequeathed personally to the first son of A when he should attain twenty-one, and A had no son at the testator's death, Lord Hardwicke held that the profits of the property should accumulate until A's son, who might be afterwards born, attained the age of twenty-one, and then pass to him. And so where a testator bequeathed chattels, including several leasehold houses for years, to M, an infant, and if M should die before twenty-one, and his mother should have no other child, then to W: M died during infancy, and Lord Hardwicke decreed that the rents and profits from the death of M, till the contingency should happen, were to accumulate, and to be added to the capital, and if M's mother should have no other child, they should go to W. (Fearne's Rem. 546-'7; Bullock v. Stones, 2 Ves. 36-'41; Shadlun v. Hodgson, 3 P. Wms. 300.)

## 8f. Transmissibility of Executory Limitations.

Executory limitations in all manner of property, lands and personalty, by the modern construction, are capable of being devised by will, assigned, or conveyed by deed, and of being transmitted by inheritance and succession to the devisee's or grantee's heirs or personal representatives; although it seems that in case of the *assignment* of possibilities, the assignee's remedy and protection are *in equity*. In Virginia, by statute, provision is specially made for transmitting *any interest in or claim to real estate* by deed or will, and *title to any real estate of inheritance* is transmissible by descent. (3 Lom. Dig. 451-'2; Fearn's Rem. 366, 550-'51 & seq.; Wright v. Wright, 1 Ves. Sr. 411; Selwin v. Selwin, 1 W. Bl. 254, and n. (m); Roe v. Griffith, Id. 605; Jones v. Roe, 3 T. R. 93; Perry v. Phillips, 1 Ves. Jr. 254, 256; V. C. 1873, ch. 112, § 5; Id. ch. 119, § 1; V. C. 1887, ch. 107, § 2418; Id. ch. 113, § 2548; see *Ante*, pp. 421-'2.)

For the application of the doctrine of transmissibility to legacies payable at a future time, see Fearn's Rem. 552, n. (g).

## 9f. Protection against Waste, to Persons Entitled to Executory Limitations.

The court of chancery will interpose, when necessary, to protect the interests of persons concerned in future limitations, although as yet contingent, against unreasonable waste or destruction committed by tenants in possession. (Fearn's Rem. 563 & seq.; 2 Stor. Eq. § 914; Stanfield v. Habbergham, 10 Ves. 278.)

## 10f. Trusts of Accumulation Allowed to a Certain Extent.

The general rule, as we have seen, touching executory limitations is that any future limitation may be made, so as the same is to take effect within a life or lives in being, including in those lives children then *en ventre sa mère*, and twenty-one years beyond the expiration of such life or lives, and the time of gestation, so as to allow for the birth of a child *in ventre matris*. Under this rule, prescribing the bounds to executory limitations, it is in the power of the testator or grantor to suspend not only the ownership of the inheritance for the limited time, but also to suspend for a like period the intermediate enjoyment, so as to accumulate the income and add it to the principal, and thus aggrandize the remote issue of the family, at the expense of the present, and perhaps of the two or three succeeding generations. Availing himself of this rule, one Peter Thellusson, a Frenchman by birth, but from an early age settled in London, as a merchant, and who had there accumulated a fortune of over £700,000, by his will, dated in 1796, and consummated by his death in 1797, made a settlement of



his large estate in a manner which produced a very lively sentiment in England. He left surviving him a wife and three sons, all married, and three daughters, of whom one was married, and a number of grandchildren, the offspring of four sons. He gave his "dear wife" 300 guineas, a certain quantity of plate, certain wines and liquors, *her own* jewels and trinkets, and £2,140 a year for life, subject to certain conditions; to his sons, including previous advancements, £23,000 each; to his daughters a provision of about £12,000 each, and to other persons trifling legacies besides, and then the great bulk of his estate (about £600,000) to trustees in trust to cause the income to be accumulated during the lives of all his sons, and all his grandsons living at his death, or then *en ventre sa mère*; and at the expiration of that period, to be divided into three lots, one to go to the family of each son, that is, one to the eldest male lineal descendant then living of each, in tail male, with cross remainders over amongst such descendants. (Fearn's *Item*, 538, n. (x), 435, n. (l); *Thelluson v. Woodford*, 4 Ves. 227.)

It was computed by the actuaries employed for the purpose that, according to the probabilities of life, the period of accumulation *might* equal ninety-five years; that there was more than an equal chance that it would exceed seventy, and a reasonable probability of its reaching eighty years; that within the last named space of time every £100 would be increased fifty-fold, so that the amount then to be distributed would be in round numbers £30,000,000! (4 Ves. 238, n. (a).)

This will was assailed with all the vigor and learning of the English bar, and Mr. Hargrave particularly distinguished himself by an argument of exhaustive research, in which he went over the whole judicial history of executory limitations from the first faint intimation of the possibility thereof in 2 & 3 Pl. & M. (2 Dy. 124 a), A. D. 1555, through their feeble development in the reign of Elizabeth, to their distinct recognition by Lord Coke, in *Matthew Manning's case* (7 Jac. I., A. D. 1610), 8 Co. 946, their final establishment in *Pells v. Brown*, 3 Cro. (Jac.) 500, (18 Jac. I., A. D. 1621), and the rules by degrees laid down for their regulation, *in point of time*, in the subsequent cases, allowing at first only *one life* within which the future limitations should take effect, then *several lives, wearing out the same time*, and finally, with many an intervening struggle, *any number of lives in being, and twenty-one years after, with an allowance of the time of gestation for a posthumous child*. In the great argument Mr. Hargrave passed in review all the leading cases upon the subject, showing the gradual modifications, and occasional fluctuations of opinion, down to

the great *Case of Perpetuities*, as it is called (Howard v. Duke of Norfolk, 3 Cha. Cas. 1; S. C. 2 Swanst. 454); and sought to deduce from the general tenor of the cases, amongst other inferences, 1st, That executory limitations, and the rules governing them, originated from an *exercise of discretion* by the judges, for the sake of *general convenience*; 2ndly, That there was in the courts a right of *further exercising their discretion for the same purpose, whenever cases pregnant with any great evil shall provoke it*; 3dly, That from the infancy of executory limitations to their maturity, there has prevailed amongst the *greatest judges* an intense jealousy of their *liability to abuse*, and a *decided aversion* to extending their limits. He then proceeds to arraign, with great and just severity, the "*frenzy of posthumous avarice*" evinced by the testator, and to point out various particulars wherein he thought he had exceeded, as well the letter as the spirit, of the limits so jealously assigned for future limitations; and concludes with a very notable *peroration*, in which he introduces Lord Nottingham, who, by his judgment in the Duke of Norfolk's case, had confirmed and defined with remarkable force and precision the doctrine of executory limitations, as applauding and enforcing the decree which the advocate hoped would be pronounced against the will: and he ingeniously makes that celebrated founder of modern equity sum up the historical statement, and the argument, with great terseness and vigor. (2 Hargr. Jurid. Arg'ts, 31 & seq., 56 & seq., 71 & seq., 180; 4 Ves. 247 & seq.)

The Lord Chancellor (Loughborough), assisted by the Master of the Rolls, (Sir Richard Pepper Arden), and Buller and Lawrence, J.'s, pronounced *in favor of the will* (thus rashly forfeiting the anticipatory approval of Lord Nottingham!), and that judgment upon appeal to the lords was sustained and affirmed by the unanimous opinion of all the judges, and of Lord Chancellor Eldon (who had succeeded Lord Loughborough). (*Thellusson v. Woodford*, 11 Ves. 133 & seq., 144, 151.)

That case gave rise to the statute 39 and 40 Geo. III., c. 98 (A. D. 1800), whereby such trusts of accumulation in England *by will* are limited, for the most part, to a period of *twenty-one years from the testator's death*. (Ferne's Rem. 540, n. (x).) In Virginia no such statute exists, so that the *Thellusson* folly may be repeated amongst us should any one be "impelled by the frenzy of posthumous avarice" to imitate his example.

The *Thellusson* case was finally disposed of in the House of Lords, in 1859. The last surviving grandson died in February, 1856, and immediately the litigation was renewed in order to determine who was the "eldest male lineal de-

appendant of the oldest son, Peter Isaac Thellusson, there being no dispute as to the representative of the youngest son, Charles, and the second son, George Woodward T., having died without male descendants, whereby the property was to be divided into two instead of three parts.

The plaintiff in the bill, the "Hon. Arthur Thellusson," born in 1801, the son of Peter Isaac, was his "eldest male descendant," then living, yet "Lord Rundlesham," the defendant, though himself born in 1840, was the only son of Frederick, an older son of Peter Isaac, and therefore claimed to be the "eldest male descendant" in point of *representation*, and according to the intent of the testator, and so it was held, both by the M. R. and by the House of Lords.

The fund, when thus distributed, had increased but little! (Ann. Reg. 1859, p. 333.)

6°. Statutory Provisions which in Virginia Modify the Common Law Doctrine in Respect of Executory Limitations ; w. c.

1°. The Statutes Themselves ; w. c.

1<sup>st</sup>. The Acts Abolishing Entails ; w. c.

1<sup>h</sup>. Act of 7th October, 1776, to Abolish Entails.

"Any person who now hath, or hereafter may have, any estate in *fee-taille*, general or special, in any lands or *slaves* in possession, or in the use or trust thereof, or who now is, or hereafter may be, entitled to any such *estate-taille* in reversion or remainder, after the determination of any estate *for life or lives*, or of any *lesser estate*, shall from henceforth, or from the commencement of such *estate-taille*, stand *ipse facto* seised, possessed, or entitled of, in, or to such lands or *slaves*, etc., in full and absolute fee-simple." (9 Hen. St. 226, *Ante*, p. 96.)

2°. Act of 13th December, 1792, to Complete the Abolition of Estates Tail.

Every estate in lands or slaves which, on the 7th day of October, 1776, was an estate in fee-tail, shall be deemed from that time to have been, and from thenceforward to continue, an estate in fee-simple. And every estate in lands which since hath been limited, or hereafter shall be limited, so that, as the law *aforetime was*, such estate would have been an estate-tail, shall also be deemed to have been, and to continue an estate in fee-simple." (1 Stats. at Large, (N. S.) 96 ; V. C. 1873, ch. 112, § 9 ; V. C. 1887, ch. 107, § 2421.)

2°. Act of 1785 (taking Effect January 1st, 1787), *Dispensing with Words of Inheritance, to Create a Fee-Simple*.

"Where any real estate is conveyed, devised, or granted to any person without words of limitation, such devise, conveyance or grant, shall be construed to pass the *fee-simple* or other the *whole estate or interest* which the testator or grantor had power to dispose of in such real estate,

unless a contrary intention shall appear by the will, conveyance or grant." (12 Hen. Stat. 157; V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420.)

- 3<sup>d</sup>. Act of 1819 (taking Effect 1st January 1820), Declaring any Limitation which would have been Valid on an Original Fee-Simple, to be Valid after a Fee-Tail Converted by Statute into a Fee-Simple.

"Every estate in lands so limited that, as the law was on the 7th October, 1776, such estate would have been an estate-tail, shall be deemed an estate in fee-simple; and every limitation upon such an estate shall be held valid, if the same would be valid when limited upon an estate in fee-simple, created by technical language." (1 R. C. (1819), 369, ch. 99, § 25; V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107, § 2421, *Post* p. 457.)

- 4<sup>d</sup>. Act of 1819 (taking Effect January 1st, 1820), Doing away with the Construction of the Phrases "*Dying without Heirs*," etc.

"Every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or children, or offspring, or descendant, or other relative, shall be construed a limitation, to take effect when such person *shall die* not having such heir, or issue, or child, or offspring, or descendant, or other relative, as the case may be, *living at the time of his death, or born to him within ten months thereafter*, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." (1 R. C. (1819), 369, ch. 99, § 28; V. C. 1873, ch. 112, § 10; V. C. 1887, ch. 107, § 2422.)

- 5<sup>d</sup>. Act of 1819 (taking Effect January 1st, 1820), Declaring that any Estate of *Freehold, or of Inheritance*, may be made to Commence *in Futuro*, by Deed, in like Manner as by Will, and any estate which would be good as an *executory devise or bequest*, shall be good if created *by deed*. (1 R. C. (1819), 369, ch. 99, § 28; V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418.)

- 6<sup>d</sup>. Act of 1849 (taking Effect 1st July, 1850), amended by Act of 1887, (taking effect 1st May, 1888), Proposing to Abolish the Rule in Shelley's Case.

The Act of 1849 (taking effect 1st July, 1850), was taken word for word from the statutes of New York, and manifested not only an ignorance of the *policy* of the rule, but of its *terms*. It enacted that "when any estate, *real or personal*, is given by deed or will to any person *for his life*, and after his death, to his heirs, or to the heirs of his body, the conveyance shall be construed to vest an estate *for life only* in such person, and a remainder in fee-simple in his heirs or the heirs of his body."



This enactment did away with the rule, not *wherever an estate of freehold* was given to the ancestor (as the rule provided, *Ante*, p. 400), but only in the single case where he took an estate *for his life*. The Code of 1887, however, effectually completed the annulment of the rule. It enacted in substance, that where any estate, real or personal, is given by deed or will to any person for *an estate of freehold*, and afterwards by way of remainder, to his heirs, or to the heirs of his body, or his issue, those words shall be construed not as words of limitation, but as words of purchase, creating a remainder in the heirs, or heirs of the body, or issue. (V. C. 1873, ch. 112, § 11; V. C. 1887, ch. 107, § 2423.)

- 2<sup>d</sup>. The Judicial Interpretation of the Statutes which, in Virginia, Modify the Common Law Doctrine Touching Executory Limitations.

Let us look at the effect at different times, of these several limitations, namely, (1), Devise to A for life, and if he die without issue, to B; (2), Devise to A for life, and if he die without issue, *to B and his heirs*; and (3), Devise to A and his heirs forever, but if he die without lawful heir, remainder *to his brother B* and his heirs:

W. C.

- 1<sup>st</sup>. The Effect of a Devise to "*A for Life, and if he Die without Issue, to B;*" W. C.

- 1<sup>b</sup>. Effect Prior to 7th of October, 1776.

Since the estate is not to pass to B until the failure of A's *issue*, which, *in a will*, is equivalent to *heirs of the body*, it must have been the testator's intent to give it, after the expiration of A's life-estate, to A's *issue*, (*Pells v. Brown*, 3 Cro. Jac. 590; *Anon.* 3 Dyer. 354 a; *Sunday's Case*, 9 Co. 128 a. and n. (B.); *Atto. Gen. v. Sutton*, 1 P. Wms. 757-8; *Doe v. Applin*, 4 T. R. 87; *Denn v. Puckey*, 5 T. R. 303; *Roe v. Grew*, 2 Wils. 323; *Jiggetts v. Davis*, 1 Leigh, 368 418-420; *See v. Craigen*, 8 Leigh, 449; *Tinsley v. Jones*, 13 Grat. 289; *Wine v. Markwood*, 31 Grat. 50, 51); so that the limitation is, in effect, to A for life, remainder to A's issue (or the *heirs of his body*), remainder after the failure of A's issue to B. But thus understood, the rule in *Shelley's case* intervenes, and vests an estate-tail in A, with a remainder thereon to B, which, as there are no words of *inheritance*, is an estate *for life only* in B. The effect, then, prior to the abolition of estates-tail on the 7th October, 1776, is as follows:

A takes by *implication*, and by the rule in *Shelley's case*, an estate-tail.

B takes a remainder *for his life*, limited after A's estate-tail.

*See Sunday's Case*, 9 Co. 128 a; *King v. Melling*, 2 T. R. 38; *Atto. Gen. v. Sutton*, 1 P. Wms. 758, 766, and

note ; *Counden v. Clarke*, Hob. 30 a ; *Langely v. Baldwin*, 1 Eq. Cas. Ab. 185 ; *Roy v. Garnett*, 2 Wash. 41.

2<sup>h</sup>. Effect Between 7th October, 1776, and 1st January, 1787.

A takes, as during the previous period, an estate-tail by implication, and by the rule in *Shelley's case*, and that estate the act of 7th October, 1776, converts *into a fee-simple*.

B's remainder is now void as a *remainder*, because limited after a fee-simple. And it is not good as an *executory limitation* because such a construction would tend to *thwart the policy* of the statute abolishing entails. The intent of the abolition of estates-tail was to make lands more alienable ; but if the result be to convert B's *remainder* into an *executory limitation*, instead of facilitating alienation, the act abolishing entails would have the effect to make real estate *more inalienable* than before ; for whilst A's estate was an estate-tail, and the limitation to B a *remainder*, it was practicable, at the cost of some expense and trouble, by means of a fine or common recovery, or in Virginia by act of Assembly, to aliene the estate-tail and bar B's remainder. But if B takes by way of executory limitation, *his* interest is incapable of being barred ; and thus the alienation of the land is more obstructed than ever. This doctrine had been acted upon, but without discussion, in *Hunter v. Hayne's Lessee*, 1 Wash. 71, and, in consequence of having been afterwards settled upon great consideration, in *Carter v. Tyler*, 1 Call, 165, it has since been denominated the *doctrine of Carter v. Tyler*. (*Carter v. Tyler*, 1 Call, 165, 182 ; *Hill v. Burrow*, 3 Call, 353-'4 ; *Tate v. Talley*, Id. 354-'59 ; *Eldridge v. Fisher*, 1 H. & M. 561 '2 ; *Broadbuss v. Turner*, 5 Rand. 309, 311, 318 ; 1 Tuck. Com. 156-'7, B. II.)

Although the limitation to B was to take effect upon a failure of A's issue, which, according to the rule of interpretation already expounded (*Ante*, p. 439-40, 1<sup>k</sup>), meant in general, an *indefinite failure* of issue at any time, however distant, yet was not the limitation at this period too remote, because, being limited to B *only for his life*, it was tied up to happen *within a life or lives*, etc., or not at all. (*Ante*, p. 441, 3<sup>l</sup> ; 2 Th. Co. Lit. 646, n. (C) ; 3 Lom. Dig. 419 ; 1 Tuck. Com. 157.)

3<sup>h</sup>. Effect Between 1st January, 1787, and 1st January, 1820.

A takes, as before, an estate-tail by implication, and by the rule in *Shelley's case*, and that estate the act of 7th October, 1776, converts into a fee-simple.

B's remainder is void as a *remainder*, because limited after a fee-simple ; and not good as an *executory limitation* for two reasons : (1st). Because of the *doctrine of*

*Widdowson v. Taylor*, 29): and (2ndly), Because, being limited after an *indefinite failure of issue*, and not being restrained as before, by B's having only an estate *for his life*, the act of 1785, taking effect 1st January, 1787, having *all passed with words of inheritance* to create a fee, 1 *Atk.* p. 451, 25, it is *too remote*. (*Smith v. Chapman*, 1 H. & M. 240; *Bells v. Gillispie*, 5 Rand. 273; *Bramble v. Billups*, 4 Leigh, 90, 93; See *v. Craigen*, 8 Leigh, 447; *Deane v. Hansford*, 9 Leigh, 256; *Callis, &c. v. Kemp, &c.* 11 Grat. 78; *Tinsley v. Jones*, 13 Grat. 291.)

It was strenuously contended, that after the abolition of entails, 7th October, 1776, the *implication* that the testator designed to give a remainder to A's issue ought not to be indulged. Such effect, it was said, had been previously allowed out of regard to the supposed *intention* of the testator to provide for the issue, being admitted only *in wills* and *not in deeds*; but since the abolition of estates-tail, it was not to be supposed that an intention could exist to create an estate which the law had interdicted; and this argument was pressed with renewed force after the act of 1785 (taking effect 1st January, 1787), had dispensed with words of inheritance to create a fee-simple: for whereas, before, in order that the issue should succeed unlimitedly, it was necessary that A should take an estate-tail, since that statute, the issue might take an independent fee-simple, without deriving it from A. This reasoning, however, was repudiated, and the courts continued, down to 1849, to hold that, whether the limitation originated before or after those acts of 1776 and 1785, A took an estate-tail, enlarged into a fee-simple. (*Tate v. Tally*, 3 Call. 354; *Smith v. Chapman*, 1 H. & M. 300, 301; *Eldridge v. Fisher*, 1 H. & M. 561; *Dean v. Hansford*, 9 Leigh, 256; *Callis v. Kemp*, 11 Grat. 78; *Tinsley v. Jones*, 13 Grat. 291; 1 Tuck. Com. 157, B. II.)

Another proposition has been much and vainly pressed upon our supreme court, namely, that where the first limitation was to A, without designating the estate as being *for life* or *otherwise*, if it occurred since 1st January, 1787, when words of inheritance ceased to be necessary to create estates in fee, A should be construed to take a fee-simple, which would thus make it needless to raise an estate-tail in him, in order to carry the property to the issue. But this view also has been overruled, and the construction of the limitation in question has remained unchanged, notwithstanding the act of 1785. (*Hall v. Payne*, 6 Rand. 76, 77; *Bramble v. Billups*, 4 Leigh, 90; See *v. Craigen*, 8 Leigh, 450, 452.)

4. Effect Between 1st January, 1820, and 1st July, 1850.

We have seen that it is an established principle, that

wherever the will contemplates that the subject devised shall not go over according to the subsequent limitation, until there is a *complete extinction of all possible issue* of the first taker, there is implied a grant to the *issue* of the latter (which, in a will, is the same thing as *heirs of the body*); and that by the rule in Shelley's case the first taker is thereby invested with what, prior to 1776, would have been an estate-tail, which our statute converts into a fee-simple. It is, however, not less an established principle, that if the devise is so framed that the subject is to go over upon what may be only a *partial extinction* of the issue of the first taker, the latter does not take a fee-tail, but the provision touching the issue either gives the issue a separate estate by way of remainder, or, giving the issue nothing, it only marks the event upon which the subsequent limitation is to take effect. Thus, where the devise was to T *in fee*, and if T should die without issue, *living W, his brother*, then to W *in fee*, it was held that an indefinite or *complete* failure of the issue of T was not contemplated, but only a failure *while W was living*, and that T's express estate in fee was not therefore converted into an *estate-tail*, but continued an estate in *fee-simple*, and the devise over to W was an *executory limitation*, which, being limited to take effect upon an event which must happen within a life in being (namely W's), was valid. (*Pells v. Brown*, 3 Cro. (Jac.) 540.) So where the devise was to the testator's son *in fee, provided that, if he died without issue, living the executors of the testator*, the land to be sold, etc., it was held, for the same reason, that the son did not take an estate-tail, but a fee-simple. (*Anon.* 3 Dyer. 354 a.)

Some confusion of thought touching this matter seems to have arisen from the use of the phrase *indefinite failure of issue*, instead of *complete failure*. Thus, whilst it is unanimously agreed, that whenever the limitation, whether express or implied, is to *all possible issue* of the first taker, the latter takes an *estate-tail*, it yet appears to have been sometimes supposed by learned judges, as well as by text-writers, that where a definite period is prescribed for the extinction of the issue, so that if there is *then* a failure of all possible issue of the first taker, the subject is to go over, no estate-tail vests in the first taker. This idea, it is submitted, is a fallacy, growing out of the use of the word *indefinite*, instead of the word *complete*, as connected with the failure of issue. The phrase *indefinite failure* of issue, meaning failure at an *indefinite time*, aptly describes the character of the event which invalidates the subsequent limitation by making it too remote; but the prescription of a definite time when the



complete and total extinction of issue is to occur, in order that the devise over may take effect, has nothing to do with the nature of the first taker's estate, as an estate for life, in tail or in fee-simple.

In the light of these principles let us see what is the effect of the legislation of 1820 upon a "devise to A for life, and if he die without issue, to B." The legislation referred to, it will be remembered, consists of two divisions, both directed *to support the limitation to B*, and neither (as it would seem) designed to affect the devise to A. The first (V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107, § 2421); obviates the *doctrine of Carter v. Tyler*, 1 Call, 165, 182, by declaring that "every estate in lands so limited that, as the law was on the 7th October, 1776, such estate would have been an estate-tail, shall be deemed an estate in fee-simple; and *every limitation upon such estate* shall be held valid, if the same would be valid when limited *upon an estate in fee-simple* created by technical language." The second provision, which removes from the limitation to B the *objection of remoteness*, enacts (V. C. 1873, ch. 112, § 10; V. C. 1887, ch. 107, § 2422), that "every limitation in any deed or will, *contingent upon the dying of any person* without heirs, or heirs of the body, or issue, or issue of the body, or children, or off-spring, or descendant, or other relative, shall be construed a limitation *to take effect when such person shall die* not having such heir, or issue, or child, or off-spring, or descendant, or other relative, as the case may be, *living at the time of his death, or born to him within ten months thereafter*, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it."

Such a devise as we are considering, therefore, namely, *to A for life, and if he die without issue, to B*, would, under the influence of the last-mentioned enactment, import a "devise to A for life, and if he should die without issue (*living at the time of his death, or born to him within ten months thereafter*), to B." And as this form of limitation embraces *all the issue that A can possibly have*, it would seem incontrovertible that he would take under it an *estate-tail*, which our statute converts into a fee-simple. Down to the period of the enactment of the provision in question, taking effect 1st January, 1820, the subsequent limitation to B in the case supposed was void. The legislation of 1820 was devised to give validity to that limitation, and not to affect A's estate. The terms of the statute last cited above, to obviate the objection of remoteness, clearly show that it was intended to relate only to B's estate, and not to A's. "*Every limitation*

. . . *contingent upon the dying of any person without heirs, or heirs of the body, or issue, etc., shall be construed a limitation to take effect when such person shall die not having such heir, etc., living at the time of his death, or born to him within ten months thereafter.*" The provision fixes a definite period (namely, the death of the first taker, or ten months thereafter), when, if there is an *extinction of his issue*, the subject shall go over to the subsequent taker.

It must be admitted, however, that this construction of the effect of the statute of 1820, in respect to the estate of A, the first taker in the case under consideration, which, to the writer, seems so irresistible, encounters serious opposition from the *dicta* of judges of great eminence, as by Judge Cabell, in *Jiggetts v. Davis*, 1 Leigh, 418; Judge Allen (more obscurely), in *Nowlin v. Winfree*, 8 Grat. 348; and Judge Moncure, in *Tinsley v. Jones*, 13 Grat. 292; and in *Wine v. Markwood*, 31 Grat. 43, 51; and also from the opinion of Judge Lomax (3 Lom. Dig. 310-'11, 313).

The English statute of Vict. c. 26, to which a different interpretation has been assigned by the English courts (2 Jarm. Wills (5th Am. ed.), 493, &c., 532, &c.), differs from ours in applying its provisions, not to the subsequent or contingent limitation, but to the first estate (that of A). It differs also from ours in confining the failure of the issue to the *death of the first taker*, which is compatible with the non-extinction of the issue, whilst ours has reference, not merely to the death of the first taker, but includes also the period of gestation (ten months) thereafter, which necessarily supposes the complete extinction of the issue.

The writer is far from being insensible to the weight of opinion which is arrayed against the view which he has ventured to propound touching the effect of the legislation of 1820 upon such a devise as that under consideration. He consoles himself, however, with the reflection that the utterances of the distinguished jurists referred to were but *obiter dicta*, upon which they had no occasion to bestow that discriminating thought which generally characterizes their judicial decisions. They may have had in mind such cases as *Pells v. Brown*, 3 Cro. (Jac.) 590, and *Anon.* 3 Dyer. 354 a. in which the party to whose death the failure of issue was referred, was not the first taker, but, as we have seen, a third person, where the non-existence of issue of such first taker, at that time, implied no final nor total extinction of his issue. But, as already urged, under our statute it is impossible to conceive a more final and total failure of issue of the first

taken than that which results when he dies *without issue living at his death, or born within ten months thereafter*. And then, upon universally acknowledged principles, the *whole estate* of A, the first taker, have, by implication, a remainder limited to them, whereby, and by force of the rule in Shelley's case, A takes an estate-tail, which is converted, with us, into a fee-simple, leaving as the only remaining subject of inquiry the effect of the subsequent limitation to B.

Supposing the view which the writer has submitted to be correct, the result would be as follows :

A would take, as during the previous periods, an estate-tail by implication, and by the rule in Shelley's case, and that estate the act of 7th October, 1776, converts into a fee-simple.

B's remainder is, as before, void as a *remainder*, but as an *executory limitation* it is *valid*; for, 1st, The doctrine of *Carter v. Tyler* is obviated by the act of 1819, taking effect 1st of January, 1820, which declares that any limitation good upon an original fee-simple, shall be good upon a fee-tail converted into a fee-simple (*Ante*, p. 455, 3<sup>d</sup>; 1 Tuck. Com. B. II. p. 151); and 2ndly, The objection of *remoteness* is removed by the other act of 1819, taking effect 1st January, 1820, whereby it is provided that a limitation over upon a *failure of issue*, etc., shall be construed to mean a *dying without issue living at the party's death*, or born within ten months thereafter. (*Ante*, p. 455, 4<sup>th</sup>; Brooke v. Croxton, 2 Grat. 507; Norris v. Johnston, 17 Grat. 8; Stone v. Nicholson, 27 Grat. 7, 8; Taylor v. Cleary, 29 Grat. 448.)

### 5<sup>th</sup>. Effect Since 1st July, 1850.

It is believed that in consequence of the statute (V. C. 1873, ch. 112, § 11), abolishing the rule in Shelley's case, where the ancestor takes an estate *for his life*, A takes only an estate *for his life*, with a *contingent remainder* to his issue, and a *concurrent remainder*, or a remainder upon a double contingency, over to B in fee; for it is an established doctrine, that that cannot be construed to be an executory limitation which can take effect as a contingent remainder. (*Ante*, p. 430; Carter v. Tyler, 1 Call, 186-7; Wine v. Markwood, 31 Grat. 43, 50, 51.)

Possibly the first remainder limited to A's issue may vest as fast as the issue shall come successively into being, so that, as soon as the first child is born to A, the remainder to A's issue rests immediately in him, in fee-simple, subject to open and let in after-born children, while B's remainder is thereby finally and effectually debarred. (Horne's Rem. 312; Cooper v. Hepburn & als. 15 Grat. 528-9; Doe v. Perry, 3 T. R. 484, 494-495;

Right v. Creber, 5 B. & Cr. (12 E. C. L.) 866; Doe v. Provoost, 4 Johns. (N. Y.) 63-66; Haman v. Osborn, 4 Paige, (N. Y.) 341-2. See Wine v. Markwood, 31 Grat. 50.) This view, however, although favored in the second edition of this work, is probably not maintainable. The issue who are to take after A's life-estate (that phrase being in a will equivalent to *heir of the body*), are believed to be such as shall be living at A's death, or born to him within ten months thereafter, the remainder therefore necessarily continuing to be contingent until the occurrence of A's death. In the cases above cited, as supporting the doctrine that the remainder to A's issue would vest in the issue of A as they came successively into being, the limitation was either in express terms, or by implication, to *children*, and not to *issue*, which latter word is supposed to be here equivalent to *heirs of the body*, and as no one can be heir to a living person, the remainder to the issue is for that reason contingent, and of course it does not become vested upon the birth of a child to A, but remains contingent until A's death. (Fearn's Rem. 373; Loddington v. Kine, 1 Salk. 224; S. C. 1 Lord Raym. 203; Doe v. Holmes, 3 Wills. 245; Citing Doe v. Reason, B. R. Trin. T. 28 and 29 Geo. II.; Wine v. Markwood, 31 Grat. 43, 50, 51.)\*

2<sup>g</sup>. The Effect of a Devise to "A for Life, and if He Die without Issue, to B and His Heirs;" w. c.

1<sup>h</sup>. Effect Prior to 7th October, 1776.

A takes by implication, and by the rule in Shelley's case (as explained *ante*, p. 456, 1<sup>g</sup>) an *estate-tail*, and B a *remainder in fee-simple*.

2<sup>h</sup>. Effect between 7th October, 1776, and 1st January, 1820.

A takes as before, by implication and by the rule in Shelley's case, an *estate-tail*, which the act abolishing entails *converts into a fee-simple*.

B's remainder is then void as a *remainder*, because limited after a *fee-simple*; and not good as an *executory limitation*, for two reasons: 1st, Because of the *doctrine of Carter v. Tyler*; and 2ndly, Because being limited to take effect upon an *indefinite failure of issue*, without words or circumstances to restrain it within the required compass of a *life or lives*, etc., it is too remote. (*Ante*, p. 457, 2<sup>h</sup>; 457-8, 3<sup>h</sup>.)

There is no need, in this case, to discriminate between the periods from 7th October, 1776, to 1st January, 1787,

\*The writer is indebted for the suggestion of this error in the former text to a well-written article in the Virginia Law Journal for April, 1880—understood to be from the pen of Prof. C. A. Graves, of the Law School of Washington and Lee University, at Lexington, Virginia; and whilst he is unable to adopt Mr. Graves' views in full, he acknowledges gratefully the benefit he has derived from the perusal of the article.



and from the latter date to 1st January, 1820; because the limitation to B, being expressly *of the inheritance*, no effect upon it was produced by the act of 1785 (taking effect 1st January, 1787), dispensing with words of inheritance.

3<sup>d</sup>. Effect Between 1st January, 1820, and 1st July, 1850.

The effect is the same as in the former case, between the same periods. (*Ante*, p. 458, 4<sup>h</sup>.)

4<sup>th</sup>. Effect Since 1st July, 1850.

The effect is the same as in the former case, for the same period. (*Ante*, p. 462, 5<sup>h</sup>.)

3<sup>d</sup>. The Effect of a Devise to "A and His Heirs for ever; but if He Die *without Lawful Heir*, Remainder Over to B and His Heirs. B being A's *Brother, Nephew, or other Relative*;" W. C.

1<sup>h</sup>. Effect Prior to 7th October, 1776.

In this case the express limitation *in fee-simple* to A, created by the words "*his heirs for ever*," is cut down to a *fee-tail* by the subsequent qualification, "*if he die without lawful heir*," that phrase, in the connection in which it is used, necessarily importing "*heir or heirs of the body*," because the following limitation is to a *blood relative*, and he cannot die without heirs generally, while such a relative exists: so that the testator must have employed the foregoing expression in the sense of *heir or heirs of the body*. Hence, prior to 7th October, 1776, A takes an *estate-tail*, and B a *remainder* in fee expectant thereon.

See Fearn's Rem. 466-7; 3 Lom. Dig. 300 & seq.; Hill v. Borrow, 3 Call. 342, 352; Eldridge v. Fisher, 1 H. & M. 559; Sydnor v. Sydnor, 2 Munf. 263; Goodrich v. Harding, 3 Rand. 284; McClintic v. Manns, 4 Munf. 330, 341; Bolls v. Gillespie, 5 Rand. 273; Broadbush v. Turner, Id. 308; Wright v. Cahoon, 12 Leigh, 270.

2<sup>h</sup>. Effect since 7th October, 1776.

The doctrines are the same as those already explained in connection with the previous instances of limitations as affected by the statutes of Virginia down to July 1, 1850. (*Ante*, p. 463 & seq., 2<sup>h</sup>.) The statute of 1850 is believed, in this case, to have wrought no change.

3<sup>d</sup>. The Effect in Respect of Executory Limitations Generally, of the Statutes in Virginia, above referred to; W. C.

1<sup>h</sup>. The General Doctrine.

In construing wills, those limitations which, as the law was *originally*, as the early statutes expressed it, or "*on the 7th October, 1776*," as our recent statutes have it, would have been deemed to create an estate-tail, *shall still do so*, whether the will were executed before or after the abolition of estate-tail, and whether the estate-tail be created *expressly or by implication alone*; and such estate-tail is

thus converted by our statute into a fee-simple. (1 Tuck. Com. 151, Pt. II.; 3 Lom. Dig. 295; Tate v. Tally, 3 Call, 354; Smith v. Chapman, 1 H. & M. 300, 301; Ball v. Payne, 6 Rand. 73; Bramble v. Billups, 4 Leigh, 90; See v. Craigen, 8 Leigh 452; Tinsley v. Jones, 13 Grat. 296.)

## 2<sup>s</sup>. Exception to the General Doctrine.

Where there is a *distinctly marked intention* to confine the first taker to a life-estate, a mere *implication of a general intent* to create an estate-tail may be rebutted by the fact that the will was made subsequent to the acts of 1776, abolishing entails, and that of 1785, dispensing with words of inheritance to create a fee-simple. In England, and with us prior to 1776, an express estate for life, with limitations over in remainder, are turned into a fee-tail, against the expressions of the will, in order to effectuate the testator's general intent to give an *inheritance* to the remaindermen. With us such an interpretation is not needful, since, in consequence of the statute dispensing with words of inheritance, children, etc., or other remaindermen, take an estate in fee; and by reason of the statute abolishing entails, to give the first taker a fee-tail would frustrate the design. This qualification, however, extends not to limitations which by long use have come to be considered to create an estate-tail; *e. g.*, to "A for life, and *if* he die without issue, to B;" but to those only where the *expressed* intention is overruled in favor of a *general intention*, touching the estate to go to the remaindermen, with which a mere life-estate in the first taker would be incompatible. (Smith v. Chapman, 1 H. & M. 240, 294, 302; Taylor v. Cleary, 29 Grat. 448.)

## 3<sup>s</sup>. Principles Applicable to Future Limitations of Chattels.

Those principles are the same as those which regulate such limitations in respect of real estate. The principal, perhaps the only exception, is that words of *apparent perpetuity* are restricted with more facility to the prescribed period of a life or lives in being, and the period of gestation, and twenty-one years afterwards. (*Ante*, p. 411-12, 51; 3 Lom. Dig. 423-'4 & seq.)

## CHAPTER XII.

### OF ESTATES IN SEVERALTY; IN JOINT-TENANCY, IN COMMON, AND IN COPARCENARY.

#### 4<sup>b</sup>. The Number and Connection of the Tenants or Owners of Estates.

Estates of any quantity or length of duration, and whether in actual possession or in expectancy, may be held in *sever-*

*ally* must be, by a sole tenant, or by a *plurality* of tenants, in which latter case the estate is said to be in joint-tenancy, tenancy in common, and in co-parcenary respectively. (2 Bl. Com. 179 & seq.)

§ 1. 1.

### 1<sup>st</sup>. Estates in Severalty.

A tenant or occupant of lands is said to hold them in *severalty*, when he holds them in his own right only, without any other person being connected with him in point of interest during his estate therein. This is the most usual way of holding an estate, and, therefore, the same observations may be made here that were made in the preceding chapter, touching estates *in possession*, as contradistinguished from those *in expectancy*; that there is little or nothing peculiar to be remarked concerning estates in severalty, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held *in severalty*. We may, therefore, proceed to consider the other class of estates, where there is a *plurality* of tenants. (2 Bl. Com. 179.)

### 2<sup>nd</sup>. Estates where there is a Plurality of Tenants.

Of this class of estates there are three species, as above mentioned, two of which, namely, joint-tenancy and tenancy in common, originate by the *act of the parties*, and not otherwise; and one, that is co-parcenary, arises only by descent, or *act of the law*;

W. 10.

### 1<sup>st</sup>. Joint-Tenancy.

An estate in *joint-tenancy* is where lands or tenements are granted or devised to two or more persons, to hold in fee-simple, for life, for years, or at will. It is sometimes called an estate in *jointure*, which has the same meaning as joint-tenancy; but in common speech the term *jointure* is now usually confined to that joint-estate (as in its origin it was), which is vested in husband and wife, as a statutory satisfaction and bar of the woman's dower. (2 Bl. Com. 180; *Ante*, pp. 177-8, 15, 21.)

Joint-tenants, tenants in common, and co-parceners, all have this common characteristic, that they hold *pro indiviso*, or *promiscuously*. So that one person is not seised or possessed exclusively of one acre, and another person of another (for then they would be tenants in *severalty*), but the interest and possession of each extend to every specific portion of the whole land of which they are joint-tenants, tenants in common, or co-parceners. And accordingly, in all of them the possession of one is considered for most purposes as that of all. In many points of view, however, these several species of estates are materially distinguishable in character and proper-

ties, as will be perceived in the successive unfolding and development of each. (1 Steph. Com. 312.)

Let us take notice of, (1), The modes of creating a joint-tenancy; (2), The properties of a joint-tenancy; (3), The incidents thereof; and (4), The modes of determining joint-tenancies, and the advantages thereof;

W. C.

### 1<sup>o</sup> Modes of Creating a Joint-Tenancy.

A joint-tenancy arises, as has been said, by act of the parties, and never by act of the law. It may be created by devise, or by any conveyance *inter vivos*, by words which give an estate to a plurality of persons, without adding any restrictive, exclusive, or explanatory words. Thus, if an estate be granted to A and B, and their heirs, this makes them joint-tenants *in fee*, of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. (2 Bl. Com. 180; 1 Steph. Com. 325-6.) And so a devise or grant to A and his children, supposing that A has children living then, or at the testator's death, creates a *joint-tenancy* in A, and those children, at common law, *for life*, in Virginia, in *fee-simple*. But in case of a will, those children only are included who were in being at the testator's death, unless a contrary intention can be inferred from the provisions of the will or the circumstances of the case. (2 Jarm. Wills (5th ed.) 154, n., & 156, & cases cited; Cook v. Cook, 2 Vern. 545; Buffar v. Bradford, 2 Atk. 221; Read v. Willis, 1 Collier, (28 Eng. Ch.) 87; Morton v. Tewart, 2 Yo. & Col. Ch. (21 Eng. Ch.) 81, 82; Wilson v. Maddison, Id. 375; Payne v. Franklin, 5 Sim. (9 Eng. Ch.) 458; De Witte v. De Witte, 11 Sim. (34 Eng. Ch.) 41; Paine v. Wagner, 12 Sim. (35 Eng. Ch.) 188; 2 Jarm. Wills, (5th Am. ed.) 393-4.) On the other hand, supposing A to have no children at the date of the grant, or at the testator's death, the word *children*, unless the context requires a different construction, is a word of *limitation*, and vests a *fee-tail* in A, which, in Virginia, is by statute converted into a *fee-simple*. (2 Jarm. Wills (5th Am. ed.) 389, 392; Wild's Case, 6 Co. 17 a, 17 b; Davis v. Stevens, 1 Dougl. 321; Broadhurst v. Morris, 2 B. & Ad. (22 E. C. L.) 1; Thomason v. Anderson, 4 Leigh, 122; Nightingale v. Burrell, 15 Pick. (Mass.) 104, 114; *Post*, p. ; V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107, § 2421.)

Formerly, joint-tenancy was much favored; but for more than a century past the courts have laid hold of every available expression to construe estates given to a plurality of tenants as *tenancies in common*. And although this innovation began in *equity*, and in reference to *wills*, yet it has long prevailed in the courts of common law as well, and the doctrine extends to *deeds* as uniformly as to *wills*. Hence,



total expressions as "*equally to be divided*," "*share and share alike*," "*equally between and amongst them*," will, according to this modern construction, convert into a tenancy in common, what would once have been a *joint-tenancy*. 2 Bl. Com. 180, n. (4); 1 Th. Co. Lit. 773, n. (42); Hutton, &c. v. Griffith, &c. 18 Gratt. 574.)

## 2. The Properties of a Joint-Tenancy.

The properties of a joint-estate are derived from its *unity*, which, as Blackstone remarks, is fourfold: the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*, or more properly, *entirety* of interest; or in other words, joint tenants have one and the same interest or estate, arising by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. Perhaps the tenancy is still better expressed by Lord Coke, who, speaking after Bracton, describes the joint-tenant as *un totum tenens et nihil tenens, scilicet totum con-junctum et nihil per se separatim*. (2 Bl. Com. 180; 2 Th. Co. Lit. 733.)

The properties, however, may be well enough classed under the several *unities* above mentioned, namely, (1), Unity of title; (2), Unity of interest or estate; (3), Unity of time; and (4), Unity of possession:

(W. 1.)

### 1. Unity of Title.

The estate of joint-tenants must be created by *one and the same act*, whether legal or illegal; as by one and the same grant, or one and the same disseisin. For joint-tenants cannot arise by descent, or act of the law, but merely by purchase, or acquisition by the act of the party; and unless that act be one and the same, the two tenants would have different titles, of which one might prove good and the other bad, thereby destroying the jointure. (2 Bl. Com. 181; 2 Th. Co. Lit. 728-9, 731.)

### 2. Unity of Interest or Estate.

Joint-tenants must have *one and the same interest*. One cannot be tenant for life, and another for years; one cannot be tenant in fee, and the other for life. On the other hand, however, there may be joint-tenants as to a portion of the fee, with a several interest in one or more of them as to the residue.

Thus, as Littleton remarks: "If lands be given to two and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee-simple. And if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life. In the same manner it is where tenements be given to two and the heirs of the body of one of them engendered, the one hath a freehold and the other a fee-tail, &c."

To which Lord Coke subjoins this comment: "By this section, and the etc. in the end of it, they are joint-tenants for life, and the fee-simple or estate-tail is in one of them; and because it is by one and the same conveyance, they are joint-tenants, and the fee-simple is not executed to all purposes, as hath been said before." (1 Th. Co. Lit. 746, 744; Fearn Rem. 23, 24, 26, 28, 29.)

And thus also, if at common law land be granted to A and B for their lives, and to the heirs of A: here A and B are joint-tenants of the freehold during their respective lives, and A has a several inheritance in fee-simple. In Virginia, indeed, this illustration does not hold; for in consequence of the statute proposing to abolish the rule in Shelley's case (V. C. 1873, ch. 112, § 11; V. C. 1887, ch. 107, § 2423), the limitation to A's heirs will not unite with A's life-estate, but will be a contingent remainder in them. However, it is presumed that even with us, if the limitation were to A and B for their lives, remainder to *A and his heirs*, the same results would follow as at common law. We have seen also (*Ante*, p. 405, 4<sup>n</sup>), that independently of our statute, if a grant were made to A and B for their lives, and afterwards to the heirs of their bodies (A and B being of the same sex, or so near of kin that they cannot marry, and procreate common heirs), A and B would have a joint-tenancy for their lives, with several inheritances. (2 Bl. Com. 181, and n. (5); 1 Steph. Com. 313-4; 1 Th. Co. Lit. 741-3; Wiscot's Case, 2 Co. 60 b.)

### 3<sup>d</sup>. Unity of Time.

The estates of joint-tenants must be *vested at one and the same period*, as well as by one and the same title. As in case of a present estate made to A and B, or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder (which is contingent) be limited *to the heirs* of A and B, and during the continuance of the particular estate A dies, whereby the remainder of one moiety is vested in his heir; and then B dies, thereby vesting the other moiety in the heir of B; now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common, for one moiety vested at one time, and the other at another. So, if an estate be granted to A for life, remainder to B and the eldest son of Z (he having at the time no son), and their heirs, B does not take in joint tenancy with Z's eldest son, because B takes a vested remainder in a moiety *immediately* on the execution of the conveyance, while the remainder in the other moiety does not vest *until a son is born to Z*; nor at all, if A dies first. If a son is born to Z in A's life-time, still B had up to that period no joint interest with him, the

tenancy was not *ab initio* a joint-tenancy : and not being so at first, cannot become so afterwards. (2 Bl. Com. 181 ; 1 Steph. Com. 313 ; 1 Th. Co. Lit. 731-'2.)

In conveyances operating under the statute of uses, and in devises, and probably also in grants, it is not needful that the *original* vesting of the several estates should be at the *same time*. It suffices if the parties take by the *same* *conveyance*. Thus, a devise to A and his children (A having one child at the time of the will, and others afterwards), carries a joint-estate to A and *all his children* in being at the death of testator, the estate vesting in those in existence at the time, and afterwards opening to let in those subsequently born. This deviation from the rule prevailing at common law has been accounted for by supposing that, upon the introduction of the new tenant, the *old* estate is revoked, and a *new estate* arises, which vests at the *same time* in all then in being, or ready to take. The explanation, however, is not altogether satisfactory, since it appears that, if the first party alienes or charges the estate before the second is born, or ready to take, the alienation or charge, though void in respect to the share of the second party, will continue good in respect to the share of the first, which it is supposed could not be the case if that person's original estate had been revoked. The tendency of the modern adjudications is to hold that it is a *joint claim by the same conveyance*, and not the vesting at the same time, which makes joint-tenants, and that the rule is the same in conveyances at common law, and under the statutes of Uses, Grants and Wills. (2 Bl. Com. 182, and n. (8) ; Fearn's Rem. 313 to 315, and n. (c) ; 2 Th. Co. Lit. 732, and n. (D.) ; Gilb. Uses, 104 ; 4 Kent's Com. 358, n. (d) ; Shelley's Case, 1 Co. 101 a, and n. (Q. 3), Thomas's ed. ; Mutton's Case, 3 Dy. 274 b ; Samme's Case, 13 Co. 57 ; Stratton v. Best, 2 Bro. C. C. 240, and n. (2) & (a) ; Doe v. Morgan, 3 T. R. 765.)

#### 1. Unity of Possession.

What Blackstone, and most writers after him, have denominated *unity of possession*, might with more propriety be styled *entirety and equality of interest* ; for while they continue to hold together, they are not considered as holding in distinct shares, but each is equally entitled to the *whole*. And on the other hand, though the entirety ceases for the purpose of alienation, every co-tenant being entitled at pleasure to transfer separately his own share, yet the equality remains ; for each is capable of conveying an equal share with the rest. This combination of entirety of interest with the power of transferring in equal shares is expressed by the ancient law maxim, that every joint-tenant is seised *per unum et per tout* ; which seems to import a seisin not *by the severalty and by the whole*, as Blackstone represents, (using

the word *my*, instead of *mie*,) but *by nothing and by the whole*, the French *mie* meaning not *moiety*, but *nothing*. This is clearly conveyed by Lord Coke, who, commenting on the phrase *per mie et per tout*, remarks (citing Bracton as already mentioned): *Et sic totum tenet, et nihil tenet, scilicet, totum conjunctim, et nihil per se separatim.* "And albeit they are so seised, as for example, where there be two joint-tenants in fee, yet to divers purposes each of them hath but a right to the moiety, as to enfeof, give or devise," etc. (2 Bl. Com. 182; 1 Steph. Com. 314-'15, and n. (m); Daniel v. Camplin, 7 M. & Gr. (49 E. C. L.) 172, n. (c); Murray v. Hall, 7 Man. Gr. & S. (62 E. C. L.) 455, n. (a); Appendix Wythe's Rep. 391 (Minor's ed.), note by Mr. W. Green.)

This mode of possession (*per mie et per tout*), by *entireties* in common and *nothing separately*, with the power of transferring in *equal shares*, which is an essential characteristic of a joint-estate, excludes the possibility of husband and wife being joint-tenants, they constituting but *one person* in law. When land is conveyed to them, *after marriage*, not expressly to hold as *tenants in common*, they are said to be seised *by entireties*; but in consequence of their legal *oneness*, neither can dispose of any part without the assent of the other, but the whole *must remain* at common law to the *survivor*. (1 Steph. Com. 314-'15; 1 Th. Co. Lit. 739-'40, and n. (L.); Case of Alton Woods, 1 Co. 30 a, n. (E. 1); Green v. King, 2 W. Bl. 1211; Doe v. Parratt, 5 T. R. 652; Thornton v. Thornton, 3 Rand. 172; Norman Ex'x v. Cunningham, 5 Grat. 63; Hemingway v. Seales, 42 Miss. 1; V. C. 1873, ch. 116, § 18; *Post*, p. 476, 2<sup>d</sup>.) But by the Code of 1887, the doctrine applicable to husband and wife as tenants *by entireties* is much modified, not to say revolutionized. The Code provides (ch. 107, § 2430), that "if *hereafter*," (that is after 1st May 1888), "any estate *real or personal*, be conveyed to a husband and his wife, they shall take and hold the same *by moieties* in like manner as if a distinct moiety had been given to each by a *separate conveyance*," thus doing away with survivorship between them.

And to this mode of holding at common law, by husband and wife, it is a corollary, that if a conveyance be made to husband and wife, and to a third person, the husband and wife have one moiety (because they are but *one person* in law), and the third person the other moiety, in the same manner as if the grant had been to only two persons. Had the conveyance been made to the three persons before the marriage of husband and wife, the three would have taken as joint-tenants, and as such would hold after marriage. (1 Steph. Com. 315; 1 Th. Co. Lit. 739-'40.)

From the *entirety* of interest in each of the co-tenants results the most remarkable incident or consequence of a



joint-estate, viz., that it is subject to *survivorship*, or the *jus accrescendi*, presently to be explained. (2 Bl. Com. 182; 1 Steph. Com. 315.)

### IV. The Incidents of Joint-Tenancy.

The incidents or consequences of joint-tenancy all depend upon that *unity* of interest which has just been described, and which is indicated by the phrase *per mie et per tout*, which, it must be remembered, imports that joint-tenants, while the jointure endures, own *by entireties together*, and *nothing separately*, but with *power of transferring in equal shares*. (Savage, p. 470, 4; Wythe's Rep. (Minor's ed.) 396, and notes by Mr. Green.)

The incidents of a joint-tenancy may be considered under the several heads following, namely: (1), The effect of a lease by two joint-tenants reserving rent; (2), A surrender to one joint-tenant enures to all; (3), Livery of seisin to, or entry or possession by, one of several joint-tenants, enures to all; (4), Joint-tenants convey one to another by release; (5), A joint-tenant can lawfully do no act to prejudice the estate of his co-tenant; (6), Joint-tenants must sue and be sued jointly; (7), Joint-tenant's liability to co-tenants for waste done, or profits received; and (8), Doctrine of survivorship, or *jus accrescendi*:

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#### P. Effect of Lease by two Joint-Tenants Reserving Rent.

The rent shall enure to both, in respect to their *joint reversion*, even though it were *in terms* payable to one only; but if the lease and reservation of rent had been by *deed indented*, the rent would have enured to *him only* to whom it was reserved. (2 Th. Co. Lit. 84; 1 Do. 734; 2 Bl. Com. 182.)

But upon a joint lease by two or more joint-tenants, there may be a *separate reservation* to each; and if so, there must be *separate actions* for the arrears; and even where the reservation of rent was, in the first instance, joint, yet, if it were not under seal, a notice from one of the joint-tenants to the lessee to pay him separately, and a payment accordingly, is evidence of a fresh *separate demise* of his share, and for subsequent arrears he must *sue separately*. (2 Bl. Com. 182, n. (11); Powis v. Smith, 5 B. & Ald. (7 E. C. L.) 850.)

#### Q. A Surrender to One Joint-Tenant Enures to All.

This depends on the *entirety* of interest vested in the joint-tenants, so that they have one and the same *reversion*. (2 Bl. Com. 182; 1 Th. Co. Lit. 734.)

#### R. Livery of Seisin made to, or Entry or Possession by, one Joint-Tenant, Enures to All.

This depends also on the *entirety* of interest vested in joint-tenants, since each has the *whole jointly*, and *nothing*

*separately.* (2 Bl. Com. 182; 2 Th. Co. Lit. 378; 1 Id. 374, n. (D).)

And so it is of a release and confirmation respectively, to one of several joint-tenants. They enure to all, and for the same reason. (2 Th. Co. Lit. 465, & n. (Z.); Id. 530.)

Since the possession by one joint-tenant is the possession by all, it follows that one cannot maintain an action of trespass against his fellow in respect to the land; because he has an equal right to enter on any part of it. And upon like principles, one joint-tenant is incapable of maintaining an action of ejectment against another, unless there is proof of an *actual ouster*, or of some *other act amounting to a total denial of the plaintiff's right as co-tenant*, of which an undisturbed sole possession for many years may afford proof; a doctrine now affirmed in Virginia by statute. (Taylor & als. v. Hill, 10 Leigh, 457; Purcell, &c. v. Wilson, 4 Grat. 16; Doe v. Prosser, Cowp. 217; V. C. 1873, ch. 131, § 15; V. C. 1887, ch. 124, § 2736; Buchanan v. King, 22 Grat. 414.) And when the adverse possession thus established has continued *uninterruptedly* for the length of time prescribed by the statute of limitations, it will give a good and sufficient title to the occupant. (Stonestreet v. Doyle, 75 Va. 356.)

And as every joint-tenant, and tenant in common, occupies a position of trust and confidence towards his companions, he is not, as a general rule, allowed to purchase an outstanding adverse title to the common property for his own benefit, to the exclusion of his co-tenants. But the co-tenant must, within a reasonable time, make his election to claim the benefit, and contribute to the expense of the purchase; and if he unreasonably delays, until there is a change in the condition of the property, or in the circumstances of the parties, he will be held to have abandoned all claim to the benefit of the new acquisition. But in order that this presumption may arise, it should appear, not only that he has been apprised of the purchase, but of the adverse claim set up under it, by his companion, for he may reasonably suppose that the acquisition is made in support of the common title, and may act on that supposition. The burden in such a case is upon the purchasing tenant to show that his co-tenant had notice, both of the purchase and of the exclusive claim, in consequence of it, asserted by him. The conveyance by the purchasing tenant to a third person, is not, in itself, such a notice; nor are the acts of purchase and conveyance acts equivalent to an actual ouster, in pursuance of the statute above referred to. (Buchanan v. King's Heirs, 22 Grat. 414, 419 & seq.; Robinett v. Preston, 2 Rob. 273; Hannon v. Hannah, 9 Grat. 146.)

4<sup>f</sup> Joint-Tenants must Convey, One to Another, by Release.

No conveyance, operating by *livery of seisin*, would be proper between joint-tenants, because each tenant being *seised of the whole* conjointly, there is nothing that can be delivered to him which he does not possess already. On the other hand, and for the same reason, a release is the proper form of assurance, each having the legal possession or seisin of the *whole*, so that when one departs with his interest to the rest, he is simply dismissed from the joint ownership, his fellow or fellows still continuing seised of the whole as before. The release in such case operates by way of *passing an estate*, *de mitter l' estate*. (2 Th. Co. Lit. 514; 1 Do. 765, and n. (E.); Gilb. Ten. 73-4.)

34. A Joint-Tenant can Lawfully Do no Act Tending to Defeat or Injure the Estate of his Co-Tenant.

His co-tenant being seised equally with himself of the *whole*, and the possession of one being the possession of both, whatever conveyance or lease either tenant may make, although it profess to be of all, operates to pass only his part. And if it be a simple *charge*, not amounting to an *entire transfer* of the estate, and the maker of it die first, the survivor takes the property at common law, discharged of all the incumbrances, according to the maxim *jus accrescendi præfertur iuribus, sed alienatio rei præfertur juri accrescendi*. (2 Bl. Com. 193, and n. (13); 1 Th. Co. Lit. 748; Tuttle v. Eskridge, 2 Munf. 330.)

But although the seisin of a joint-tenant is *per totum et per nihil* (of the whole jointly, and of nothing severally), and although his capacity is to transfer an equal share *undivided*, and not by *metes and bounds*, yet a joint-tenant's conveyance by metes and bounds is *not void*. It cannot, indeed, affect *injuriously* the co-tenant, but as against the grantor, it is effectual to pass *his interest* in the land making the grantee tenant *in common* with the co-tenant. And especially would it be so in Virginia, under the influence of our statute (V. C. 1873, ch. 112, § 7; V. C. 1887, ch. 107, § 2419), declaring that a writing purporting to pass or assure a greater right or interest in real estate than the person making it may lawfully pass or assure, shall operate as an alienation of such right or interest in the said real estate as such person might lawfully convey or assure.

Robinett v. Preston's Heirs, 2 Rob. 278; Hannon v. Hannon, 9 Grat. 146; Varnum v. Abbot, &c. 12 Mass. 489; McKee v. Bailey, 11 Grat. 346; Cox & als. v. McMullin, 14 Grat. 90; Buchanan v. King, 22 Grat. 422.)

35. Joint-Tenants must Sue and be Sued Jointly.

This is an inevitable consequence of the *entireties* by which joint-tenants are seised. Their estates being *one and the same*, their titles *one and the same*, and their interest *entire, per totum conjunctim, et per nihil separatim*, there

can be no foundation for anything but a *joint suit*, whether the joint-tenants are plaintiff or defendant, unless, indeed, they avail themselves of their rather inconsistent capacity to *transfer distinct shares*, for a time, as by *separate leases* reserving rent, in which case they not only may, but *must* sue for the rent *separately*; and if they have occasion to bring an action to recover the land thus separately demised, it must be a *separate action*. (2 Bl. Com. 182, and n's (12) and (11); 1 Th. Co. Lit. 733-'4; *Ante*, p. 472, 1<sup>t</sup>; Doe v. Chaplin, 3 Taunt. 126.)

7f. Joint-Tenants in Possession are not, at Common Law, Liable to their Co-Tenants for *Waste Done, or Profits Received*.

This doctrine arose out of the consideration that either tenant had a right to the separate occupancy of the whole, and that if one permitted his fellow to occupy the premises exclusively, he had only himself to blame for waste committed, or for any surplus above his due share of profits received, unless, in the latter case, the co-tenant in possession had been constituted expressly the *bailliff* or *agent* of his companion, when an action of account always lay against the party receiving. But as to waste, this principle was corrected by Stat. Westm. II. (13 Ed. I., c. 22, A. D. 1285), whereby the action of waste is given to one *tenant in common* of the inheritance against another, who makes waste in the common estate, the equity of which statute was held to extend to *joint-tenants*, but not to co-parceners, because they could always guard against such an injury by *compelling partition*, which the common law did not permit joint-tenants and tenants in common to do. In respect of non-accountability for surplus profits over and above his proper share, received by one co-tenant, no remedy was applied by statute until 4 Anne, c. 16 (A. D. 1706), whereby joint-tenants and tenants in common were made accountable, one to another, for receiving more than their due share of the profits of the common estate: co-parceners it seems were not mentioned in this statute for the same reason as before, namely, that they had it in their power to prevent the injury by compelling a partition. In Virginia we have statutes similar to those of 13 Edw. I., and 4 Anne, and somewhat more comprehensive. Thus, it is enacted (V. C. 1873, ch. 133, §§ 2, 4, 5; V. C. 1887, ch. 126, §§ 2776, 2777, 2778, 2780), that if a tenant in common, joint-tenant, or *parcener*, commit waste, he shall be liable to his co-tenants, jointly or severally, for damages, which may be recovered by *action on the case*; and if the waste be found by the jury to be *wanton*, judgment shall be for *three times* the amount assessed. And if the waste shall be committed by the tenant in possession pending any suit to *recover or charge* the land,



with knowledge of the suit, three times the damages assessed therefor may be recovered. And provision is made by the statute to prevent further waste. The statute 4 Anne is more closely adhered to. (V. C. 1873, ch. 142, § 14; V. C. 1887, ch. 159, § 3294.) It provides that an *action of account* may be maintained by one joint-tenant, or tenant in common, or his personal representative, against another as bailiff, for receiving more than comes to his just share, and against his personal representative. And this provision is believed to extend by *construction* to parceners also, partly because equity had obliged them to render such an account before the statute of Anne, and partly from the reasonableness of such a conclusion, and from the force of the analogy in the case of joint-tenants and tenants in common. (4 Kent's Com. (12th ed.) 366 n. (e); 1 Lom. Dig. 632; *Post*, & seq.) But notwithstanding the mention by the statute of the *action of account*, the usual proceeding is not by that action, but by a bill in equity, which, by its *commissioner*, can adjust the account more conveniently than can be done in the action at law, where resort must be had to several persons as *auditors*. (2 Bl. Com. 183, & n. (14); 3 Do. 227-'8; 3 Th. Co. Lit. 245, n. (26); Id. 346, & n. (15); 1 Stor. Eq. §§ 446, 466; 3 Rob. Pr. 172-'3; 4 Do. 576, &c.; Huff v. Thrash, 75 Va. 546; White v. Stuart, & Co., 76 Va. 546.

8<sup>l</sup>. The Doctrine of Survivorship, or *Jus Accrescendi*; w. c.

1<sup>st</sup>. The Source and Nature of the Doctrine.

The doctrine of survivorship is the grand incident of joint-estates, which more than any other distinguishes them from the other instances of estates with a plurality of tenants. It is the immediate consequence of the peculiar mode in which joint-tenants are seised, namely, *per totum et per nihil*, or *per mie et per tout*; for if A and B are joint-tenants in fee, and each is seised of the *whole* jointly, but of *nothing* separately (but with capacity to *transfer an equal share*), and A dies, he can *transmit nothing* to his heir, but leaves B seised as before of *the whole*, but now with no one to share with him. (2 Bl. Com. 183-'4; 1 Th. Co. Lit. 736 & seq.)

This right of survivorship is called the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors; or as Bracton and Flou express it, "*pars illa communis accrescit superstitione de persona in personam, usque ad ultimum superstitionem.*" It is usually, but not necessarily, *mutual*; thus, if lands be let to A and B, during the life of A, if B dies, A has all by survivorship; but if A dies, the estate is at an end, and B takes nothing. (2 Bl. Com. 184, & n. (16); 1 Th. Co. Lit. 737-'8.)

Nature must, moreover, be taken of a diversity as to sur-

survivorship, between a *bare trust or authority* and a *trust coupled with an interest*. The bare trust or authority does not survive; the latter does, as in the case of a deed of trust. (1 Th. Co. Lit. 738; Combe's Case, 9 Co. 75 b; 1 Sugd. Pow. 143; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 19, 20; Mosby v. Mosby, 9 Grat. 590, 591.) And also a farther diversity, as to survivorship, should be noted, between joint-estates in chattels generally, which are subject to the *jus accrescendi*, and in *capital or stock in trade*, amongst merchants and traders, as to which there is no survivorship, out of regard to the interests of trade, the maxim being *jus accrescendi inter mercatores pro beneficio commercii, locum non habet*. (1 Th. Co. Lit. 738, and n. (I.); 3 Do. 297.)

But although the *title* to partnership chattels does not survive, and, therefore, the surviving partner has no power to dispose of the deceased partner's share, but the same goes to the latter's personal representative, yet it is otherwise as to the *choses in action* of the partnership. They do survive, and the *remedy* is to be prosecuted in the name of the surviving partner. The chattels in possession are to be distributed between the survivor and the personal representative of the deceased partner, in the same manner as they would have been upon a voluntary dissolution *inter vivos*. (Stor. Partnership, § 342; Buckley v. Barber, 6 Excheq. 177 & seq.)

This doctrine extends to manufacturers in partnership, and every other description of trade, and embraces *trade fixtures* as much as any other part of the partnership stock. (Stor. Partnership, § 342; Buckley v. Barber, 6 Excheq. 181.)

## 25. The Doctrine of Survivorship in Virginia.

The *jus accrescendi* is entirely abolished, as between joint-tenants in Virginia, save only in three cases, namely, 1st, Of joint trustees; and 2ndly, Of joint executors; 3rdly, Where it appears from the tenor of the *instrument* that it was intended the part of one dying should then belong to the others. It is also abolished as between husband and wife, tenants *by entireties*, in all cases of conveyances made after 1st of May, 1888, when the Code of 1887, took effect, as to which it is provided that if any estate, real or personal, be conveyed or devised to a husband and his wife, they shall take and hold the same by moieties in like manner as if a distinct moiety had been given to each by a separate conveyance. This last provision, touching *entireties* as between husband and wife, was first introduced into our Code by the revival of 1849. Previous thereto survivorship was abolished only as between *joint-tenants*, which was held not to extend to tenants *by entireties*. It would seem

that now, under the Code of 1887, in case of *tenancy by entirety*, the parties may *separately* aliene their respective shares. (V. C. 1873, ch. 113, §§ 18, 19; V. C. 1887, ch. 107, §§ 2430, 2431; Thornton v. Thornton, 3 Rand. 179; Norman's Ex'or v. Cunningham, 5 Grat. 70; Hemingway v. Seales, 42 Miss. 1; *Idote*, p. 470, 4<sup>th</sup>.)

Let it be observed that the Code of 1849, abolishing *entireties* as between husband and wife, applies only to estates of *inheritance*, conveyed or devised *since 1st July, 1850*. (V. C. 1873, ch. 112, § 18; Zollman v. Moore & als. 21 Grat. 313, 328.) So that, if the tenancy were created prior to the time indicated, or if the interest were only for years or for life, and not an estate of inheritance, the surviving consort still, under that Code, took the whole.

The Code of 1887 abolishes *entireties*, however, as between husband and wife, *in all cases*, without exception, where the conveyance was made after 1st May, 1888. (V. C. 1887, ch. 107, § 2430.)

#### 4. Modes of Determining Joint-Tenancies, and the Advantages Thereof.

We will advert to, (1). The modes of severing the jointure; and (2), The advantage or disadvantage thereof;

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#### 1<sup>st</sup>. The Modes of Severing the Jointure.

The joint-tenancy is severed or dissolved by destroying any one of its constituent unities; and if it be any other unity than that of *possession*, the holding then becomes a *tenancy in common*. (2 Bl. Com. 185, 192);

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#### 1<sup>st</sup>. Destruction of *Unity of Title*; w. c.

##### 1<sup>st</sup>. The Sale (or *in Equity* the Contract to Sell) one Co-Tenant's Part to a *Stranger*.

If one joint-tenant conveys his share to a third person, according to the power reserved to him (notwithstanding he is otherwise seised only *per totum, conjunctim*), or in equity, which looks upon what ought to be done as actually done, if he *contracts* to convey, the jointure is severed, as to the tenant so conveying; and as between his alienee and the other tenants, it is turned into a tenancy in common. For instance, if A, B and C are joint-tenants in fee, and A alienes to Z, Z is thenceforward, as to B and C, a tenant in common, but as between themselves, B and C are still joint-tenants. But a *devise* of one's share by will is no severance of the jointure; for no will takes effect till *after* the death of the testator, and *by* such death the right of the survivor (which accrued at the original creation of the estate, and has, therefore, a priority to the other), is already vested, "whereby it appears," says Lord Coke, "that Littleton, by these

words—*post mortem, et per mortem*,—though they jump at one instant, yet alloweth priority of time in the instant, which he distinguisheth by *per* and *post*," the rule of law being that *jus accrescendi præfertur ultimæ voluntati*. In Virginia, however, if a joint-tenant devises his share, even though the jointure were not dissolved in his lifetime, the will takes effect; for, as we have seen, there is with us, in general, between joint-tenants, no survivorship. (2 Bl. Com. 185-6, and n. (18); 1 Th. Co. Lit. 752 & seq., 759, 755, and n. (U.); *Ante*, p. 477, 2<sup>g</sup>.)

2<sup>h</sup>. The Sale of (or in Equity the *Contract to Sell*) one Co-Tenant's Share to *One of Several Other Co-Tenants*.

Thus, if A, B and C be joint-tenants in fee, and C convey, or in equity contract to convey, his share to B, the jointure is dissolved as to C's share; for whilst the two remaining parts are still held *in jointure*, B holds C's original share by a different title, taking effect at a different time, by means of a different conveyance, and as to that share is a tenant in common with A. (2 Bl. Com. 186; 1 Th. Co. Lit. 764-5.)

The proper mode, at common law, whereby one joint-tenant should convey to his fellow, is not by feoffment, or by any conveyance operating, at common law, by *livery of seisin*, which is, indeed, impossible, each tenant being already seised of the whole, but by *release*, which enures by way of *mitter l'estate*, and not by way of *extinguishment*. Under the statute of Grants (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 108, § 2417), it may be effected by *grant* also. (1 Th. Co. Lit. 765; and n. (E.); *Ante*, p. 473, 4<sup>f</sup>.)

2<sup>g</sup>. Destruction of *Unity of Estate or Interest*; w. c.

1<sup>h</sup>. The Sale of (or in Equity the *Contract to Sell*) a Part of the Estate of one Co-Tenant to a Stranger.

Thus, if there be two joint-tenants in fee, and one makes a lease *for life* of his share, this defeats the jointure; for it destroys the unity of *title*, as well as of *interest*, the reversion following the condition of the freehold. Although, if the tenant for life die in the life of both the original joint-tenants, they become joint-tenants as before. And so, if there be two joint-tenants *for years*, and one of them lets his share for a part of the term, the jointure is severed, it seems irrevocably. (2 Bl. Com. 163; 1 Th. Co. Lit. 760 to 764, 754 & seq.)

2<sup>h</sup>. The Acquisition of the Inheritance by One of Two Joint-Tenants for Life or Years.

If there be two joint-tenants for life (or for years), and the inheritance is afterwards purchased by, or descends upon, either, it is a severance of the jointure; for the lesser estate *merges* in the inheritance, and thus the ten-



into one to have the same estate or interest. But, as we have seen, if an estate is originally limited to two for life, and after to the heirs of one of them, or in Virginia to one of them and his heirs, the freehold shall remain in jointure without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate. (2 Bl. Com. 186; 1 Th. Co. Lit. 744 5, & n. (N.); Wiscot's Case, 2 Co. 60 b, 61 a, and Note (G).)

### 2°. Destruction of *Unity of Time*.

The unity of time respects only the original commencement of the joint-estate, and cannot (being now past) be affected as to the original parties by any subsequent transactions. (2 Bl. Com. 185)

### 4°. Destruction of the *Unity of Possession*.

The joint-tenancy may be destroyed without any alienation, by disuniting the possession of the tenants by *partition* of the land among them. For as joint-tenants must be seized *per totum et per nihil*, everything that tends to prevent their being seized throughout the *whole*, is a severance of the jointure. Hence, if two joint-tenants part their lands and hold them in severalty (or in equity *agree to do so*), they are no longer joint-tenants; for they have now no joint interest in the whole, but only a several interest in the respective parts. And for that reason, also, the right of survivorship is by such separation destroyed. (2 Bl. Com. 185.)

Such partition amongst the several joint-tenants may be either, (1). By common consent; or (2). By compulsion; w. c.

### 1°. Partition between Joint-Tenants *by Common Consent*.

By the common law all the joint-tenants might *agree* to make partition of the lands, but one of them could not *compel* the others so to do; for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent; a reason which has been justly characterized as more specious than solid; good sense seeming rather to indicate that in cases capable of severance of interest, the jointure should continue, as in case of partnership, so long as both parties should consent, and no longer. (2 Bl. Com. 185; 1 Th. Co. Lit. 753; 1 Stor. Eq. § 647.)

w. c.

### 2°. The Evidence Required of Consent to Partition; w. c.

#### 1°. Partition of Estates of Freehold.

Partition of estates of *freehold* between *joint-tenants* made by consent, even at *common law*, requires a *deed*,

mutual livery of seisin between the parties (which is sufficient in case of tenants in common) being impracticable in consequence of that *entirety of seisin* which is so marked a characteristic of joint-tenancy. And *a fortiori* is a deed required under the Virginia statute of conveyances in case of partition of an estate of freehold, or for a term exceeding five years. But an *agreement* to make partition may be enforced in equity, although not under seal, whenever a similar agreement *to convey* would be decreed. (2 Th. Co. Lit. 449, n. (G.); V. C. 1873, ch. 112, § 1; Id. ch. 140, § 1; V. C. 1887, ch. 107, § 2413; Id. ch. 133, § 2840; (cl. 6.): 1 Th. Co. Lit. 704-5, n. (57), 753, n. (R.); Frewen v. Relfe, 2 Bro. C. C. 224.)

## 2<sup>k</sup>. Partition of Estates for Years.

Joint-tenants *for years* may make partition by parol, in all cases, *at common law*; but by the Virginia statute of conveyances, if the term exceeds *five years*, the partition must be *by deed*; and an *agreement* to make partition, if the term exceeds one year, must in general be in writing, and signed by the parties to be charged. (1 Th. Co. Lit. 753; V. C. 1873, ch. 112, § 1; Id. ch. 140, § 1; V. C. 1887, ch. 107, § 2413; Id. ch. 133, § 2840 (cl. 6).)

## 2<sup>i</sup>. The *Effect* of Partition by Consent; w. c.

1<sup>k</sup>. Where the Parties are under no Disability, and the Partition was made without Fraud or Misrepresentation.

If the parties labor under no disability, and no fraud or misrepresentation is shown, an inequality in value, or irregularity in proceeding, will not affect the validity of the partition, especially if it has been long acquiesced in by the parties. (1 Th. Co. Lit. 692, 708; 1 Tuck. Com. 174, B. II.)

2<sup>k</sup>. When the Parties, or Either of Them, labor under any Disability, or there has been Fraud or Misrepresentation in making the Partition.

Within a reasonable time a court of equity will set the partition aside, and correct it in those particulars wherein it is liable to objection, just as the court would do in case of any other transaction, attended by similar objections. (1 Th. Co. Lit. 692, 710, 712; 1 Tuck. Com. 174, B. II.; Fitzhugh, &c. v. Foote & al. 3 Call. 17.)

## 2<sup>h</sup>. Partition between Joint-Tenants *by Compulsion*; w. c.

1<sup>i</sup>. Doctrine at Common Law as to Coercing Partition between Joint-Tenants, etc.

We have seen that joint-tenants and tenants in common are not compellable to make partition at common law. (2 Bl. Com. 185; *Ante*, p. 480, 1<sup>h</sup>.)

## 2. Doctrine by Statute.

Joint-tenants, and tenants in common, were first subjected to compulsory partition by the statutes 31 Hen. VIII., c. 1, and 32 Hen. VIII., c. 32, which were followed by others afterwards. The corresponding statutes in Virginia apply without discrimination (as, indeed, there is no need of discrimination), to *joint-tenants, tenants in common, and co-parceners*; declaring that tenants in common, joint-tenants, and co-parceners shall be compellable to make partition, and that the circuit or corporation court of the county or corporation (that is, the circuit court of the county, or the circuit or corporation court of the corporation), wherein the estate, or any part thereof, may be, shall have jurisdiction in case of partition, and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in any proceeding. (2 Bl. Com. 185; 1 Lam. Dig. 622; V. C. 1873, ch. 120, § 1; V. C. 1887, ch. 114, § 2562.)

The observations following, therefore, are to be understood as applicable as well to tenants in common and to co-parceners, as to joint-tenants;  
w. c.

1<sup>k</sup>. Proceeding by Writ of Partition.

The former statutes of Virginia contemplated the writ of partition (*de partitione faciendâ*), as the proper and regular proceeding to coerce partition between joint-tenants, and tenants in common: being founded in that particular, as in most others, on the statutes of 31 Hen. VIII., c. 1, and 32 Hen. VIII., c. 32, which again had derived the writ in question from the common law in respect to co-parceners. Our present statutes are silent as to the use of a writ of partition; but as it existed at common law, and was applied in case of joint-tenants and tenants in common, by statutes prior to the fourth year of James I., there can be no doubt that it is saved by the effect of our statute (V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2, § 3) reserving the benefit of all writs, remedial and judicial, given by any act of parliament, made in aid of the common law, prior to that year, so far as is consistent with our own constitution and laws. It has not been often resorted to in our past judicial history, although a few instances of it seem to have occurred (Rob. Forms, 7, 131, 374, 132; 1 Rob. Pr. (1st ed.) 502), having been in practice almost completely superseded by the concurrent proceeding of a bill in equity. And hereafter it may be expected to be still more out of use; so that a very brief exposition of the steps to be taken will suffice.

(1 Tuck. Com. 174, B. II.; 1 Lom. Dig. 623; 1 Rob. Pr. (1st ed.) 501);

W. C.

# 1. Summons on Writ of Partition.

## FORM OF SUMMONS IN PARTITION.

The Commonwealth of Virginia,

To the Sheriff of the County of A, *Greeting:*

We command you that you summon C. D., if he be found within your bailiwick, to appear before the judge of our circuit court for the county of A, at Rules to be holden for our said county on the first Monday in December next, to show wherefore when A. B. and the said C. D. together and undivided, hold a certain tract or parcel of land, containing eight hundred acres, with the appurtenances, lying and being in the county aforesaid, the said C. D. to make a partition thereof between them according to the form of the statute in that case made and provided, doth gainsay, and the same to be done, unjustly doth not permit. And have then there this writ.

Witness T. W., Clerk of our said Circuit Court, at the Court-house this — day of — in the year of our Lord, eighteen hundred and —, and of our foundation the —.

Teste,

T. W., *Clerk.*

See Rob. Forms, 7.

# 2. Interlocutory Judgment *Quod Partitio Fiat Inter Partes*, etc.

## FORM OF INTERLOCUTORY JUDGMENT IN PARTITION.

### JUDGMENT CONFESSED.

A. B., . . . . . *Plaintiff.*

Against

C. D., . . . . . *Defendant.*

Upon a writ for making partition of 800 acres of land, with the appurtenances, in this County.

This day came as well the Plaintiff by his attorney, as the Defendant by his attorney: and the Defendant says that he cannot gainsay the action of the said Plaintiff, nor but that partition ought to be made of the tenement aforesaid, with the appurtenances, between the said parties. Therefore it is considered by the Court that partition of the tenement aforesaid, with the appurtenances, be made between the said Defendant and the said Plaintiff. And the Sheriff is commanded that in his proper person he go to the tenement aforesaid, and in the presence of the parties aforesaid, by him to be warned, if they are willing to be present, and the same tenement, with the appurtenances, by the oath of good and lawful men of his county, he cause to be divided into two equal parts, having respect to the true value of the same, and deliver and assign one moiety thereof to the Plaintiff for his purparty, to be held in severalty by him, and the other moiety thereof to the Defendant for his purparty, to be held by him, in severalty; and that he have such partition so distinctly and openly made by the said Sheriff himself at the next term of this court, under his seal, and the seals of those by whom the same shall be made.

See Rob. Forms, 131; 1 Tuck. Com. 174, B. II.; 1 Th. Co. Lit. 699 & seq.

# 3. The Writ of Execution, *de Partitioe Facienda*.

This writ is of course addressed to the sheriff, and commands him to make partition of the premises by the oaths of twelve good and lawful men, in pursuance of the judgment, to assign the parts in severalty, and to make report to court under his seal and the seals



of the jurors. (1 Rob. Forms, 132; 1 Tuck. Com. 174, B. II.; 1 Th. Co. Lit. 699, 700 & seq.)

1. Final Judgment Confirming the Partition made by the Sheriff and Jury.

The judgment is that the partition be held firm and stable for ever. (1 Rob. Forms, 132; 1 Tuck. Com. 174, B. II.; 1 Th. Co. Lit. 701.)

2. Proceeding by Bill in Equity.

The jurisdiction of courts of equity in cases of partition, which is beyond question very ancient, has in practice, as above observed, quite superseded the proceeding at law, by writ of partition, insomuch that a very learned judge (Judge Green, in *Wiseley v. Findlay*, 3 Rand. 370), expresses a doubt whether such a writ has ever been prosecuted in Virginia, in which, however, he seems to have been mistaken. At all events, an application to equity for partition is not now, and for more than a century has not been, an application merely to the sound discretion of the court, as in cases of specific performance and others; but independently of the statutory provisions, it is due *ex debito justitiæ*. It is a remedy substituted for the difficult and perplexed remedy by writ of partition, the necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and sometimes indispensable compensatory adjustments, the peculiar remedial processes of courts of equity, and their ability to clear away all intermediate obstructions against complete justice, having led to a general concurrent jurisdiction on the part of those courts with courts of law, in all cases of partition. So that it is not now deemed needful to state in the bill any peculiar ground of equitable interference. Nor is it an objection to partition that an outstanding, continuing, particular estate for life exists in another in the land; and the particular tenant need not be a party to the suit; for the decree will be made subject to his rights. (1 Stor. Eq. §§ 646 & seq. 658; Mitf. Eq. Pl. 110-11; 2 Rob. Pr. (1st ed.) 10 & seq.; *Wiseley v. Findlay*, 3 Rand. 364, 370; *Agar v. Fairfax*, 17 Ves. 543, 552; *McClintock v. Mann*, 4 Munf. 328; *Otley v. McAlpine*, 2 Grat. 340-43; *Bolling v. Teele*, 76 Va., 487; *Hunt v. Jones*, 75 Va., 431.)

The only indispensable requisite to entitle the plaintiff to relief in equity in respect to partition (supposing the lands to *lie in Virginia*; *Poindexter v. Burwell*, 82 Va., 507; *Wimer v. Wimer*, Id. 901-'2,) was formerly that he must appear to have a clear *legal title*. If this be doubtful or disputed, as if there be a question whether

the deeds under which he claims are not forged, or if his title depend on difficult and doubtful questions of law, equity, without the aid of the statute law, will either dismiss the bill as unfit for its jurisdiction, or retaining the bill, will defer giving relief for a reasonable time, until the plaintiff establishes his title at law, by ejectment or other legal remedy. In Virginia, however, it is provided by statute, not only that partitions may be decreed in equity, but that that court, in the exercise of such jurisdiction, may take cognizance of all questions *of law*, affecting the legal title, that may arise in the proceeding. And when the parties claim under the same person, it is sufficient to prove the derivation of title from him, without proving his title. (2 Rob. Pr. (1st ed.) 11; 1 Tuck. Com. 174-5; Wiseley v. Findlay, 3 Rand. 361; Castleman v. Veitch Id. 598; Stuart's Heirs v. Coalter, 4 Rand. 74; Straughan v. Wright, Id. 485; Currin & als. v. Spraul & als. 10 Grat. 147-8; Hannon v. Hannah, 9 Grat. 150; Hinton v. Bland, 81 Va. 593-94; Bradley v. Zehmer, 82 Va. 688; Fry v. Payne, 82 Va. 761; 2 Greenl. Ev. § 307; V. C. 1873, ch. 120, § 1; V. C. 1887, ch. 114 § 2562.)

The proceedings in equity to effect a partition of lands between joint-tenants, tenants in common, and co-parceners may be primarily classed where, (1), The names or shares of some of the parties are unknown; and (2), Without reference to the fact whether all the names and shares are known or not.

W. C.

# 1<sup>1</sup>. Proceeding in Equity when the Names or Shares of some of the Parties are *Unknown*.

No provision seems to have existed at common law for such a case as the names or shares of any of the parties being unknown, nor even for the more probable case of their being abroad; nor has this deficiency been adequately supplied in England by statute, at least not by the statutes of 2 Wm. IV., c. 33, and 4 & 5 Wm. IV., c. 82, (1 Dan. Ch. Pract. 502.) The migratory habits of our people have given rise to a proceeding very well known amongst us as an *order of publication*, whereby a defendant resident without the State may be constructively summoned by notice, published in the newspapers, etc., in the manner prescribed, to answer a complaint. Of that mode of proceeding, advantage is taken in the case supposed. If the names or shares of any persons interested in the subject of the partition be unknown, so much as is known in relation thereto shall be stated in the bill, and such persons shall be made defendants by the general description of *parties unknown*. Then, upon

admission of the fact that the names are unknown, an *order of publication* may be entered (either in court, or in the clerk's office in vacation, at *any time*) against such unknown parties, which is proceeded with as against non-residents. The order states briefly the object of the suit, and requires the absent defendants, against whom it is entered, or the unknown parties, to appear within fifteen days after due publication thereof, and do what is necessary to protect their interests. It is published for *four successive weeks* in a newspaper prescribed by the court or clerk, and must be posted *by the clerk*, at the front door of the court-house of the county or corporation wherein the court is held, on the *first day* of the *next* county or corporation court after it is entered. And when so posted and published, if the defendants shall not appear within fifteen days after such publication is completed, the case may be tried or heard as to them, and such decree entered as may appear just; reserving, however, to any party not actually served with process, three years from the date of the decree, or one year from the time of service of a copy thereof, to petition to have the case re-heard, to plead or answer, and have any injustice in the proceedings corrected. (V. C. 1873, ch. 120, § 4; Id. ch. 166, §§ 10, 12, 14, 15; V. C. 1887, ch. 114, § 2567, Id. ch. 158, § 3230.) And so the proceeding may be by order of publication, when the number of parties *exceeds thirty*, etc. (V. C. 1887, ch. 158, § 3230.)

But it is singularly enough provided that "in any case, if the court or judge deem it proper," the court or judge may "*dispense with such publication in a newspaper*" (V. C. 1887, ch. 158, § 3231): A provision which seems to come perilously near setting at naught a rule which Chief Justice Marshall, and the United States Supreme Court, and our own Court of Appeals have again and again declared to be "founded on the first principles of natural justice, that a party shall have an opportunity to be heard in his defence, before his property is condemned." (The Mary, 9 Cr. 126; Dean v. Nelson, 10 Wal. 158; Lasere v. Rochereau, 17 Wal. 437; Galpin v. Page, 18 Wal. 350; *Exp. Lange*, Id. 163; McVeigh v. U. States, 11 Wal. 259; Earle v. McVeigh, 91 U. S. 503; Underwood v. McVeigh, 23 Gratt. 409; Windsor v. McVeigh, 93 U. S. 274; Dorr v. Rohr, 82 Va. 362.)

<sup>21</sup> Proceedings in Equity in Making Partition, whether the Names and Shares are all Known or Not.

Let us note. (1), The proper parties to the suit; (2), The interlocutory decree; (3), Proceedings of the com-

missioners to make partition ; (4), Costs of partition ; (5), Final decree in partition.

W. C.

### 1<sup>m</sup> The Proper Parties to the Suit.

In bills for partition, whether by joint-tenants, tenants in common, or co-parceners, as mutual conveyances are decreed, all persons necessary to make such conveyances must be parties to the suit ; and, therefore, not the original owners only, but also assignees of any of the shares, or lessees thereof, must be joined as such. But as decrees for partition are not allowed to affect the interests of third persons, mortgagees and judgment creditors, whether of the whole or of individual shares, are not to be made parties. (1 Dan. Ch. Prac. 257 ; Anon. 3 Swanst. 139 ; 2 Rob. Pr. (1st ed.) 14 ; Agar v. Fairfax, 17 Ves. 544 ; Wooten v. Copeland, 7 Johns. C. R. 140 ; Sebring v. Mersereau & als. 1 Hopk. C. R. 501 ; Harwood v. Kirby, 1 Pai. 471.)

### 2<sup>m</sup>. The Interlocutory Decree.

When the titles are clear upon the record (whatever may be the *estates*, whether in fee, for life, or for years), the court orders a commission of partition to issue ; if not clear, an inquiry is instituted for the purpose of ascertaining them ; and with this view it may be requisite to refer the matter to a master-commissioner to investigate and report the facts, not so much in respect to cases in which the title is litigated, as to cases of doubt and difficulty as to the extent of the undivided interest of the respective parties. In England, it seems to be the practice, when such an inquiry by a master is directed, to go on, by the same decree, to order a partition according to the finding of the master, and a commission issues accordingly, without requiring the cause previously to come on again on the master's report. With us, the practice is believed to be otherwise, and that, if there is a reference to a master, the court will require his report to be returned before pronouncing for the partition, and appointing commissioners. The commissioners are appointed by the court, generally upon the nomination of the parties, but if they do not agree, according to its own discretion. They are usually five in number, any three to act ; and if the land is in different counties, in the discretion of the court, different sets of commissioners may be named for each county. They are directed by the decree to allot to the tenants their respective parts in severalty, and to report their proceedings to the



court, in order to a final decree. In England, a formal commission is issued corresponding in tenor with the decree, and in Virginia a like degree of formality seems at one time to have been observed (Rob. Forms, 198, 41); but practically a copy of the decree is believed to be for the most part the only actual authority with which the commissioners are at present provided. (2 Dan. Cham. Pract. 1327 & seq.; 2 Rob. Pr. (1st ed.) 12; Sands' Suit in Equity, 446 & seq. and n. (a); Otley v. McAlpine's Heirs, 2 Grat. 340.)

As an incident to decreeing partition, a court of equity directs accounts to be settled between the co-tenants when there has been an unequal perception of the rents and profits, and will include in such adjustment, sums of money which have been laid out by either party in *improvements* beneficial to the property. In adjusting the account for *rents and profits*, the co-tenant, although in exclusive possession, ought not to be charged with profits where, without his default, none were made; and in respect to *improvements*, the co-tenant in possession is entitled to credit not only for his expenses and actual services in the improvements which may have increased the value of the property, but also for his expenses, labor, and services in unsuccessful but *bona fide* attempts at improvement. He who proposes to take the profits must share the burden. And the expenditure of each year should be set off against the rents and profits thereof, as far as the same will go, thus allowing the claim for improvements in any year to be liquidated in whole or in part by the profits of that or any succeeding year. (1 Stor. Eq. §§ 655, 656 b; Ruffners v. Lewis' Ex'ors, 7 Leigh, 743-'4; Early v. Friend, 16 Grat. 21, 47, 52; Graham v. Pierce, 19 Grat. 28, 38 & seq.; 1 Lom. Dig. 632; 4 Kent's Com. 366, n. (d); Graham v. Graham, 6 Monroe (Ky.) 562; O'Bannon v. Roberts, 2 Dana (Ky.) 55-'6.)

Where the improvements have been confined to certain parts of the premises which have been in the occupancy of one of the co-tenants, it is proper in making partition, if it can be done with due regard to justice, to assign the portion on which the improvements were made to him who made them, without taking their value into consideration; and that is a rule especially to be observed when the improvements were made under the belief on the part of the tenant that he was exclusively entitled to the property. See *Swail v. Atherton*, 6 Dana, (Ky.) 276; *Borah v.*

Archer, 7 Dana, 175; St. Felix v. Rankin, 3 Edw. Ch. (N. Y.) 323; Brookfield v. Williams, 1 Green. Ch. (N. J.) 341.)

3<sup>m</sup>. Proceedings of the Commissioners to make Partition.

A far greater latitude has always been assumed by courts of equity in making the partition, in order that it should be reasonable, equal and mutually advantageous, than was ever claimed by the courts of law upon the writ of partition. With their usual rigor of construction, especially where the freehold was concerned, the courts of law upon the writ of partition were accustomed to hold that they were restrained to the allotment in kind of their respective shares of the property to the several parties, giving each his due proportion of every tract, of every house, and of every species of land, arable, pasture, meadow, wood, etc. But the courts of equity repudiated these affected scruples, and whilst assigning to each co-tenant his proper proportion, insisted that it should be done in such a manner as to lessen as little as possible the value of the parts and of the whole. "If there were three houses of different value to be divided among three, it would not be right," says Lord Chancellor Parker, "to divide every house, for that would be to spoil every house; but some recompense is to be made, either by a sum of money, or rent for *ouelty* of partition, to those that have the houses of less value. By the same reason, every house on the estate must be divided, which would depreciate the estate, and occasion perpetual contention." (Clarendon v. Hornby, 1 P. Wms. 447; 1 Stor. Eq. § 654 & seq.; 2 Rob. Pr. (1st ed.) 12; 1 Th. Co. Lit. 699-700.)

But notwithstanding the liberal doctrine propounded by Lord Chancellor Parker, in Clarendon v. Hornby, it was understood, and indeed affirmed by himself in that case, that each tenant must have some substantial part of the premises, so that, if there were but one house or mill to be divided, and no other lands to make up the co-tenant's share, a division in kind was unavoidable. The English books afford a number of cases where this doctrine was applied disadvantageously to the *interests* of all parties, but in magnanimous vindication of their *rights*. The most pitiable of these, in its results, is Turner v. Morgan, 8 Ves. 145. The bill was filed for a partition by a person entitled to two-thirds of a house at Portsmouth, against his co-tenant entitled to one-third. The Lord Chancellor (Eldon) forbore a decree for a time, as

"an act of mercy to the parties," in the hope that they would compromise their differences, but neither yielding, he was constrained to issue a commission, which was executed by allotting to the plaintiff the whole stack of chimneys, all the fire-places, the only stair-case in the house, and all the conveniences in the yard. But the chancellor said he knew not how to make a better partition, and that the only escape for the parties was to agree to buy or sell. See *Parker v. Gerard*, 1 Amb. 236; *Warner v. Baynes*, 2 Amb. 589.

In Virginia, by statute (V. C. 1873, ch. 120, §§ 3, 2; V. C. 1887, ch. 114, §§ 2564, 2563), sufficient discretion is now conferred on the court to avoid such embarrassments. When partition cannot conveniently be made otherwise,—

1st. The entire subject may be allotted to any party who will accept it, and pay therefor to the other parties such sums of moneys as their interest therein may entitle them to;

2dly. The entire subject may be sold and its proceeds divided;

3dly. Part may be allotted, and the residue sold;

4thly. Any two or more of the parties, if they so elect, may have their shares laid off together, when partition can be conveniently made that way.

The sale of the entire subject or the allotment of part and the sale of the residue, and the distribution of the proceeds of sale may be made by the court, according to the respective rights of those entitled, notwithstanding any of them may be an infant, insane person or married woman, taking care when there are creditors of any deceased person who was a tenant in common, joint-tenant or co-parcener, to have the proceeds of such deceased person's part applied according to the rights of such creditors. And when there are liens, by judgment or otherwise, on the interest in the land of any party, the court, in case of such sale, may on petition of any person holding a lien, ascertain the liens on the said interest and apply the "*dividend*" of such party in the proceeds of the sale to the discharge thereof, so far as the same may be necessary. (V. C. 1873, ch. 120, § 3; V. C. 1887, ch. 114, § 2564.)

When the "*dividend*" of a party exceeds \$300, if such person be an infant, or insane person, or be a married woman whose interest in the land accrued, and whose marriage took place, prior to the 4th day of April 1877, the court may order the same to be invested in like manner as if the sale were made

under V. C. 1887, ch. 117, touching the sale of the lands of infants and insane persons. (V. C. 1887, ch. 114, § 2564. See *Frazier v. Frazier*, 26 Grat. 500; *Zirkle v. McCue*, Id. 517.)

If the "*dividend*" does not exceed \$300, it shall be deemed *personal estate*, and be paid to the guardian of such infant, committee of such insane person, or to such married woman, as her separate estate, the court being first satisfied that such guardian or committee has given bond in sufficient penalty, and with sureties sufficient for the security of the same; but if the interest of such married woman in the land be held in trust, her "*dividend*" shall be paid to her trustee, to be held by him upon the same trusts as her interest in the land was held. (V. C. 1887, ch. 114, § 2564.)

A sale of land so made by order of the court shall operate to bar the contingent right of dower of the wife in the share of her husband in the land so sold, whether she be a party to the suit or not. (V. C. 1887, ch. 114, § 2564; *Lee v. Lindell*, (22 Mo. 202) 64 Am. Dec. 263; *Weaver v. Gregg*, (6 Ohio 547,) 67 Am. Dec., 358-'9.)

Every final decree in partition hereafter made under this chapter shall include the names of all the parties whose interest is disposed of by said decree, the names of the parties in whom it is vested, and the description of the land conveyed and shall be recorded in the book of deeds of the county or corporation in which such real estate is situated, and shall vest the *legal title* in the person or persons to whom the several shares are or have been allotted in as full and ample a manner as if mutual conveyances had been executed by the parties, or the title had been conveyed by a commissioner of the court duly authorized. (V. C. 1887, ch. 114, § 2565; Id. ch. 111, § 2510.)

Upon a bill for partition of lands, the share of each co-tenant should be assigned to him *in severalty*, if it can be done with a due regard to the interests of all concerned. And if, from the condition of the subject or of the parties, it is deemed proper to pursue a different course, the facts supposed to justify a departure from the rule ought (at least where infants are concerned,) to be disclosed by the report of the commissioners appointed to make the division, or be otherwise made to appear, in order to enable the court to judge whether or not the interests of the parties will be injuriously affected by the action taken. (*Custis v. Snead*, 12 Grat. 262, & seq.;



Cox v. McMullin, 14 Grat. 91; Howery v. Helm, 20 Grat. 8; 1 Th. Co. Lit. 699, 704.) Where such partition in severalty is impracticable, or cannot be made without impairing the portions of some or all of the parties, then nothing remains but to resort to one or other of the devices above stated, as, for example, by dividing the property into shares of unequal value, and correcting the inequality by charging money on the more valuable in favor of the less valuable portion (Cox v. McMullin, 14 Grat. 82), or by a sale of the whole, and a distribution of the proceeds. (Howery v. Helms, 20 Grat. 1.) And whether the partition shall be made in kind, or in some one of the special modes allowed by the statute, is a question for the court, whose decision is not to be controverted *in a collateral suit*, except for fraud or surprise. (Wilson & al. v. Smith, 20 Grat. 502.)

When the division has been made into the required number of shares, the proper, or rather the *usual* course, is to determine *by lot* which portion shall belong to the parties severally; but if it will be to their mutual benefit, or to the benefit of one without injuring another, the commissioners may, in their discretion, subject to the correction of the court, assign the respective shares to the co-tenants specifically, instead of resorting *to the lot*. (1 Th. Co. Lit. 695; Cox v. McMullin, 14 Grat. 91-'2.)

The same statute, touching partitions, also confirms a convenient practice, which had long been established in Virginia, of making division in equity of *goods and chattels* which cannot be conveniently distributed in kind amongst those entitled, by the sale thereof and the distribution of the proceeds, or, by the actual distribution in kind, if they can be so distributed, there being no provision whatever at law for the compulsory partition of chattels. (V. C. 1873, ch. 120, § 6; V. C. 1887, ch. 114, § 2569; Smith & als. v. Smith, 4 Rand. 95, 102; Fitzhugh & ux. v. Foote & al. 3 Call, 17, 18.)

#### 4<sup>m</sup>. Costs of Partition.

The costs of the proceeding are in general to be paid by the parties *in proportion to the value of their respective interests*, it being a rule that no costs shall be given until the commission, nor for any proceedings subsequent to the confirmation of the commissioner's report. (Agar v. Fairfax, 17 Ves. 533; Calmady v. Calmady, 2 Ves. Jr. 568; Whaley v. Dawson, 4 Sch. & Lefr. 371.)

#### 5<sup>m</sup>. Final Decree in Partition.

Upon the return of the commissioners' report, showing how the land has been allotted to the parties in severalty, if there is no successful objection made thereto, a final decree is made confirming the report; or if a sale be found necessary, ordering it to be made; in which latter case the decree is not entirely final, the cause being reserved in order that the court may superintend the sale. Supposing an allotment of shares to the several tenants to have been made and confirmed, the decree, independently of statute, directs *mutual conveyances to be executed* by the parties to each other, of the several lots assigned to them respectively. And herein consists an important diversity between this proceeding in equity, and the writ of partition at law. The latter operates to confer a legal title by the judgment of the court of law, and the delivery up of possession in pursuance thereof, which concludes all the parties to it. Partition in equity transfers only an equitable right in itself, and secures a legal title by conveyances to be executed by the parties mutually. (*Bolling v. Teel*, 76 Va. 487.) Hence, if the parties, or any of them, be incompetent to execute the conveyances, the partition, independently of statute, cannot effectually be had until the disabilities are removed, and the conveyances executed. This is helped, however, in Virginia by two statutes, of which one (V. C. 1873, ch. 174, § 7; V. C. 1887, ch. 167, § 3418), provides that a court of equity in a suit in which it is proper to decree the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title, and interest of the party on whose behalf it is executed, as if such party had been competent, and had executed it. And the other (V. C. 1887, ch. 111, § 2510) enacts that the decree of partition shall be recorded in the book of deeds of the county or corporation, in which the lands are situated and shall *rest the title* (meaning the *legal title*) in the person or persons to whom the several shares are or shall have been allotted in as full and simple a manner as if mutual conveyances had been executed by the parties, or the title had been conveyed by a commissioner of the court duly authorized. (V. C. 1887, ch. 114, § 2568.) In case of infancy of any of the parties, the infants are as much bound by the decree as persons of full age; but it was formerly indispensable that the decree should reserve leave to the infant to show cause against the

ance within six months after coming of age, the omission of which was error sufficient to reverse the decree. (Jackson's Heirs v. Turner, 5 Leigh, 119; Tennent's Heirs v. Patton, 6 Do. 196; Zirkle v. McCue, 26 Grat. 528-'9; Parker v. McCoy, 10 Grat. 594.) At present this is more conveniently provided for by statute. (V. C. 1873, ch. 174, § 10; V. C. 1887, ch. 167, § 3424), which dispenses with such a clause, and gives the same effect to the decree as if it had been inserted. The statute above cited (V. C. 1873, ch. 174, § 7; V. C. 1887, ch. 167, § 3418), meets fully and removes the embarrassment which formerly attended decrees for partition in case of contingent remainders, or executory limitations, not barrable or extinguishable, limited to persons not in existence, when the conveyance, and, therefore, the consummation of the decree, was necessarily deferred until the party entitled came into being, or the contingency was determined; and then a supplemental bill was required to carry the original decree into execution. (1 Stor. Eq. §§ 651, 652; Whaley v. Dawson, 2 Sch. & Lefr. 471-'2; Sands' Suit in Eq. 446 & seq.)

## 2. The Advantage, or Disadvantage of Dissolving the Jointure.

In general it is advantageous for joint-tenants to dissolve the jointure, where the right of survivorship still subsists, as in Virginia, it will be remembered, it does not, at least for the party's own benefit, unless expressly limited to the survivor; for since by the dissolution the *jus accrescendi* is taken away, each tenant may transmit his own part to his own heirs. Sometimes, however, that very privilege of survivorship confers a marked advantage, and then, of course, the continuance of the joint-tenancy is desirable. Thus, if A and B be joint-tenants for life, during the jointure each has an estate *in the whole*, for the life of his companion, and if he survive, for his own life also; whereas, if they make partition, each has an estate *in his own share*, for *his own life only*. (2 Bl. Com. 187; V. C. 1873, ch. 112, §§ 18, 19; V. C. 1887, ch. 107, §§ 2430, 2431.)

## 2. Tenancy in Common.

A tenancy in common is where two or more hold the same land, with interests accruing under different titles; or accruing under the same title, but at different periods; or conferred by words of limitation importing that the grantees are to take in distinct shares. (1 Steph. Com. 323.)

In this tenancy there is not necessarily any *unity of title*; for one may hold by purchase from A, and another by purchase from B; nor any *unity of time*; for one's estate may have existed fifty years ago, and that of the other but yesterday; nor any *unity of estate* or interest; for one tenant in common may be entitled in fee-simple, and the other for life

or for years. Neither is there that *entirety* of interest which so remarkably characterizes joint-tenancy; for each is seised or possessed of a *distinct* though *undivided* share; from which also it follows that there is *no survivorship*, that is, by the effect of the tenancy itself, for by *express limitation* there may be. The union consists only in this, that they hold the same land *pro indiviso*, by a possession in common, or promiscuously. (2 Bl. Com. 191 '2; 1 Steph. Com. 323 '4; 1 Th. Co. Lit. 758.)

Let us observe, (1), The modes whereby a tenancy in common may be created; (2), The properties of tenancy in common; (3), The incidents thereof; and (4), The modes of determining it.

W. C.

# 1<sup>e</sup>. Modes whereby a Tenancy in Common may be Created.

A tenancy in common may be created by (1), A special limitation to two or more persons to hold expressly as tenants in common; (2), A grant of half of one's land to a stranger; (3), A grant of lands to two corporations; (4), A devise or grant of lands to two or more persons, *equally to be divided* between them; and (5), A breaking up of estates in joint-tenancy, and in co-parcenary.

W. C.

## 1<sup>f</sup>. A Special Limitation to Two or more Persons to hold expressly as *Tenants in Common*.

"If lands be given to two," says Littleton, "to have and to hold, *seil*, the one moiety to the one and his heirs, and the other moiety to the other and his heirs, they are tenants in common;" and Lord Coke adds, that the reason is because they have several freeholds, and an occupation *pro indiviso*. And so it is if lands be given to two or more to hold as tenants in common, and not as joint-tenants. (1 Th. Co. Lit. 772; 1 Steph. Com. 325; 2 Bl. Com. 193.)

## 2<sup>f</sup>. A Grant of Half of One's Lands to a Stranger.

"If a man seised of certain lands enfeoff another of the moiety of the same land, (and the like law is if it be of a third or fourth part) without any speech of assignment or limitation of the same moiety in severalty, at the time of the feoffment; then the feoffee and the feoffor shall hold their parts of the land *in common*;" for as they do not derive their titles by the act of the law, but by that of the parties, they are not parceners; and as they do not claim by one and the same conveyance, taking effect at one and the same time, they are not joint-tenants; nor are they seised in severalty, but *pro indiviso*; they must therefore be *tenants in common*. (1 Th. Co. Lit. 773; 1 Tuck. Com. 182, B. II.)

## 3<sup>f</sup>. A Grant of Lands to Two Corporations.

The instances stated by Littleton, of grants to bodies



politic, which are, therefore, tenancies in common, are confined to *corporations sole* (e. g., two abbots, or two bishops), and the reason given by Coke for holding them to be tenants in common, although the words be joint, is that they take the lands in their *politic capacity*, and are, therefore, seised *in several rights*, and consequently not jointly, but by *several titles*. It is not perceived but that the doctrine is equally applicable to corporations *aggregate*, the reason appearing to be as strong in case of such corporations as of corporations sole. (1 Th. Co. Lit. 769-70; Ang. & Ames Corp. § 185.)

f. A Devise or Grant of Lands to two or more Persons, *Equally to be Divided Between Them*, etc.

The doctrine that the phrases "*equally to be divided*," "*share and share alike*," "*respectively between and amongst them*," etc., will make a tenancy in common, was at first confined to *wills*, and to the courts of *equity*, but has long prevailed in the courts of law also, and in reference not only to wills, and to conveyances under the statutes of Uses and of Grants, but also in respect to conveyances at common law. (*Ante*, p. 467, 1<sup>o</sup>; 2 Bl. Com. 180, n. (4).)

This is an instance of a *change of policy* in the law, to which allusion has already been made. Formerly, joint-tenancy was much favored, and the common law, in its construction, leaned to it rather than to tenancy in common; because the divisible services issuing from land (as rent, etc.), were not divided, nor the entire services (as fealty) multiplied by joint-tenancy, as they must necessarily be upon a tenancy in common. The leaning in later times, however, has been the other way; the right of survivorship being often inconvenient and harsh in its effect; and, therefore, in wills, and in other conveyances referred to, which came into use in comparatively modern times, and where a more liberal construction is, in some respects, allowed, than in the case of a common law conveyance, a tenancy in common will be created by words which, in the latter case, might have operated as a limitation in joint-tenancy. (2 Th. Co. Lit. 773, n. (42); 2 Bl. Com. 192; 1 Steph. Com. 326.)

g. By the *Breaking up* of Estates in Co-Parcenary, and in Joint-Tenancy.

If an estate in joint-tenancy, or in co-parcenary, be destroyed by breaking up any of its constituent unities, except that of possession, a tenancy in common always results. Thus, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now *several titles* derived from different sources; and also *dissimilar interests*, the former joint-tenant holding in fee-simple, and the other

for his own life only. And it may be observed, in passing, that if the alienee die, living the alienor and the former joint-tenant, the two are joint-tenants again; but if either dies, living the alienee, the jointure is finally determined. In like manner, if one of two parceners alienes his share, the alienee and the remaining parcener are tenants in common: because they hold by different titles, the parcener by descent, and the alienee by purchase. Nor is this doctrine repugnant to that with which we set out, namely, that tenancy in common is by *act of the parties*, which in this case is plainly true, notwithstanding one of the parties claims by descent. (2 Bl. Com. 192; 1 Steph. Com. 324 '5; 1 Th. Co. Lit. 759, 762.)

## 2<sup>e</sup>. The Properties of Tenancy in Common.

Tenancy in common requires no other unity than that of *possession*. The occupation of the lands is *undivided*, and neither of them knoweth his part in severalty. (1 Th. Co. Lit. 750; 1 Tuck. Com. 181.)

## 3<sup>e</sup>. The Incidents of Tenancy in Common.

The incidents which belong to tenancy in common may be set forth under the following heads, namely: (1), To sue and be sued *severally*; (2), Actions of waste and of account; (3), Possession by one tenant in common is the possession of all; (4), The reparation of the premises owned by tenants in common; (5), Non-survivorship; (6), Mode whereby one tenant in common may convey his share to the other; (7), Cross-remainders as between tenants in common; and (8), Partition as between tenants in common;

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### 1<sup>f</sup>. To Sue and be Sued *Severally*.

To sue and be sued severally is an universal incident at common law, in case of tenancy in common, when the action is *real or mixed*, because the tenants have, or at least may have, *separate and distinct titles*. In respect to *personal* actions, including claims for injuries done to the premises held in common, by trespass or otherwise, tenants in common are, at common law, to sue and be sued *jointly*. Hence, if tenants in common make a grant in fee-simple, reserving a rent in fee, and the rent being unpaid, an *assize*, which is a *real* action, is brought to recover the *seisin* of the rent, it must be instituted by them *separately*; but if the object is merely to recover the *arrears*, which is done by means of debt, or some other *personal* action, it is prosecuted *jointly*, and on the death of either the action survives. (1 Th. Co. Lit. 777-'8, 782, 783-'4; 3 Rob. Pr. (2d ed.) 163; Rose's Adm'x v. Burgess, 10 Leigh, 198; Clarkson & als. v. Booth, 17 Grat. 496.)

In Virginia, however, it is provided by statute, that "tenants in common *may* join or be joined as plaintiffs or de-

jointants" (V. C. 1873, ch. 164, § 2; V. C. 1887, ch. 159, § 3236), whilst, as according to the common law doctrine, they may also sue and be sued separately.

2<sup>d</sup>. Actions of Waste and of Account.

Tenants in common could not, at common law, recover one against another for waste committed, any more than joint-tenants, and for the same reason essentially, namely, that each was entitled to the possession of the undivided whole, and so might obtain redress as to waste on the part of his fellow, by entering upon and occupying the premises. So, also, a tenant in common could not, any more than a joint-tenant at common law, call his fellow to account for receiving more than his proper share of profits, unless he had constituted him his bailiff or receiver. These principles, however, are changed, as we have seen, by statute. As to waste it is enacted in Virginia (V. C. 1873, ch. 133, § 2; V. C. 1887, ch. 126, § 2776), after the example of 13 Edw. I., c. 22, that if a tenant in common, joint-tenant, or parcener, commit waste, he shall be liable to his co-tenants, jointly or severally, for damages; and as to the mutual accounting for an over-share of profits received, it is provided (as by 4 Anne, c. 16), that an action of account or in practice, a bill in equity for an account, may be maintained by one joint-tenant, or tenant in common, or his personal representative, against the other as bailiff, or against his personal representative, for receiving more than comes to his just share or proportion. (V. C. 1873, ch. 142, § 14; V. C. 1887, ch. 159, § 3294; 2 Bl. Com. 183, 194; 1 Th. Co. Lit. 787-8; Huff v. Thrash, 75 Va. 546.)

Every tenant in common has a right, notwithstanding the statute, to possess, use, and enjoy the common property severally, accounting to his co-tenants, under the statute, for so much of the rents and profits as he may receive. And where such tenant in common uses the property to the total or partial exclusion of his co-tenants, the best measure of his accountability to them is their share of a fair rent of the property so occupied and used by him (Graham & als. v. Pierre, 19 Grat. 38-9; Early, &c. v. Friend, 16 Grat. 21, 52, 54); although circumstances may make it proper to resort to other modes of adjustment between the co-tenants.

Early v. Friend, 16 Grat. 54; Ruffners v. Lewis' Ex'ors, 7 Leigh, 720.)

3<sup>d</sup>. Possession by One Tenant in Common is the Possession of All.

As such tenant in common is entitled to an *undivided* portion of the whole, he is entitled to occupy the whole, and the possession by one is looked upon as a possession in the interest of all, unless it be expressly negatived. Hence, in an action by one tenant in common, joint-tenant,

or parcener, against a co-tenant, for the land, the plaintiff must prove an actual *ouster*, or some other act amounting to a total denial of the plaintiff's right as co-tenant. The mere possession by the co-tenant is not sufficient, that being no more than he is entitled to. But sole and uninterrupted possession by one tenant in common, for a great number of years (*e. g.*, thirty-six years), without any account, or demand made, justifies presumption of *ouster*. (*Doe v. Hill*, 10 Leigh, 457; *Purcell v. Wilson*, 4 Grat. 16; 1 Th. Co. Lit. 784, & n. (N.), 789, n. (T).)

The same observations are applicable here as in respect to joint-tenants, for which see *Ante*, pp. 472-'3, 3<sup>d</sup>.

In the case of *chattels personal*, a very singular consequence results from the unity of possession existing between tenants in common, namely, that if one take the whole chattel to himself out of the possession of the other, the other has no other remedy but to take it again from the wrong-doer, to occupy in common, when he can "*see his time*." It is only where the chattel held in common is *totally destroyed* by his companion that a tenant in common can sue his fellow. (1 Th. Co. Lit. 786, & n. (Q.); 1 Chit. Pl. 178.) But *partition* of chattels may by statute with us be decreed in equity between tenants in common as well as joint-tenants. (V. C. 1873, ch. 120, § 6; *Ante* pp. 491-'2; V. C. 1887, ch. 114, § 2569.)

#### 4<sup>d</sup>. The Reparation of the Premises Owned by Tenants in Common.

If two tenants in common, or joint-tenants, be of a *house or mill*, and it fall into decay, and the one is willing to repair the same, and the other is not, he that is willing shall have a writ *de reparatione facienda*, but not so as to *fences or other enclosures*, nor without a previous request to join in the reparation and a refusal, nor unless the expenditure has been previously actually made. The parties being *in equali jure*, equality of burden is equity, and hence the obligation of each to contribute. (1 Th. Co. Lit. 787; 4 Kent's Com. 370-'71; *Lewis Bowles's Case*, 11 Co. 82 b.)

This defect of the common law is supplied in Virginia by statute, which allows neighboring proprietors to compel the *repair* at their common expense, of "*division-fences separating enclosed cleared lands*." (V. C. 1887, ch. 93, §§ 2053, & seq.)

#### 5<sup>d</sup>. Survivorship.

Between tenants in common there are no *entireties*, and therefore the doctrine of *survivorship* does not apply as between them; but upon the death of either, his share descends *to his heirs*. (1 Th. Co. Lit. 789, n. (T); 1 Tuck. Com. 183, B. II.)



- 6<sup>d</sup>. Mode whereby one Tenant in Common may Convey his Share to his Co-tenant.

One tenant in common may, at common law, *enfeoff* his companion, with livery of seisin, but cannot *release* to him as a joint-tenant may, because tenants in common have *several trackability*, and are not seised *by entirety*. On the other hand, co-parceners may both enfeoff and release, because, to some extent, their seisin is joint, and to some several. (1 Th. Co. Lit. 788-9.) One tenant in common may also convey to another by conveyance under the statute of Uses, or the statute of Grants. (V. C. 1873, ch. 112, §§ 14, 4; V. C. 1887, ch. 107, §§ 2426, 2517; *Ante*, p. 213; *Post*, p. 501.)

- 7<sup>d</sup>. Cross-Remainders as between Tenants in Common.

When lands are given to two or more, as tenants in common, it frequently happens that a particular estate is limited to each of the grantees in his share, with remainder over to other or others of them in case they should happen to survive, or in case the first taker should die without heirs of his body, etc., and so reciprocally; as if a man give lands to his two children for their lives, as tenants in common, and direct that, upon the failure of heirs *of the body* of one of them, his share shall go over to the other in fee, and *vice versa*. Such ulterior limitations are styled *cross-remainders*, because each of the grantees has reciprocally a remainder in the share of the other; and it is a rule respecting them, that in a deed they can be given only by express limitation, and shall never be *implied*; though it is otherwise with respect to *wills*, which are expounded more liberally, with a view to the presumable intent of the donor; for in these, cross-remainders can be raised not only by actual limitation, but by any expression from which the design to create them can be reasonably inferred. It is said that, even in a will, although cross-remainders are favored as between two, yet among more than two, the *presumption* is against them, subject still, however, to be controlled by a plain intention to the contrary. It seems, indeed, that wherever it appears to be the intention of a testator that the whole of his estate shall go over together, upon the failure of heirs *of the body* of even more than two tenants in common, cross-remainders will be implied between them in the meantime, in order to effectuate that intent. The doctrine of cross-remainders is applicable to personal, as well as to real estate; but where there are more than two persons concerned, and the share of one passes to the others by way of cross-remainder, and then another dies without heirs of his body, nothing passes by way of remainder, but his *original share*, unless the contrary appear plainly to have been the testator's intent. (1

Steph. Com. 326; 1 Th. Co. Lit. 774, &c., n. (1.); *Post*, p. 41.)

8f. Partition between Tenants in Common.

At common law partition could be made *voluntarily* between tenants in common, by *mutual consent*, but could not be compelled, for a reason already indicated. (*Ante*, p. 480-'81, 1<sup>h</sup>.) But compulsory partition is allowed in Virginia, by a statute corresponding to, but more convenient than, 31 Hen. VIII., c. 1, and 32 Hen. VIII., c. 32. (2 Bl. Com. 194; 1 Th. Co. Lit. 789, and n<sup>\*</sup> (u); V. C. 1873, ch. 120, §§ 1, 2, 3, 6; V. C. 1887, ch. 114, §§ 2562, 2563, 2564, 2569; *Ante*, pp. 481 & seq. 2<sup>h</sup>; *Ruffners v. Lewis's Ex'ors*, 7 Leigh, 743-4.)

4e. Modes of Determining Tenancies in Common.

There being in tenancies in common but a single *unity*, namely, that of *possession*, such a tenancy is determined only by disuniting the possession, and assigning to each tenant his share in severalty, or else by uniting all the shares in the hands of some one of the tenants, or by *agreeing* to do one or the other of these things. (2 Bl. Com. 194; *Ante*, p. 479, 2<sup>h</sup>.)

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1f. Uniting all the Titles and Interests in one Tenant; w. c.

1g. Mode of Uniting all the Interests, &c., in one Tenant, in Case of a *Freehold*.

Tenants in common may transfer their interests one to another by feoffment, *with livery*, at common law, which, independently of the statute 29 Car. II., c. 3, might as well have been made *by parol* as by deed. By our statute of conveyances (V. C. 1873, ch. 112, §§ 1, &c.; V. C. 1887, ch. 107, §§ 2413, &c.), corresponding to 29 Car. II., c. 3, §§ 1, 2, 3, it must be *by deed*, and by the statute of Grants (8 and 9 Vict. c. 106; V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417), it suffices to have a deed *without livery*. (1 Th. Co. Lit. 705, 753; 4 Kent's Com. 368-'69; 1 Tuck. Com. 183, B. II.) And one tenant in common may also convey to his fellow by conveyances operating under the statute of *Uses*. (*Ante*, p. 213.)

2g. Mode of Uniting the Interests in Case of Terms for Years.

Tenants in common may convey to each other, as if they dealt with a stranger. Hence, at common law, the interests of such tenants in a term for years could be united by a mere parol assignment without livery, there being no freehold involved. But by our statute of conveyances (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413), if the term is for a period exceeding *five years* the transfer must be by deed. (1 Th. Co. Lit. 753; 4 Kent's Com. 368.)

2f. Partition of the Lands in Severalty Amongst the Tenants.

Partition between tenants in common is effected in like manner as between joint-tenants, either by mutual consent (*Ante*, p. 480, 1<sup>h</sup>), or by compulsion (*Ante*, p. 481, 2<sup>k</sup>);  
w. c.

1<sup>st</sup>. Partition between Tenants in Common by *Mutual Consent*; w. c.

1<sup>st</sup>. The Evidence Required of Consent to Partition; w. c.

1<sup>st</sup>. Partition of Estates of Freehold.

See *Ante*, p. 480, 1<sup>k</sup>.

2<sup>nd</sup>. Partition of Estates for Years.

See *Ante*, p. 481, 2<sup>k</sup>.

2<sup>nd</sup>. The Effect of Partition by Consent; w. c.

1<sup>st</sup>. When the Parties are under no Disability, and there was no Fraud nor Misrepresentation.

See *Ante*, p. 480, 1<sup>k</sup>.

2<sup>nd</sup>. When Either of the Parties is under Disability, or there has been Fraud or Misrepresentation.

See *Ante*, p. 481, 2<sup>k</sup>.

2<sup>nd</sup>. Partition between Tenants in Common by Compulsion; w. c.

1<sup>st</sup>. Doctrine at Common Law as to Compulsory Partition between Tenants in Common.

See 2 Bl. Com. 193.

2<sup>nd</sup>. Doctrine by Statute as to Compulsory Partition; w. c.

1<sup>st</sup>. Proceedings by Writ of Partition.

See *Ante*, p. 482, 1<sup>k</sup>.

w. c.

1<sup>st</sup>. Summons on Writ of Partition.

See 1 Rob. Forms, 7: *Ante*, p. 483.

2<sup>k</sup>. Interlocutory Judgment, *Quod Partitio Fiat*, etc.

See *Ante*, p. 483, 2<sup>l</sup>.

3<sup>k</sup>. The Writ of Execution *de Partitione Facienda*.

See *Ante*, p. 483, 3<sup>l</sup>.

4<sup>l</sup>. Final Judgment Confirming the Partition made by the Sheriff, etc.

See *Ante*, p. 484, 4<sup>l</sup>.

2<sup>nd</sup>. Proceeding by Bill in Equity.

See *Ante*, p. 484, 2<sup>k</sup>.

w. c.

1<sup>st</sup>. Proceeding in Equity when the Names or Shares of Some of the Parties are Unknown.

See *Ante*, p. 485, 1<sup>l</sup>.

2<sup>nd</sup>. Proceeding in Equity in Making Partitions; w. c.

1<sup>st</sup>. The Proper Parties to the Suit.

See *Ante*, p. 487, 1<sup>m</sup>.

2<sup>nd</sup>. The Interlocutory Decree.

See *Ante*, p. 487, &c., 2<sup>m</sup>.

3<sup>rd</sup>. Proceedings of the Commissioners to make Partition.

See *Ante*, p. 489, &c., 3<sup>m</sup>.

4<sup>l</sup>. Costs of Partition.See *Ante*, p. 492, 4<sup>m</sup>.5<sup>l</sup>. Final Decree in Partition.See *Ante*, p. 492-3, &c., 5<sup>m</sup>.3<sup>d</sup>. Estates in Co-Parcenary.

An estate held in *co-parcenary* is where lands of inheritance descend from the ancestor to two or more persons as joint heirs. In England, it arises either by the common law, or by the custom of particular places. By common law, as where a person seised in fee-simple dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, and these *co-heirs* are then called *co-parceners*, or for brevity, *parceners* only; though in some points of view, the law considers them as together making only one heir. Parceners by particular custom are where lands descend, as in *gavel-kind*, to all the *males* in equal degree, as sons, brothers, uncles, etc. In Virginia, an estate in co-parcenary arises by the statute of descents (V. C. 1873, ch. 119, § 1; V. C. 1887, ch. 113 § 2548); whenever there are several relatives in equal degree to the decedent, or decendants of those in equal degree, without regard to sex, or primogeniture. (2 Bl. Com. 187; 1 Steph. Com. 319; 1 Th. Co. Lit. 678 & seq.; (V. C. 1873, ch. 119, § 1; V. C. 1887, ch. 113, § 2548.)

Let us observe, (1), The modes of creating estates in co-parcenary; (2), The properties of estates in co-parcenary; (3), The incidents of such estates; and (4), the modes whereby such estates in co-parcenary are dissolved, including the doctrine of *hotch-pot*;

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1<sup>o</sup>. Mode of Creating Estates in Co-Parcenary.

An estate in co-parcenary can arise by *descent* only, and never by *purchase*, as joint-tenancy and tenancy in common do; so that, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants; and hence, also, no lands can be held in co-parcenary, but those wherein the estates are estates of *inheritance*; whereas not only estates in fee, but for life or years, may be held in joint-tenancy, or tenancy in common. Nor, it seems, do estates *pur autre vie*, limited to the heirs as *special occupants*, (*Ante*, p. 99, 2<sup>k</sup>), constitute an exception to this general rule; the *heirs* in such case taking, not *by descent*, properly, as heirs, but by force of the limitation as *purchasers*, and consequently as joint-tenants. This is a point, however, which cannot arise under our statute in Virginia, (V. C. 1873, ch. 126, § 18; V. C. 1887, ch. 119, § 2653), which enacts that any estate for the life of another shall go to the *personal representative* of the party entitled to the estate, and be assets in his hands, and be applied and distributed as



the personal estate of such party. (2 Bl. Com. 188; 1 Steph. Com. 319; 1 Tuck. Com. 177.)

## 2<sup>d</sup>. Properties of Estates in Co-Parcenary.

The properties of co-parceners are in some respects like those of joint-tenants, there being the same unities of *interest* and of *title*, and *an unity* of possession, but not exactly that *entirety of interest* which characterizes joint-tenancy, nor is there any unity of *time*. (2 Bl. Com. 188; 1 Steph. Com. 319);

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### 1<sup>st</sup>. Unity of Title.

Since co-parceners or co-heirs derive their estates by descent mediately or immediately from the same ancestor, it follows of course that the title must be *one and the same*. It is not requisite, however, that the interest should vest at the *same period*. For if a man have two daughters to whom his lands descend in co-parcenary, and one dies before the other, without partition having been made, the surviving daughter and the heir of the other, or if both are dead, their two heirs, are still parceners, the estates vesting in each of them at different times, though it be the same estate in point of quantity, and held by the same title. (2 Bl. Com. 188; 1 Steph. Com. 320.)

### 2<sup>d</sup>. Unity of Interest or Estate.

Co-parceners must needs have *one and the same estate*, namely, an estate of inheritance, because they derive it by descent from a common ancestor. But it is not necessary that they should have *equal shares*. Thus, if a man die, leaving a daughter and three granddaughters, the issue of a deceased daughter, who died before him, they will all be co-parceners; but the daughter will take three times as large a share as each of the granddaughters, who will have amongst them the moiety of their mother. (2 Bl. Com. 188; 1 Steph. Com. 320; V. C. 1873, ch. 119, § 3; V. C. 1887, ch. 113, § 2550.)

### 3<sup>d</sup>. Unity of Possession.

Co-parceners have an *unity of possession*, but not exactly that *entirety of interest* which belongs to joint-tenants. They constitute *but one heir*, how many soever they be, but are properly entitled each to the whole of a distinct moiety, and not as joint-tenants are, *per nihil et per totum* to the whole jointly, and to nothing separately. Of course, therefore, there is no *jus accrescendi*, or survivorship, between them: for each part descends severally to their respective heirs, though the unity of possession may continue. And as long as the lands continue in a course of descent, and are held promiscuously, so long are the tenants therein, whether male or female, called parceners. (2 Bl. Com. 188; 1 Steph. Com. 320; 1 Th. Co. Lit. 681, 683-4, and notes.)

3<sup>c</sup>. The Incidents of Estates in Co-Parcenary.

The incidents belonging to an estate in co-parcenary, for the most part, grow naturally out of its unities, and the manner in which it is held. They may be set forth in connection with the following heads, namely: (1), Suing and being sued; (2), The effect of entry by and possession of one co-parcener as to the rest; (3), The liability of co-parceners one to another, for trespass or waste; (4), The liability of co-parceners to account, one to another, for profits; (5), Modes whereby co-parceners may convey, one to another; (6), Liability to curtesy and dower; and (7), Partition;

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1<sup>f</sup>. Suing and Being Sued.

Suits by or against co-parceners touching the right to the property descended to them must be joint; for as they are together but one heir, they have of course but one freehold in the land, as long as it remains undivided. But this supposes that they are heirs to the *same ancestor*, although it may be in different degrees; for if co-parceners be actually seised or entitled, and then die leaving issues, their issues shall not join in a *droiturel* action; because several *rights* descended to them from several ancestors; and yet when they have severally recovered, they are co-parceners, and then they may be sued for the land jointly. On the other hand, as their *possession* is joint, in the case supposed, any action *possessory* which shall be brought by them should be joint. (2 Bl. Com. 188; 1 Th. Co. Lit. 683-4, and n. (G.); Bac. Abr. Co-parceners, (B).)

2<sup>f</sup>. Effect of Entry by, or Possession of, one Co-Parcener, as to the Rest.

Entry by, or possession of, one co-parcener, is an entry by or possession of all, wherever they *might sue jointly* for the possession, because they are seised promiscuously *pro indiviso*; and hence, as we have seen, in the case of joint-tenants and tenants in common, one co-parcener cannot be disseised by his fellow, so as to justify an action of ejectment against him, without an *actual ouster*, or some other act amounting to a total denial of the plaintiff's right as co-tenant. (3 Th. Co. Lit. 51-2; 1 Do. 681, n. (C); Gilb. Ten. 29; V. C. 1873, ch. 131, § 15; V. C. 1887, ch. 124, § 2736; Buchanan & als. v. King's Heirs, 22 Grat. 422-3; Robinett v. Preston's Heirs, 2 Rob. 273; Hammon v. Hannah, 9 Grat. 146; *Ante*, pp. 472-3, 3<sup>f</sup>.)

3<sup>f</sup>. Liability of Co-Parceners to One Another for Trespass or Waste.

Co-parceners are not liable, the one to the other, for trespass, either at common law or by statute, for the reason just stated, namely, that each is rightfully entitled to the possession of the whole. As to waste, also, there was, at

common law, no mutual responsibility, for the same reason; and in England the statute 13 Edw. I., c. 22, which subjected joint-tenants and tenants in common to liability therefor, did not extend to co-parceners; because, it was said, they could at any time compel partition, and might thus avoid any injury from that source. In Virginia the statute, with more practical wisdom, declares that if a tenant in common, joint-tenant or parcener commit waste, he shall be liable to his co-tenants, jointly or severally, for damages; and if the waste be *wanton*, or be committed pending any suit, to "*recover or charge*," and it is supposed, by parity of reason, *to divide* the land, with knowledge of the suit, for *three times* the amount of damages assessed therefor. (2 Bl. Com. 188; V. C. 1873, ch. 133, §§ 2, 4, 5; V. C. 1887, ch. 126, §§ 2776, 2778, 2780; *Ante*, p. 501.)

4<sup>th</sup>. Liability of Co-Parceners to Account to One Another for Receiving More than their Due Share of Profits.

At common law co-parceners were not liable to such mutual accounting, unless the party receiving more than his share had been constituted by his fellows their bailiff or receiver; but this feature has been changed *in terms*, as to joint-tenants and tenants in common, by the statute 4 Anne, c. 16, in England, and by the corresponding statute here (V. C. 1873, ch. 142, § 14; V. C. 1887, ch. 159, § 3294); and it is believed to have been changed by *construction* as to parceners also, partly because equity had obliged them to render such an account prior to the statute of Anne, and partly from the irresistible reasonableness of the thing, and the force of the analogy of the case of joint-tenants and tenants in common. (4 Kent's Com. 366, n. (d); 1 Lom. Dig. 632; 2 Com. Dig. Chanc'y (2 A. 1), p. 470 (citing *Dean v. Wade*, and *Drury v. Drury*, 1 Ch. Rep. 48 '9; Eq. Cas. 32; 1 Eq. Cas. Abr. 5; *Graham v. Graham*, 6 Monroe, (Ky.) 562; *O'Bannon v. Roberts*, 2 Dana (Ky.) 55-'6; *Chinn & als. v. Murray & als.*, 4 Grat. 406; *Fry v. Payne*, 82 Va. 762.)

5<sup>th</sup>. Modes whereby Co-Parceners may Convey One to Another.

While the estate remains undivided, co-parceners are but one heir, and have one entire freehold in the land in respect to strangers, and therefore may convey their respective shares from one to another by *release*, like joint-tenants. But to many purposes, as between themselves, they have in judgment of law several freeholds; and hence, one of them may *release* another of his or her part, and make livery. So that, whilst joint-tenants may release and not enfeoff, because the freehold is joint, and tenants in common may enfeoff and not release, because the freehold is several, co-parceners may both release and enfeoff, because their seisin is to some intents, joint, and to some several. Co-parceners may also convey the one to the other by bargain and sale,

etc., under the statute of *Uses*, or by grant, under the statute of *Grants*. (1 Th. Co. Lit. 683, & n. (E.); Id. 789; V. C. 1873, ch. 112, §§ 14, 4; V. C. 1887, ch. 107, §§ 2426, 2417.)

#### 6<sup>f</sup>. Liability to Curtesy and Dower.

Joint-tenancy is not, at common law, liable to curtesy and dower, because of the doctrine of survivorship, whereby the consort's right to curtesy or dower, as the case may be, is anticipated and prevented. But tenancy in common, and estates in co-parcenary, not being subject to survivorship, have always been deemed liable to those incidents. And survivorship having been abolished in Virginia as to joint-tenancy, that estate is with us also now in the same category. Dower is assigned, however, in all these cases where there is a plurality of tenants, undividedly as the husband held it, and not by metes and bounds. (1 Th. Co. Lit. 691, n. (L.), 789, n. (T.); V. C. 1873, ch. 112, § 18; V. C. 1887, ch. 107, § 2430.)

#### 7<sup>f</sup>. Compulsory Partition.

Co-parceners coming to their estate by act of the law, were indulged by the common law, with the privilege of coercing partition amongst themselves, which was denied to tenants in common and joint-tenants, for the opposite reason, namely, that they came to their estates by act of the parties, and that, as their common interests were created by mutual consent, they ought to be dissolved only in like manner. Parceners, or co-parceners, are so called because they are *compellable to make partition*. (2 Bl. Com. 189; 1 Th. Co. Lit. 678-'9, 696, & seq.)

#### 4<sup>e</sup>. Modes whereby Estates in Co-parcenary are Dissolved.

An estate in co-parcenary is dissolved by the severance of any one of its constituent unities. To sever the unity of interest or of title, as by one parcener aliening her share to a stranger, whilst the unity of possession is preserved, is to convert it into a tenancy in common, whilst if the unity of possession is dissolved, the tenants hold in severalty; and it should be observed that an *agreement to sever* will have *in equity* the same effect as an actual severance of the unities. (2 Bl. Com. 188-'9; *Ante*, pp. 478, &c. 1<sup>e</sup>.)

W. C.

#### 1<sup>f</sup>. One or More of the Co-Parceners Conveying their Shares Respectively to Strangers, or (in Equity) *Agreeing to Convey Them*.

If this is done by one parcener, the alienee is tenant in common with the other co-tenant, or tenants, and if there be more than two in the first instance, the others are still co-parceners as before. A lease for years, nor, it is said, even a *lease for life*, does not sever the estate in co-parcenary, although a lease for life by a joint-tenant is admitted to destroy the jointure; and it would seem that it should



as to separate a severance of the co-parcenary, by destroying the unity of both the title and interest. (1 Th. Co. Lit. 764-6, & n. (1).)

2<sup>d</sup>. Union of All the Shares in the Hands of one Co-Parcener.

This may be by the several shares passing by descent to one of the co-heirs, or by their being conveyed, by release, feoffment, or otherwise, to one who, in either event, is of course seised in severalty.

3<sup>d</sup>. Partition amongst the Co-Parceners Severally: w. c.

1<sup>st</sup>. The Modes of Making Partition Amongst Co-Parceners; w. c.

I<sup>a</sup>. Partition by Consent: w. c.

i. The Evidence of Consent to Partition.

Partition between parceners may be proved at common law as well by parol, without deed, as by deed; and that not only as to lands, that may pass by livery without deed, but also as to rents, commons, and the like, which lie in grant only. The reason seems to be that partition between parceners makes *no degree*, but leaves each parcener seised as by descent from the common ancestor, and it is, therefore, *no conveyance*. Hence, also, it is supposed that no deed was requisite for partition between co-parceners, under our former statute of conveyances (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413); or the English statute of frauds, 29 Car. II. c. 3. (1 Th. Co. Lit. 704-5, 692; 1 Lom. Dig. 634 to 636; Jones's Devises v. Carter, 4 H. & M. 190; Bryan v. Stump, 8 Grat. 241; Coles v. Wooding, 2 Pat. & H. 189; Bolling v. Teel, 76 Va. 493.)

But the Code of 1887 provides in terms, that no voluntary partition between co-parceners shall be made except *by deed*. (V. C. 1887, ch. 107, § 2413.)

2<sup>d</sup>. The Modes of Effecting Partition by Consent.

Partition amongst co-parceners by consent is accomplished in various ways, of which Littleton mentions four specifically, and Coke others in general terms. (1 Th. Co. Lit. 692 & seq., 695; 2 Bl. Com. 189);

w. c.

I<sup>k</sup>. Mutual Assignment between Themselves.

Where the parceners divide the lands into equal parts in value, and each takes his own part in severalty, by general agreement. If they are of full age, not married women, and of sane memory, such partition, if made without fraud, is good and firm for ever, albeit the values be unequal; but if any of the parceners labor under the disabilities of infancy, coverture, or insanity, or if any fraud were employed in bringing it about, the infant, feme covert, insane, or person de-

frauded, may avoid the partition within a reasonable time after the removal of the disabilities, or the perpetration, and, in some instances, the discovery of the fraud. (1 Th. Co. Lit. 692; Id. 709 & seq.; 2 Bl. Com. 189; Jones's Devises v. Carter, 4 H. & M. 190.)

2<sup>k</sup>. Partition by a Common Friend; First Choice *by the Eldest*.

When the parceners agree amongst themselves upon one or more friends to make partition of the lands for them, after the divisions into portions as nearly equal in value as may be has been completed, the rule of the common law is, that the eldest parcener (unless it be otherwise agreed) shall choose first, and so in succession, in the order of seniority; and the part which the eldest thus takes is called, in Latin, *enitia pars* (French *aîné* or *éigné*—elder); but this advantage is merely personal to the eldest, and if he or she dies, passes to the next in age, etc. This priority of election in the eldest parcener was abolished by statute in Virginia in 1790 (13 Hen. Stat. 123; 1 R. C. 1819, p. 358, c. 96, § 21), but the provision not being retained in the revisal of 1849, and being therefore repealed (V. C. 1873, ch. 209, § 1; V. C. 1887, ch. 206, § 4202); it is supposed that the common law is thereby restored. (1 Th. Co. Lit. 693; 2 Bl. Com. 189; Insurance Co. v. Bailey, 16 Grat. 384; Booth's Case, Id. 529.)

3<sup>k</sup>. Partition Made by the Eldest Co-Parcener.

When the eldest parcener makes the partition, by a rule very judiciously devised to prevent inequality or unfairness in laying off the shares, he or she is to choose last, according to the maxim *cujus est divisio, alterius est electio*. (2 Bl. Com. 189; 1 Th. Co. Lit. 694.)

4<sup>k</sup>. Partition into Shares, and Assignment of Shares, *by Lot*.

Littleton describes this method with particularity, thus: "After partition of the lands be made, every part of the land by itself is written in a little scroll, and is covered all in wax in manner of a little ball, so as none may see the scroll, and then the balls of wax are put in a hat to be kept in the hands of an indifferent man, and then the eldest sister shall first put her hand into the hat, and take a ball of wax with the scroll within the same ball for her part, and then the second sister shall put her hand into the hat and take another, etc., and in this case every one of them ought to stand to their chance and allotment." And in this kind of par-

tion, ancient writers say that co-parceners *fortunam faciant iudicem*. (1 Th. Co. Lit. 695; 2 Bl. Com. 189.)

### 3. Other Methods of Partition.

Lord Coke mentions several instances of other methods of voluntary partition besides the four above-mentioned, as where it is agreed between two co-parceners that the one shall have and occupy the land from Easter until the first of August in severalty, and the other from the first of August until Easter, yearly, to them and their heirs, or where two co-parceners of two tracts of land make partition that the one shall have the one tract for one or more years, and the other the other tract for the same, and so alternately. And in these cases, each co-parcener has an estate of inheritance, and no chattel, albeit either of them, *alternis vicibus*, has the occupancy but for a certain term. (1 Th. Co. Lit. 695-6.)

### 2<sup>b</sup>. Partition by Compulsion.

Parceners are at common law compellable to make partition, and the process employed for the purpose is a *writ of partition*, which, however, in modern times has been almost wholly superseded in practice, by the *bill in equity*. But joint-tenants and tenants in common are not at common law compellable to make partition, and hence various embarrassments used to arise in cases where the estate in co-parcenary had been partially dissolved. Thus, neither tenant by the curtesy (husband of a co-parcener), nor the alienee of a co-parcener, can have a writ of partition at common law against the other co-parcener, whilst yet the other co-parcener may have such writ against the tenant by the curtesy, or the alienee. At present, however, since the statute of 31 Hen. VIII., c. 1, and 32 Hen. VIII., c. 32, and the corresponding statute in Virginia (V. C. 1873, ch. 120, § 1, &c.; V. C. 1887, ch. 114, § 2562), provide for the enforcement of partition amongst joint-tenants and tenants in common, as well as co-parceners, such difficulties cannot intervene. (1 Th. Co. Lit. 696, 697-8.)

W. C.

### 1<sup>d</sup>. Proceeding by Writ of Partition.

The statutes in Virginia at present declare that joint-tenants, tenants in common, and co-parceners, shall be compellable to make partition, and that the circuit court of the county, or the circuit or corporation court of the corporation wherein the estate or any part thereof may be, shall have jurisdiction in cases of partition (V. C. 1873, ch. 120, § 1; V. C. 1887, ch. 114, § 2562); but this does not prevent the use of the writ of partition as at common law, there being no negative words to forbid.

(1 Rob. Pr. (1st ed.) 502 ; Rob. Forms. 7, 131, 374, 132 ; *Ante*, pp. 482, &c., 1<sup>k</sup>.)

The various steps in the proceeding are identically the same as in the case of joint-tenants, etc., already explained. (*Ante*, pp. 482, &c., 1<sup>k</sup> & seq.)

2<sup>i</sup>. Proceeding by Bill in Equity.

The origin of the proceeding in equity to compel partition, as well as the proceedings themselves, have been fully explained in connection with joint-tenancy, to which reference is now made. *Ante*, p. 484, &c., 2<sup>k</sup> & seq.)

w. c.

1<sup>k</sup>. Proceeding in Equity when the Names or Shares of Some of the Parties are Unknown.

See V. C. 1873, ch. 120, § 4 ; Id. ch. 166, §§ 10, 12, 14 ; V. C. 1887, ch. 114, § 2567 ; Id. ch. 158, §§ 3230, 3231 ; *Ante*, pp. 485-'6, &c., 1<sup>l</sup>.

2<sup>k</sup>. Proceedings in Equity in Making Partition ; w. c.

1<sup>l</sup>. The Proper Parties to the Suit.

See *Ante*, p. 487, 1<sup>m</sup>.

2<sup>l</sup>. The Interlocutory Decree.

See *Ante*, pp. 487, &c., 2<sup>m</sup>.

3<sup>l</sup>. The Proceedings of the Commissioners to Make Partition.

See *Ante*, pp. 489 & seq., 3<sup>m</sup>.

4<sup>l</sup>. The Costs of Partition.

See *Ante*, p. 492, 4<sup>m</sup>.

5<sup>l</sup>. Final Decree in Partition.

See *Ante*, p. 492-'3 & seq., 5<sup>m</sup>.

2<sup>g</sup>. The Incidents which Belong to Partition Amongst Parceners ; w. c.

1<sup>h</sup>. A Mutual Implied Warranty.

Upon the eviction of one parcener by a title paramount from the share assigned to him, the whole partition is defeated, and the evicted parcener is entitled to enter upon the shares of his fellow or fellows as if no partition had taken place ; there being a warranty implied mutually between the parties that the possession and title to each share shall be guaranteed. And this proposition is true, though the eviction be only of part of the purparty allotted to one of them, or even of a part of the *estate*, or interest, provided it be a *freehold estate*. Thus, if there be two co-parceners who make partition, and one of them be evicted of his purparty, in whole or in part, or of an *estate for life* in his portion, the partition, by virtue of the implied warranty above described, is avoided in the whole. (1 Th. Co. Lit. 716-'17, 720.)

But this doctrine supposes that the privity of estate between the co-parceners still continues ; for if one par-



cease alienes his or her share, and the alienee is evicted, the privity having been destroyed, there ceases to be any liability, by reason of the implied warranty, to make recompense, either to the alienee or to the parcener from whom he bought. (1 Th. Co. Lit. 718.)

## 2<sup>b</sup>. The Doctrine of Hotchpot.

The most important incident belonging to partition amongst co-parceners, is the doctrine of *hotchpot*, which having belonged to a very early period of the common law, had almost grown out of use even in Lord Coke's time, but has been revived in England by the statute of *Distributions*, and greatly extended in Virginia by our statute of *Descents and Distributions* (2 Bl. Com. 190-'91; 1 Lom. Dig. 639; V. C. 1873, ch. 119, § 14; V. C. 1887, ch. 113, § 2561.)

W. C.

### 1<sup>l</sup>. Doctrine of Hotchpot at Common Law.

The best description of the doctrine, as it existed at common law is to be drawn from Littleton's own words: "If a man seised of certain lands *in fee-simple* hath issue two daughters, and the eldest is married, and the father giveth part of his lands to the husband with his daughter in *frank-marriage* (*Ante* p. 91, 3<sup>h</sup>), and dieth seised of the remnant, the which remnant is of a greater yearly value than the lands given in *frank-marriage*. In this case neither the husband nor wife shall have anything for their purparty of the said remnant, unless they will put their lands given in *frank-marriage* in hotchpot, with the remnant of the land, with her sister. And if they will not do so, then the youngest may hold and occupy the same remnant, and take the profits only to herself. And it seemeth that this word (*hotchpot* or *hodge-podge*) is, in English, a *pudding*; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this case to put the lands given in *frank-marriage* with the other lands in hotchpot (that is, to estimate their value in the division), if the husband and wife will have any part in the other lands." (1 Th. Co. Lit. 720 & seq.; 2 Bl. Com. 190-'91.)

### 2. The Doctrine of Hotchpot, by Statute, in Virginia.

The doctrine of hotchpot has been much enlarged in Virginia, not only beyond the scanty limits of the common law, but also beyond the purview of the English statutes of Distribution. (22 & 23 Car. II., c. 10, and 29 Car. II., c. 30.) The intent with us is the same which more feebly animates the common law and the statutes of England just referred to, namely, to bring about, as nearly as may be, an equal division among the *children*

or other descendants, of a decedent, of all his estate, both *real and personal*, except so far as, in the exercise of his right of ownership, he may have thought fit himself to create a difference; not by *constraining* a child who has received an advancement to submit to a re-division, bringing in what he has already received, but by subjecting him to the alternative of either doing so, or of foregoing any participation in what remains of the decedent's estate undisposed of by him. (1 Th. Co. Lit. 725; 1 Tuck. Com. 180-'81, B. II.; 1 Lom. Dig. 639-'40; Chim & als. v. Murray & als. 4 Grat. 377; V. C. 1873, ch. 119, § 14; V. C. 1887, ch. 113, § 2561.)

The terms of the statute are as follows: "Where any descendant of a person dying *intestate* as to his estate, or any part thereof, shall have received from such intestate in his lifetime, or under his will, any estate, *real or personal*, by way of advancement, and he, or any descendant of his, shall come into the partition or distribution of his estate, with the other parceners and distributees, such advancement shall be brought into hotchpot with the whole estate, *real and personal*, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, *real and personal*." (V. C. 1873, ch. 119, § 14; V. C. 1887, ch. 113, § 2561.)

w. c.

1<sup>k</sup>. Under what Circumstances the Law of Hotchpot Applies.

Where the decedent is *intestate as to his estate, or any part thereof*, and any descendant of his has received from the *intestate* in his lifetime, or under his will, any estate, *real or personal*, by way of advancement. (V. C. 1873, ch. 119, § 14; V. C. 1887, ch. 113, § 2561.)

2<sup>k</sup>. The Character of the Advancement; w. c.

1<sup>l</sup>. From Whom the Advancement Must be Received.

The advancement must have been received from the *intestate*, either in his life-time or under his will. (V. C. 1873, ch. 119, § 14; V. C. 1887, ch. 113, § 2561; Puryear & als. v. Cabell & als. 24 Grat. 260; Strother v. Mitchell, 80 Va. 149; McDearman v. Hodnett, 83 Va. 281.)

2<sup>l</sup>. The Nature of the Gift to Constitute an Advancement.

The property may be either *real or personal*, but it must be given "*by way of advancement*." An advancement is a *gift* by a parent to a child or descendant, for the purpose of *advancing him in life*. Hence, a present, when the father has lived a considerable time with a child, or when the child has otherwise

rendered valuable service, is considered a satisfaction for trouble, and not an advancement: and petty sums of money at different times, whilst the child is yet under the parental protection—clothes, a watch, a riding-horse, etc.—are, in general, not advancements. Nor, for the most part, are the expenses of education (unless, perhaps, of professional education), nor of travelling. But a premium given with a son as apprentice, or money furnished to set him up in business, is regarded as an advancement: and so also is an annuity, or a reversion settled on a child. A provision may even be an advancement, though dependent on a contingency, when the contingency has either actually happened, or must occur within a reasonable time. On the other hand, the mere precarious enjoyment of property, and taking the profits, without having any title thereto, except as tenant at will, constitutes, it is said, no advancement, certainly not as to the land itself; but it would seem to be otherwise as to the profits; nor is money laid out by the intestate on repairs of property thus occupied an advancement. *V. C.* 1873, ch. 119, § 14; *V. C.* 1887, ch. 113, § 2561; 2 *Lom. Ex'ors*, 367-'8; 1 *Tuck. Com.* 181, B. II.; *Hume v. Edwards*, 3 *Atk.* 452; *Edwards v. Freeman*, 2 *P. Wms.* 444; *Kircudbright v. Kircudbright*, 8 *Ves.* 51; *Christian v. Coleman*, 3 *Leigh*, 30; *Williams v. Stonestreet*, 3 *Rand.* 562; *Smith v. Smith*, 5 *Ves.* 721; *Darne v. Lloyd*, 82 *Va.* 859, 861-'2.)

Whether a gift from a parent to a child, supposing the gift to be adapted to advance the latter in life, is or is not to be deemed an advancement such as must be brought into hotchpot, is admitted to be a matter of *intention* in the parent: and it is *prima facie* to be presumed to have been so designed. (*McDearman v. Hedgett*, 83 *Va.* 281.) Hence a gift to a son-in-law, is *prima facie* an advancement to the daughter; and that conclusion is in no wise affected by the Married Women's Law; (*Idem*; *Bruce v. Slemper*, 82 *Va.* 357-'8). The doctrine of hotchpot is founded upon the idea of equality in the division amongst descendants, of the ancestral property, unless the ancestor shall himself, *by will* duly executed, think fit to make a difference. When therefore he makes to one of them a gift of a nature to advance him in life, in pursuance of the policy in question, it ought *prima facie* to be presumed to have been so intended; and that while the circumstances and the declarations of the donor *accompanying* the gift, may well be adduced to repel or confirm such presumption, and that no *subsequent* declaration from him should

be allowed any effect, nor indeed be admitted in evidence at all. (*Hatch v. Straight*, 3 Conn. (8 Am. Dec.) 31; *Jacksons v. Matsdorf*, 11 Johns. (N. Y.) 91; S. C. 6 Am. Dec. 355; *Ante*, pp. 212-3.) Such *prima facie* presumption prevails in respect to the *ademption* of legacies upon the rational ground that no one ought to be presumed to intend to make a double provision for the *same object*, and also in the case of a purchase by a parent's money, and the conveyance made to the child, in which case it is *prima facie* presumed that the parent designed it as an advancement, and no implied trust arises. (2 Lom. Ex'ors, 199 & seq.; *Ante*, pp. 221-'2.) The trustworthiness of these conclusions, however, is impaired by the case of *Watkins v. Young*, 31 Grat. 84, where it is *doubted* if there is any *prima facie* presumption that a gift is intended as an advancement, and it is *held* that the subsequent, as well as the contemporaneous declarations of the ancestor, are admissible to show that it was designed to be *absolute and not an advancement*. (*Watkins v. Young*, 31 Grat. 88-90.) And whilst the *doubt* is, as it would seem properly, over-ruled, in the later case of *McDearman v. Hodnett*, 83 Va. 281, yet the same case goes to confirm the proposition that as well the *subsequent*, as the *contemporaneous* declarations of the ancestor are admissible to show that the gift was or was not designed to be an advancement.

Although it is admitted that when one *in loco parentis* gives a legacy as a *portion*, and afterwards advances in the nature of a portion to the same person, the legacy will be thereby adeemed (*Hansborough v. Hooe*, 12 Leigh, 322), yet when the gift is made before the will, and the will does not charge it as advancement, it cannot be so deemed. (*Strother v. Mitchell*, 80 Va. 149.)

3<sup>k</sup>. The Value to be Accounted for in Advancements.

The general rule is, that advancements are to be accounted for as of the value they bore when received, neither rents, interests nor profits being charged as against the heir or distributee. (*Beckwith v. Butler*, 1 Wash. 224; *Kircudbright v. Kircudbright*, 8 Ves. 62; *Hudson v. Hudson's Ex'or*, 3 Rand. 120; *Williams v. Stonestreet*, Id. 559; *Christian v. Coleman*, 3 Leigh, 30; *Chinn v. Murray*, 4 Grat. 348; *Knight v. Oliver*, 12 Grat. 33; *Purveyar v. Cabell*, 24 Grat. 260.)

Advancements are not charged with interest or profits, partly because they are, for the most part, made at that period of life when, at least in the parent's opinion, it is most fitting that the recipients should respectively have them; but chiefly in order to



compensate for the *risk of loss* by destruction or deterioration of the subject. Of course, therefore, such destruction or deterioration is not to be taken into account in estimating the value of the advancement. *Beckwith v. Butler*, 1 Wash. 225; *Kean v. Welsh & als.*, 1 Grat. 406.

But where a time is fixed, as by the testator's will, for a distribution of the surplus undisposed of by the testator, the principle of *equality* which underlies the doctrine of hotchpot requires that interest should be computed upon all advancements *from that time*. Hence, where a testator, in his lifetime, made advancements to some of his children, and then by his will gave his estate to his widow for life, and authorized her to make advancements to their children, directing that, *at her death*, his estate, including those advancements, should be *equally divided among his children*, it was held that interest should be charged to each child *from the death of the widow*, until the time of division. (*Cabell v. Puryear*, 27 Grat. 907-'8.)

4. Doctrine Touching the Revocation of Advancements.

The object of the statute in respect of *hotchpot*, is, as we have seen, to bring about *equality* in the distribution of estates of decedents among their *descendants*, except so far as the decedent himself shall think fit *by will* to make a difference. (2 Bl. Com. 516-'17, 519; 2 Kent's Com. 418, 419, n. (b).) Hence an advancement once consummated by the decedent's irrevocable gift cannot have its effect altered by his subsequent verbal declaration, for that would be to allow to *parol statements* an effect in the disposition of a decedent's property, which can result only from a will duly executed. Indeed, whilst questions of advancement depend, in some aspects, principally upon the decedent's *intention*, of which his declaration *at the time*, or perhaps *afterwards*, and the descendants's admissions then or afterwards, are generally evidence, yet the parent cannot, by mere declarations of intention, make that an advancement which is *not such by law*, nor prevent that from being an advancement which the law plainly declares to be one. He can give effect to such intentions as these only by last will, disposing of his entire estate, real and personal, so as to die intestate as to nothing. (*Cleaver v. Kirk*, 3 Metc. (Ky.) 270; *Harris's Appeal*, 2 Grant, (Pa.) 304; *Miller's Appeal*, 40 Penn. 57, (80 Am. Dec. 559 & seq. *note*); *Watkins v. Young*, 31 Grat. 88-90.)

5. The Person in Respect to Whom Advancements are to be Brought into Distribution.

As the doctrine of *hotchpot* is designed by the statute to benefit descendants only, advancements are not to be brought into distribution or partition in respect to any other persons, *e. g.*, not for the benefit of the *widow*, as regards the distribution of the personal estate, a doctrine which, as it prevails under the English statute of *distributions*, which relates only to personalty, in which the widow by the statute is allowed a share as a principal distributee, prevails *a fortiori* in Virginia, where the statute requires lands (wherein the widow has, as *heir*, no interest) as well as personal property, to be brought in. (1 Tuck. Com. (B. I.) 181; Kircudbright v. Kircudbright, 8 Ves. 64; Gibbons. v. Caunt, 4 Ves. 847; Knight v. Oliver, 12 Grat. 33; Persinger v. Simmons, 25 Grat. 241.)

And by parity of reason, when a widow's dower has been assigned her, and upon a bill filed for a partition of the remaining two-thirds of the lands, two of the heirs decline to bring their advancements into *hotchpot*, and a partition of the two-thirds is decreed amongst the other heirs, upon the death of the widow, the heirs who refused to come into the division may, notwithstanding, by bringing in their advancements, come into the division of the dower-property. (Persinger & als. v. Simmons & als. 25 Grat. 238, 241.)

## CHAPTER XIII.

### OF THE TITLE TO THINGS REAL, IN GENERAL.

#### 5<sup>a</sup>. The Title to Things Real.

This last division of the subject of real property may be presented under the two heads of, (1). The nature of title; and (2), The modes of acquiring title;

W. C.

#### 1<sup>b</sup>. The Nature of Title.

The nature of title involves, (1), The definition of title; and (2), What elements constitute title;

W. C.

#### 1<sup>c</sup>. Definition of Title.

A title is thus defined by Sir Edward Coke (2 Th. Co. Lit. 155): "*Titulus est justa causa possidendi, quod nostrum est*;" or says Blackstone, "it is the means whereby the owner of lands hath the just possession of his property." (2 Bl. Com. 195.)

#### 2<sup>c</sup>. What Elements Constitute Title.

A complete title to lands embraces three several stages or

degrees, namely, (1), The mere possession; (2), The right of possession (which may be either apparent or real); and (3), The mere right of property. (2 Bl. Com. 195 & seq.; 2 Th. Co. Lit. 153, n. (A.); 1 Lomb. Dig. 739);

W. C.

#### 1<sup>st</sup> The Mere Naked Possession.

The mere *naked possession*, or actual occupation of the land, without any apparent right, or any shadow or pretence of right to continue such possession, may happen when one man invades the premises of another, and by force or surprise, turns him out of the occupation of his lands, which is termed a *disseisin*. Or it may happen where, after the death of the ancestor, and before the entry of the heir, or after the death of a particular tenant, and before the entry of him in remainder or reversion, a stranger contrives to get possession of the vacant land, and holds out him who has a right to enter; of which two last injuries, the first is styled an *abatement*, and the last an *intrusion*. In all these, and in many other similar cases, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to by a variety of legal remedies, explained in 3 Bl. Com. 174 & seq., and in 4 Min. Inst. 463, & seq. But in the meantime, until some act be done by the rightful owner to divest this possession, and assert his title, such actual possession is *prima facie* evidence of a complete legal title in the possessor; and by length of time, and negligence of him who hath the right, it may by degrees ripen into a perfect and indefeasible title. At all events, without such actual possession no title can be completely good; and on the other hand, such actual possession gives the occupant a right against every person who cannot show an existing right of possession, or mere right of property. (2 Bl. Com. 196, and n. (4); 1 Lomb. Dig. 739.)

#### 2<sup>d</sup> The Right of Possession.

The next step to a perfect title is the *right of possession*. This may reside in one man, while the actual possession is in another. Thus, as between the disseisor and disseisee the *actual possession* is in the *disseisor*, but the *right of possession* is in the *disseisee*; and the latter may exert his right whenever he thinks fit, by *entering* upon the disseisor, and turning him out of the occupancy which he has so illegally gained. Or if deterred from entering by menace or bodily fear, the claimant may, at common law, make claim as near the land as he can, which, if repeated once in every year and a day (when it is called *continual claim*), has the same effect as a legal entry. But in Virginia no continual or other claim upon or near any land, constitutes a right of entry or of action. (V. C. 1873, ch.

146, § 3; V. C. 1887, ch. 139, § 2916.) But this right of possession is of two sorts: *apparent*, which is liable to be defeated by proving a better; and *actual*, which will stand the test (so far as concerns the possession), against all opponents. (2 Bl. Com. 196; 2 Th. Co. Lit. 153, n. (A.); 3 Bl. Com. 175; 1 Lom. Dig. 740.)

W. C.

### 1°. The Apparent Right of Possession.

At common law, if the disseisor or other wrongdoer dies possessed of the land of which he became seised by his own unlawful act, and the same descends to his heir, the heir hath thereby obtained an *apparent* right though the *actual* right of possession remains in the person disseised; but the latter cannot divest this apparent right by a *mere entry*, or other act of his own, but only by a *action at law*; for until the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. The descent, in such a case, is said to *toll*, or take away, the seisin, agreeably to the maxim *lescensus tollit seisinam*. This doctrine arose from considerations connected with feudal policy, which was always solicitous to provide some one at hand to perform the feudal services, and to offer to the military vassal, as one of the strongest incentives to courage in battle, the assurance that, if he fell, his children or heirs would be, as to their inheritance, better off even than himself, being exempt from all danger of any eviction by sudden entry, or any otherwise than by the slow process of a real action. The statute, 32 Hen. VIII., c. 33, considerably qualified the principle (which one would have thought it was then time to abolish), by restricting the application of the maxim to cases where the disseisor had had peaceable possession *five years next after the disseisin*. And in Virginia the same policy was continued until by the revisal, which took effect 1st July, 1850 (V. C. 1853, ch. 129, § 4; V. C. 1887, ch. 122, § 2715), it was enacted that the right of entry or of action for lands shall *not be tollid* by descent cast. (2 Bl. Com. 196-197; 3 Do. 176.) But if he who has the *actual* right of possession brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession to which he hath such actual right.

### 2°. The Actual Right of Possession.

If the party disseised neglect to bring his possessory action within a competent time, his adversary may at length gain an *actual right* of possession, in consequence



of the other's negligence. And thus the party kept out of possession may have nothing left in him but the *mere right of property*; or *jus proprietatis*, without either possession, or even the right of possession; and then his estate is said to be divested, and *turned to a right*. (2 Bl. Com. 197; 2 Th. Co. Lit. 144, n. (A).)

In Virginia, by abolishing the maxim that *descent tolls entry* (V. C. 1873, ch. 129, § 4; V. C. 1887, ch. 122, § 2715), and also by imposing the same limitation in point of time upon "an *entry on*, and an *action to recover any land*" (V. C. 1873, ch. 146, § 1; V. C. 1887, ch. 139, § 2915), the common law distinction between the *right of possession*, whether apparent or actual, and the *mere right of property*, is virtually done away with.

### 3<sup>d</sup>. The Mere Right of Property.

A person may, at common law, have the true ultimate property of the lands in himself, whilst, either by his negligence, by the solemn act of his ancestor, or by the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist, who has, therefore, obtained the absolute *right of possession*. Thus, 1st, If a person disseised of his land neglects to pursue his remedy within the time limited by law, the disseisor gains the actual right of possession: for the law presumes that he either had a good right originally when he dispossessed the other party, or has acquired a sufficient title since; and, therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet still, if the person disseised hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right: but by proving such his better right, he may recover the land. 2ndly, If tenant in tail alienes the land to a stranger in fee, and dies, the estate-tail is *discontinued*, and the issue hath no right of *possession*, independent of the right of *property*; for the law presumes that the ancestor would not attempt to disinherit his heirs, unless he had power so to do; and as the ancestor had himself the right of possession, and has transferred the same to a stranger, the possession is not now permitted to be disturbed, unless by showing the absolute right of property to reside in another person. Here also, therefore, the heir has only a *mere right*, and on that footing alone can recover the lands. 3rdly, Where by accident, neglect or otherwise, judgment is given for either party in any *possessory* action (that is, such wherein the right of possession only, and not that of property, is contested), and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof

in a subsequent action, denominated a *writ of right*, he shall recover his seisin of the lands. (2 Bl. Com. 198; 2 Th. Co. Lit. 153-'4, n. (A).)

Thus, in England, if a disseisor turns W out of possession of his lands, he thereby gains a mere naked possession, and W still retains the *right of possession* and the *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of possession; but W still retains the *actual* right of possession, and the *right of property*. If W acquiesces for a certain period prescribed by the statute of limitations, the son gains the *actual right* of possession, and W retains nothing but the *mere right of property*. And after the lapse of a certain further period, prescribed by the same statute, the right of property will fail, or at least it will be without a remedy. (2 Bl. Com. 198-'9; 2 Th. Co. Lit. 153-'4, n. (A.); Wms. Real. Prop. 416-'17.)

In Virginia, it must be remembered, no *practical* discrimination remains to be made between the *right of possession* and the mere *right of property*. The right of entry, and the right of action in respect of lands, are both barred by the lapse of the same period, namely, *fifteen* years east, and *ten* years west of the Alleghany mountains. (V. C. 1873, ch. 146, § 1; V. C. 1887, ch. 139, § 2915.) If, therefore, with us, one be disseised of his lands, the disseisor gains a mere naked possession, and the disseisee has the right of possession, and the right of property, both of which are lost at the same time, namely, by the expiration of fifteen or of ten years, as the case may be, from the time of the right accrued. It is conceivable, indeed, that a writ of assize (which, though out of use, is still a *possible* action in Virginia, V. C. 1873, ch. 15, §§ 1, 2; V. C. 1887, ch. 2, §§ 2, 3), might be instituted, and an adverse judgment be rendered therein, and thus an end be put to the *right of possession* (3 Bl. Com. 184); whilst an ejectment (the statutory substitute for a writ of right, V. C. 1873, ch. 131, § 38; V. C. 1887, ch. 124, §§ 2723, 2759), within the limit of time prescribed, might afterwards be maintained upon the mere right of property. (3 Bl. Com. 193.) And so, theoretically, it is possible that, after an unsuccessful resort to a writ of assize to recover a life estate, a writ of *quod ei de forcat* might be employed, upon the ground of the *mere right of property*. (3 Bl. Com. 193; V. C. 1873, ch. 15, §§ 1, 2; V. C. 1887, ch. 2, § 3.) But such cases, it must be owned, are not very likely to occur.

It may be observed that, when the right of possession is joined to the right of property, it is denominated a double right, *jus duplicatum*, or *droit droit*. And when to such

double right is added the actual possession, there is said to be *jointure of right and conjunction*, and then, and then only, is the title *complete* and fully lawful. (2 Bl. Com. 199; 2 Th. Co. Lit. 153; 4 n. (A.); 1 Lom. Dig. 742.)

## 2<sup>d</sup>. The Modes of Acquiring Title to Things Real.

The modes of acquiring a title to real property are two, namely, (1). By descent; and (2). By purchase: by *descent* where the title is vested in a person by *operation of law* alone, as where land descends from ancestor to heir; and by *purchase* where the title is vested by the person's *own act and agreement*, as where land is derived by *conveyance*, whether gratuitously or for a price. (2 Bl. Com. 243; Id. 201, n. (2); 1 Lom. Dig. 743; 2 Th. Co. Lit. 156, & n. (D.); Id. 184, & n. (A.).)

Let us note, (1). The differences between the acquisition of title by descent and by purchase; and (2). The nature of the several modes of acquiring title to lands;

w. c.

## 1<sup>st</sup>. Differences between Acquisition of Title by Descent, and by Purchase; w. c.

### 1<sup>st</sup>. By Purchase, the Estate Acquires a *New Inheritable Quality*.

The land *by purchase* becomes descendible to the owner's blood *in general*, as a feud of *indefinite antiquity*; whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line; whereas land taken *by descent* can, at common law, pass to those heirs only who are of the blood of the *first purchaser*. (2 Bl. Com. 201; Id. 243; 1 Lom. Dig. 773; 4; 2 Th. Co. Lit. 185-6, n. (A).)

This first difference has no existence in Virginia. By our law of descents, no change is wrought in the inheritable quality of land where the title accrues by purchase. This arises from our having abolished the feudal principle of preferring the blood of the first purchaser of the inheritance, in seeking for an heir, except only in the single case of an infant dying without issue, having title to real estate derived by gift, devise or descent from *one of his parents*, and in that single case any discrimination between descent and purchase is excluded by the terms of the exception itself. (V. C. 1873, ch. 119, §§ 1, 9; V. C. 1887, ch. 113, §§ 2548, 2556.)

### 2<sup>d</sup> Where Land is Taken *by Purchase*, the Taker is not Subjected, at Common Law, to Liability for his Ancestor's or Predecessor's Debts, as in Case of Descent.

An estate taken *by descent* subjects the heir at common law to pay (so far as the value of the land extends) all the debts of the ancestor due by any *contract of record* (e. g., a judgment or recognizance), or by any *contract of spe-*

*cialty*, that is, *under seal*, which *expressly binds the heirs*. (2 Bl. Com. 201, n. (2); Id. 243-4; 1 Lom. Dig. 773-4; 2 Th. Co. Lit. 185-6, n. (A.); Piper v. Douglas, 3 Grat. 372-3.) On the other hand, when the land comes *by purchase*, it is not charged with the preceding owner's debts, except in so far as it may be subject to the lien of a mortgage or judgment, etc.

This second diversity prevails more extensively in Virginia than at common law, because with us a man's lands in the hands of his heir are liable to pay, not alone his debts of record and of specialty binding the heirs, but *all of his debts* of every description (V. C. 1873, ch. 127, § 3; V. C. 1887, ch. 120, § 2665), but only after the personal estate, not specifically bequeathed, has been exhausted. (Rogers v. Denham's Heirs, 2 Grat. 201; Elliot v. Carter, 9 Grat. 541; Lewis v. Overby, 31 Grat. 601, 618 & seq.; Ryan v. McLeod, 32 Grat. 367, 374 & seq.)

## 2<sup>c</sup>. The Nature of the Several Modes of Acquiring Title to Lands.

We have already seen that the modes of acquiring title to lands are two in number, namely, (1), By *descent*, or act of the law; and (2), By *purchase*, or act of the parties, of each of which a full exposition must be made;

W. C.

## CHAPTER XIV.

### OF TITLE BY DESCENT.

#### 1<sup>d</sup>. Title to Lands by Descent, or Act of the Law.

The investigation of the doctrine touching the title to land by descent requires us to note, (1), The nature of title by descent; (2), The doctrine of kindred; (3), The English canons of descent; and (4), The Virginia law of descent;

W. C.

#### 1<sup>e</sup>. Nature of Title by Descent.

Descent, or hereditary succession, is the title whereby one, on the death of his ancestor, acquires the ancestor's estate in *real property*, by right of representation as his *heir at law*. An heir, therefore, is that person of the kindred of a decedent upon whom the law casts the estate in *real property* immediately on the death of such decedent; and such estate so descending to the heir is called the *inheritance*. (2 Bl. Com. 201.)

#### 2<sup>e</sup>. The Doctrine Touching Kindred.

Kindred includes those persons related to one by marriage, or *affinity*, as well as by blood, or *consanguinity*; but as the common law always, and the statute of descents with



as, with rare exceptions, selects the heir from the kindred *by blood*, or consanguinity; what is to be said will be applied to the latter.

W. c.

- 1<sup>st</sup>. The Nature of Kindred: that is, Relationship by Blood, or *Consanguinity*.

Consanguinity is the connection which subsists between persons descended from the *same common ancestor*. (2 Bl. Com. 202.)

- 2<sup>nd</sup>. The Several Sorts of Consanguinity.

Consanguinity is, (1), Lineal; and (2), Collateral;

W. c.

- 1<sup>st</sup>. Lineal Consanguinity.

Lineal consanguinity is the relationship which subsists between persons of whom one is descended *directly from the other*. Such for example, as that between father and son, grandfather and grandson, etc. (2 Bl. Com. 203.)

- 2<sup>nd</sup>. Collateral Consanguinity.

Collateral consanguinity is that relationship which subsists between persons who are descended from the *same common ancestor*, but not one from the other, such as that between brothers, between uncle and nephew, between cousins, etc. (2 Bl. Com. 204.)

- 3<sup>rd</sup>. The Mode of Estimating Degrees of Consanguinity.

In the direct line—that is, in the line of *lineal* consanguinity), every generation, reckoning either upwards or downwards, constitutes a degree, and this mode of reckoning degrees in the *direct line* universally obtains, as well in the civil as in the canon and common law;

W. c.

- 1<sup>st</sup>. The Method of Reckoning Degrees of Collateral Kindred in the *Canon Law*, which the *Common Law* also Adopts.

The canon law reckons from the common ancestor down to the *more remote party*; thus, brothers are related, by the Canon law mode of computation, in the *first degree*, first cousins in the second, second cousins, and also third, in the third degree, and fourth cousins in the fourth. (2 Bl. Com. 206.)

- 2<sup>nd</sup>. The Method of the Civil Law, in Reckoning Degrees of *Collateral Consanguinity*.

The civil law reckons from one party up to the common ancestor, and then down to the other. (2 Bl. Com. 207.)

Thus, by the civil law computation, brothers are related in the second degree, first cousins in the fourth, second cousins in the fifth, third cousins in the sixth, and fourth cousins in the seventh.

The Canon law reckons degrees of consanguinity with a view to determine the *validity of marriages*, and so it has

## Table of Consanguinity



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reference to the amount of *common blood* which the parties have. The civil law adopts its computation with a view to the *distribution of estates*, and, therefore, it looks to the proximity or remoteness of the parties in respect to one another. Seeing that the common and civil law have the same object, it might have been expected that the Common law would have adopted the computation of the civilians, rather than that of the canonists. We shall see, however, that the common law, in the disposition of inheritances, has a chief regard to the *blood of the first purchaser*, who for the most part is the common ancestor, so that proximity to *him* is of more importance than proximity of the parties one to another. (2 Bl. Com. 224-5.)

### 3°. The English Canons of Descent; w. c.

#### 1<sup>st</sup>. The Subject-Matter of Descent at Common Law.

The subject-matter of descent at common law embraces only estates *in fee-simple* in real property, where the ancestor from whom the descent is claimed, *died actually seised* of the inheritance at the *time of his death*. The law casts the inheritance upon the heir immediately upon the ancestor's death, but it is merely a *seisin in law*, which will not enable him, at common law, to transmit the inheritance to *his* heirs. His ownership becomes complete for all purposes only by an *actual corporal entry*, either by himself, or by his agent or tenant. (2 Bl. Com. 201, and n. (4), 208.)

#### 2<sup>d</sup>. When the Heir's Ownership becomes Complete.

As just explained, it becomes complete only by *actual corporal entry* by the heir, or by his agent or tenant in his behalf. (2 Bl. Com. 201, n. (4).)

Hence comes the doctrine of *possessio fratris facit sororem esse heredem*, or as it is commonly called, the doctrine of *possessio fratris*, which is where a man has a son and daughter by one wife, and a son by a second wife, and dies seised of an inheritance. If the older son does not actually enter upon the premises, but dies before such entry, the younger son succeeds, as heir to *his father*, the person who *died last actually seised*. But if the older son enters before his death and *dies actually seised*, the younger son, being of the half blood to him, cannot, at common law, be his heir (2 Bl. Com. 224, 227), and, therefore, the sister succeeds *possessione fratris*. (2 Bl. Com. 227-8, and n. (28).)

#### 3<sup>d</sup>. Distinction between *Heirs Apparent* and *Heirs Presumptive*.

No person can be the actual, complete heir of another, until the ancestor is dead. *Nemo est hæres viventis*. Before that time the person who is next in the line of succession is called an *heir apparent*, or *heir presumptive*; *apparent* when the right of inheritance is indefeasible (that is, by the birth of any nearer relation), provided he outlives



the owner, as the oldest son; and *presumptive* when, if the owner should die at the moment, the person would, in the present circumstances of things, be the heir, but whose right to inherit may be defeated by the contingency of some nearer heir being born, as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child. (2 Bl. Com. 207.)

And this divestment of the inheritance may, at common law, occur after the estate has actually descended by the death of the owner, to such presumptive heir. Nay, the divestment may occur repeatedly in the same case. Thus, if one die seised of land, leaving as his next of kin a father and mother, and a sister of the father, inasmuch as inheritances cannot lineally *ascend*, the sister shall be, by the common law, his heir presumptive, and may actually succeed to the possession of the inheritance. But the subsequent birth, at any distance of time, of a brother to such female heir, will divest the estate out of her, and he, the decedent's uncle, may lose it to an afterborn sister of decedent, from whom it may be divested by the subsequent birth of a brother, in whom it finally vests as *heir apparent*. (2 Bl. Com. 298. & n. 191.)

This doctrine, which is certainly inconvenient, was altered by our first statute of descents, which took effect 1st January, 1787 (12 Hen. Stat. 138), by a provision that *none but children of the intestate* should inherit, unless they were in being, and capable to take as heirs at the death of the intestate. This supposes, of course, that the child is at least *en ventre sa mère* at that time (*Ante* pp. 447-'8; *Reeve v. Long*, 3 Lev. 408), but limits the case to the *children* of a decedent. (Blunt v. Gee, 5 Call, 512.) Since 1840, this policy has been extended to *all persons*. "Any person," says the statute at present, "*en ventre sa mère*, who may be born within ten months after the death of the intestate, shall be capable of taking by inheritance, in the same manner as if he were in being at the time of such death." (V. C. 1873, ch. 119, § 8; V. C. 1887, ch. 113, § 2555.)

4<sup>o</sup> The Kindred who, at *Common Law*, are to Take, and their Shares.

The canons or rules which regulate descent at common law, are in number *seven*. They may be divided into two classes; namely, (1), Primary; and (2), Secondary canons; *W. C.*

1<sup>o</sup> The Primary Canons of Descent in England at Common Law.

The canons of descent at common law, as enumerated by Blackstone, are, as just remarked, seven in number, of which five are devoted to determine the persons who are to take as heirs, and the shares wherein they are to take,

and may, therefore, be called *primary canons*; and the remaining two are employed as auxiliary, in order to ascertain the application of the former, and so may be denominated *secondary canons*. The primary canons, as they assign the inheritance to the lineal descendants, or to collateral kindred of the decedent, may again be subdivided accordingly, into such canons as relate to the *lineal* kindred as heirs, and such as relate to the *collateral* kindred as heirs.

All these canons savor more or less of feudal policy, in which they doubtless originated, and some of them are warranted by no other than feudal considerations. It is, therefore, remarkable that all of them were adhered to with tenacity (although several of them had for ages become unadapted to the existing state of English society), until 1834, when, by statutes 3 & 4 Wm. IV., c. 106, followed, in 1859, by 22 & 23 Vict. c. 35, material innovations were introduced, which will be noticed as we proceed.

The applications of these canons will be better understood by reference to the *Table of Descents*. (2 Bl. Com. 240; *Post*, p. 549.)

W. C.

1<sup>b</sup>. Primary Canons of Descent Applicable to *Lineal Kindred* as Heirs; W. C.

- 1<sup>a</sup>. *Canon I.* Inheritances shall Lineally Descend to the Issue of the Person who last Died *Actually Seised In Infinitum*; but shall never *Lineally Ascend*. (2 Bl. Com. 207.)

This canon implies, it will be observed, that the ancestor must be *actually dead* before the inheritance can take effect, which is in accordance with the maxim, *nemo est hæres viventis*. It implies secondly, that the ancestor must have had *actual seisin* in fee-simple of the lands by his own entry, or by the possession of his or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold, or in case of an incorporeal hereditament, by what is equivalent to corporeal seisin, such as the receipt of rent, the enjoyment of a way or common, etc. And thirdly, it implies that the ancestor was *so seised at his death*; the law requiring this notoriety of *possession* at that time, as evidence that the ancestor had that property in himself which is now to be transmitted to his heir. This seisin of any person, at his death, makes him the root or stock whence all future inheritance, by right of blood, must be derived; which is very briefly expressed in the maxim, *seisinat facit stipitem*. (2 Bl. Com. 207 to 209; 2 Th. Co. Lit. 164, 177-'8, 179, 182.)

This rule, so far as it is *affirmative* and relates to

lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason that the possessions of parents should, upon their decease, if transmissible at all, go in the first place to their children, and descendants. But the *negative branch*, which excludes parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to the common law of England, and to those countries whose jurisprudence is tinged with the policy of feuds. It is an express rule of the feudal law, that *successionis feudi talis est natura, quod ascendentes non succedunt*. Henry I., indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line, but in the time of Henry II., Glanvil lays it down as established law that *hereditas nunquam ascendit*; which until 1834 remained an invariable maxim. These circumstances evidently show the negative part of the rule, at least, to be of feudal original; and so viewed it seems to have been in its origin not wholly an unreasonable doctrine. For if the feud of which the son died seised was really *feudum antiquum*, or one derived to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter), the father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known rule of the early feudal constitutions, which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon the consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if the *feudum novum* were held by the son (as in practice it commonly was), *ut feudum antiquum*, or with all the qualities annexed to a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an ancient feud; and, therefore, could not go to the father, because if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases could the father possibly succeed. These reasons, drawn from the history of feuds, are certainly more satisfactory

than the very quaint one of Bracton,\* adopted by Lord Coke, which regulates the descent of lands according to the laws of gravitation; but as Mr. Christian observes, there is not an entire consistency in their application; for if the father does not succeed to the estate because it must be presumed that it has passed him in the course of the descent, the same reason ought to prevent an elder brother from inheriting from the younger. And if it does not pass to the father, lest the lord should have the services of a decrepit feudatory, the same principle should *a fortiori* exclude the father's eldest brother from the inheritance. Yet the elder brother is permitted to succeed to the younger, and the uncle, although older than the father, to the nephew. (2 Bl. Com. 211-12, and n. (13). See Ratcliffe's Case, 3 Co. 40; 2 Th. Co. Lit. 163, n. (8).)

But it must not be forgotten that this first common law canon, as well as several that follow, have been very essentially modified in England by the statutes 3 & 4 Wm. IV., c. 106 (applicable to all descents subsequent to 1st January, 1834), amended by 22 & 23 Vict. c. 35. (1 Steph. Com. 376; Wms. Real Prop. 114, & seq; *Post*, p. 536.)

The most important changes wrought by these statutes are the following, viz:

1st, That inheritances shall lineally descend to the issue of the *last purchaser*, instead of the person *last actually seized*. (Wms. Real Prop. 114-15.)

\* 2d, That inheritances, upon failure of the issue of the last purchaser, shall *ascend* to his *nearest lineal ancestor* (preferring *male* ancestors and their descendants), who shall thenceforward be regarded *as the purchaser*. (Wms. Real Prop. 118-19, 122.)

3d, That a kinsman of the *half blood* shall be capable of being heir, and shall inherit next after a kinsman in the same degree of the whole blood, and his issue, when the common ancestor *is a male*, and next after the common ancestor when such ancestor *is a female*. (Wms. Real Prop. 121-2.)

4th, That upon the total failure of heirs of the *last purchaser*, descent is to be traced from the person *last entitled* to the land, as if he had been the *purchaser* thereof. (Wms. Real Prop. 122-3; *Post*, p. 536.)

From the perusal of these provisions, it will be apparent how material are the innovations upon the first common law canon of descent, made by these statutes. And perhaps it may still more plainly appear, when,

\* *Descendit itaque ius, quasi ponderosum quod cadens deorsum recta linea et unquam re-ascendit.* (Bract. Lib. III., c. 29; 2 Th. Co. Lit. 162-3.)



after having set forth all the common law canons, the existing English rules of descent are stated *seriatim*.

See Wms. Real Prop. 114 & seq.; *Post*, p. 536.)

2. *Canon II.* The Male Issue Shall be Admitted Before the Female. (2 Bl. Com. 212.)

The preference of males to females is agreeable to the law of succession amongst the Jews, and also amongst the Athenians; but was unknown to the laws of Rome, which made no distinction between brothers and sisters. The reason of the preference by the common law is deduced from feudal principles; for by the genuine and original policy of that constitution, no female could ever succeed to a proper fief, being incapable of performing those military services for the sake of which that system was established. The common law, however, does not extend to a total exclusion of females, like the Salic law and others; it only postpones them to males of the same degree. (2 Bl. Com. 213-114.)

3. *Canon III.* Where there are Two or More Males in Equal Degree, the *Eldest only* shall Inherit; but the *Females All Together*. (2 Bl. Com. 214.)

The Jews allowed some, although not an exclusive advantage to primogeniture, giving to the *eldest son* a double portion of the inheritance. The Greeks, Romans, Britons, Saxons, and even originally the Feudists, divided the lands equally; some among all the children at large, and some among the males only. But when the emperors began to create honorary fiefs, or titles of nobility, it was found necessary in order to preserve their dignity to make them impartible, or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was further enforced by the inconveniences that attend the splitting of estates, namely, the division of military services, the multitude of infant tenants incapable of performing any duty, the consequent weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and to the public, by engaging in mercantile, military, civil or ecclesiastical employments. These reasons occasioned an almost total change in the method of feudal inheritance on the continent of Europe; so that the eldest male began universally to succeed to the whole of the lands in all military tenures; and in this condition the feudal constitution was established in England by William the Conqueror. (2 Bl. Com. 214-215.)

Socage estates, however, are mentioned by Glanvil in

the reign of Henry II., as frequently descending to all the sons equally. But in the time of Henry III., we find by Bracton that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, according to this third canon, except in the county of Kent, where they gloried in the preservation of their ancient *gavelkind tenure*, of which a principal incident was a joint inheritance of all the sons; and except also, in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the *youngest son* only, or in other more singular methods of succession. (2 Bl. Com. 215-16; *Ante*, pp. 74-75.)

The succession of females was left as by the ancient law, subject to an equal division; for they were all alike incapable of military service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest; and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown; wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to dignities and titles of honor descended on females. (2 Bl. Com. 215-16.)

- 4<sup>i</sup>. *Canon IV.* The Lineal Descendants, *In Infinitum*, of any Person Deceased shall *Represent Their Ancestor*; that is, shall Stand in the same Place as the Person Himself would have Done, had He been Living. (2 Bl. Com. 217.)

This taking by representation is called succession *in stirpes*, or *per stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed; but the Roman law somewhat differed from it. In the descending line, the right of representation continued *in infinitum*; and in all cases, the inheritance always descended *in stirpes*. Thus, if one of three daughters died leaving ten children, and then the father died, the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them; and so, if all the daughters had died before the father, leaving respectively ten, six, and two children, the estate would have been divided into three parts, go-

one *ex stirpe* to the offspring of each daughter. But among *collaterals*, representation had no place, unless the persons succeeding to the inheritance were of *unequal degree*. Thus, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother, and two nephews, the sons of another brother), the succession was guided still *by the roots*; but if both brethren were dead, leaving issue, then their representatives in equal degree became themselves principals, and shared the inheritance *per capita*; that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation. So if the next heirs of J. S. be six nieces, three by one sister, two by another, one by a third, his inheritance by the Roman law was divided into six parts, and one given to each of the nieces: whereas the common law in this case would still divide it only into three parts, and distribute it *per stirpes*, thus: one-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative *of her mother*. (2 Bl. Com. 217-'18; Just. Inst. III., i. 6.)

The common law mode of representation is the necessary consequence of the double preference which that law gives first to the male issue, and next to the first-born among the males, to both which the Roman law is a stranger. For if all the children of three sisters were in England to claim *per capita*, in their own right as next of kin to the ancestor, without any respect to the stocks whence they sprung, and those children were partly male and partly female, then the eldest male among them would exclude, not only his own brethren and sisters, but all the issue of the other two daughters. (2 Bl. Com. 217 & seq.)

## 2<sup>d</sup>. Primary Canons of Descent Applicable to *Collateral Kindred* as Heirs; w. c.

*Canon V.* On Failure of Lineal Descendants, or Issue of the Person last Seised, the Inheritance shall Descend to his Collateral Relations, being of the Blood of the First Purchaser, subject to Canons II., III., and IV. (2 Bl. Com. 220.)

This rule, so far as it pays regard to the blood of the first purchaser, is purely of feudal original. It was entirely unknown among the Jews, Greeks, and Romans; none of whose laws looked any further than the person himself who died seised of the estate, but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it.

When feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; not even to his brother, because he was not *descended* from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended, and derived his blood from the first feudatory, might succeed to such inheritance. The true feudal reason for which rule was this, that what was given to a man for his personal service and personal merit ought not to descend to any but the heirs of his body, because it was supposed that none else would be so likely to succeed to the personal qualities which induced the original grant. And, therefore, in the feudal donation the word *heirs* extended only to the *descendants* from the first vassal, the will of the donor, or original lord, (when feuds began to turn from life-estates into inheritances, as described, *Ante*, pp. 67-8), not being to make feuds absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo*; not hereditary to the collateral relations, or lineal ancestors, or husband or wife of the feudatory, but to the issue descended from his body only.

However, in process of time, when the feudal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*, that is, with all the qualities annexed of a feud derived from his ancestors, and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is, descended from, the first imaginary purchaser. For since in such general grants it is not ascertained whether the feud shall be held *ut feudum paternum*, or *ut feudum maternum*, but *ut feudum antiquum* merely; that is, as a feud of *indefinite antiquity*, the law will not ascertain from which of the ancestors of the grantee the land shall be supposed to have descended; and, therefore, it admits *any* of his collateral kindred (who have the other requisites), to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

Of this nature are all the grants of *fee-simple* estates in England; for there is now no such thing in law as the grant of a *feudum novum*, to be held *ut novum*, unless in case of a *fee-tail*, where the rule is strictly observed,



and none but the lineal descendants of the donee in tail are admitted; but *every grant of lands in fee-simple in England is a feud whose antiquity is indefinite*; and, therefore, any of the collateral kindred of the grantee are capable of being called to the inheritance.

Yet, when an estate has *really descended* in a course of inheritance, the common law observes the strict feudal rule, and admits none but the heirs of those through whom the inheritance has passed; for all others have demonstrably none of the blood of the first purchaser in them.

The great and general principle, then, upon which the common law touching collateral inheritance depends is this: that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended. (2 Bl. Com. 221, &c.)

This fifth canon is considerably modified by the statutes above named (3 & 4 Wm. IV., c. 106, and 22 & 23 Vict. c. 25.). Thus, the case contemplated by the canon, as amended, is not the failure of the issue of the person *last seised*, but of the *last purchaser*; and then the inheritance is not to pass immediately to *collateral relations*, but to the nearest *lineal ancestor* (preferring *male ancestors*, and their descendants), who is then to be regarded as *the purchaser*, from whom the descent of those thenceforth claiming as heirs is to be derived. And when at length, upon failure of such lineal ancestors, an heir is to be sought amongst *collateral relatives*, those of the *half-blood*, though *postponed* to kinsmen in the same degree, of the whole blood, are yet *not excluded*. (Wms. Real Prop. 418-419, 421-2.)

The remaining rules of inheritance are only rules of evidence, calculated to aid in investigating the question of who the *purchasing ancestor was*; which in feuds *vere antiquis* has in process of time been forgotten, and is supposed to be in feuds that are held *ut antiquis*. These rules may therefore be denominated *secondary canons*. (2 Bl. Com. 223-4.)

2 Secondary Canons of Descent at Common Law: w. c.

1<sup>st</sup> Canon VI. The Collateral Heir of the Person *Last Seised* must be His Next Collateral Kinsman of the Whole Blood. (2 Bl. Com. 224 & seq.)

The heir must be first the *next collateral kinsman*, either personally or *jure representationis*, as already defined (Ante, pp. 531-2), which proximity is reckoned according to the canonical degrees of consanguinity before

mentioned; and he must be secondly, at common law, *of the whole blood*, that is descended not only from the same ancestor, but from the same *couple of ancestors*. The total exclusion of the half-blood from the inheritance is not so much to be considered in the light of a rule of descent, as of a *rule of evidence*: an auxiliary rule to carry into execution the fifth canon, which requires that the inheritance shall continue in the blood of the *first purchaser*. A collateral relative of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally the ancestors of the *propositus* also, and those of the *propositus* are *vice versa* his. He, therefore, is very likely to be derived from that unknown ancestor of the *propositus* from whom the inheritance descended. But a kinsman of the half-blood has but one-half of his ancestors above the common stock, the same as those of the *propositus*, and therefore there is not the same probability of that requisite of the common law, that he be derived from the *blood of the first purchaser*. This is doubtless the best reason that can be given for this exclusion of the half-blood, but it must be admitted to be very far from satisfactory. In the first place, it does not justify the peremptory and *total exclusion* of the half-blood, but only its postponement; and next, it neglects the obvious consideration, that there is or may be a greater probability that a nearer kinsman of the half-blood is derived from the blood of the first purchaser, than a more remote kinsman of the whole blood. (2 Bl. Com. 224, 227, 228, and n. (29).)

This canon is also materially changed by the statutes before referred to (3 and 4 Wm. IV., c. 106, and 22 & 23 Vict. c. 35), whereby kinsmen of the *half-blood* are not *excluded*, but only *postponed*. Thus it is provided that a kinsman of the half-blood shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman, when the common ancestor *is a male*, and next after the common ancestor, *when such ancestor is a female*. (Wms. Real Prop. 121.)

By the effect of this provision, and of that referred to above, under Canon V. (*Ante*, pp. 533-4), the collateral kinsman who is to succeed, whether of the whole or half-blood, must trace his descent from the *last purchaser*; or if *his* heirs have failed, and where the land is descendible as if an ancestor had been the purchaser thereof, if *his* heirs have also failed, then from the person *last entitled to the land*. (Wms. Real Prop. 114-15, 122.)

2<sup>n</sup>. Canon VII. In Collateral Inheritances the *Male Stock shall be Preferred to the Female* (that is, Kindred Derived from the Blood of the Male Ancestors, however Re-

male shall be Admitted before Those from the Blood of the Female, however Near, unless where the Lands have, *in Fact, Descended from a Female*. (2 Bl. Com. 234 & seq.)

This also is an auxiliary canon, or mere rule of evidence formulated upon Canon V., which insists upon collateral kinsmen, in order that they may be heirs, being of the blood of the first purchaser; for if it is not known whether the inheritance came by the male or female line of ancestors, it is probable that it came by the male, because in the descending line, by Canon II., males are preferred to females. In the absence, therefore, of any contrary proof, the first purchaser and his blood are more likely to be found amongst the male than the female stocks. (2 Bl. Com. 235 '6; Wms. Real Prop. 120.)

- 5<sup>th</sup>. The Kindred who *by Statute* in England (3 & 4 Wm. IV., c. 106; 22 & 23 Vict. c. 35) are to Take as Heirs, and their Shares.

It will be sufficient under this head merely to state the rules, without enlarging on them. The student, however, will not fail to observe, that if in some cases antique fancies, and in others what savors of want of reason, not to say of injustice, has been obviated, the system of descents as a whole, has been rendered more complicated, and more difficult of application. The summary of the rules is derived from Mr. Williams' neat and perspicuous, but very brief, essay on the principles of the law of real property for the use of students in conveyancing; and the student is advised to study the *Table of Descents* given by that writer, in illustration of the rules. (Wms. Real Prop. 122.)

A. C.

- 1<sup>st</sup>. *First Rule*. Inheritances shall Lineally Descend, in the First Place, to the Issue of the *Last Purchaser, In Infinitum*. (Wms. Real Prop. 114.)

The word *purchase* here is employed, of course, in its technical sense, to denote possession to which one comes *not by title of descent*; so that the purchaser from whom descent is to be traced is the last person who had a right to the land, and who cannot be proved to have acquired it by descent, &c. (Wms. Real Prop. 114.)

- 2<sup>nd</sup>. *Second Rule*. The Male Issue shall be Admitted before the Female. (Wms. Real Prop. 115.)

- 3<sup>rd</sup>. *Third Rule*. Where Two or More of the Male Issue are in Equal Degree of Consanguinity to the *Purchaser*, the Eldest only shall Inherit; but the Females shall Inherit *All Together*. (Wms. Real Prop. 116.)

- 4<sup>th</sup>. *Fourth Rule*. All the Lineal Descendants *In Infinitum*, of any Person Deceased, shall Represent their Ancestor;

that is, shall Stand in the Same Place as the Person Himself would have done had he been Living. (Wms. Real Prop. 117.)

5<sup>th</sup>. *Fifth Rule.* On Failure of Lineal Descendants, or Issue of the Purchaser, the Inheritance shall Descend to His *Nearest Lineal Ancestor.* (Wms. Real Prop. 118.)

6<sup>th</sup>. *Sixth Rule.* The *Father*, and all the *Male Paternal* Ancestors of the *Purchaser*, and their Descendants, shall be Admitted before any of the *Female Paternal* Ancestors or their Heirs; all the *Female Paternal* Ancestors and their Heirs before the Mother, or any of the Maternal Ancestors, or her or their Descendants; and the Mother and all the *Male Maternal* Ancestors, and her and their Descendants before any of the *Female Maternal* Ancestors, or their Heirs. (Wms. Real Prop. 120.)

7<sup>th</sup>. *Seventh Rule.* A Kinsman of the Half-Blood shall be Capable of being Heir; and such Kinsman shall Inherit next after a Kinsman in the Same Degree of the Whole Blood, and after the Issue of such Kinsman, when the Common Ancestor is a Male, and next after the Common Ancestor, when such Ancestor is a Female. (Wms. Real Prop. 121.)

8<sup>th</sup>. *Eighth Rule.* In the Admission of *Female Paternal* Ancestors, the Mother of the More Remote Male Paternal Ancestor, and her Heirs, shall be Preferred to the Mother of a Less Remote Male Paternal Ancestor, and her Heirs; and so in the Admission of Female Maternal Ancestors. (Wms. Real Prop. 122; 2 Bl. Com. 238.)

9<sup>th</sup>. *Ninth Rule.* Where there is a Total Failure of Heirs of the Purchaser, or where any Land shall be Descendible as if an Ancestor had been the Purchaser thereof, and there is a Total Failure of the Heirs of such Ancestor, the Land shall Descend, and the Descent shall thenceforth be Traced from the Person *last Entitled* to the Land, as if He had been the Purchaser thereof. (Wms. Real Prop. 122.)

#### 4<sup>th</sup>. The Virginia Law of Descents.

From the first settlement of the colony of Virginia in 1607, down to 1st January, 1787, the common law of descent prevailed within its limits. The independence of the colony having been declared by the convention-legislature, 29th June, 1776, in October of the same year, an act was passed for a general revival of the whole code of laws. The commission for the purpose consisted of Edmund Pendleton, George Wythe, George Mason, Thomas Ludwell Lee, and Thomas Jefferson; and Mr. Jefferson has preserved an interesting, though very brief memorial of its deliberations and action.

“We agreed to meet,” says he, “at Fredericksburg, to settle the plan of operation, and to distribute the work. We



met there accordingly on the 13th of January, 1777. The first question was, whether we should propose to abolish the whole existing system of laws, and prepare a new and complete institute; or preserve the general system, and only qualify it to the present state of things. Mr. Pendleton, contrary to his usual disposition in favor of ancient things, was for the former proposition, in which he was joined by Mr. Lee. To this it was objected, that to abrogate our whole system would be a bold measure, and probably far beyond the powers of the legislature; that they had been in the practice of revising, from time to time, the laws of the colony, omitting the expired, the repealed, and the obsolete, amending only those retained, and probably meant we should now do the same, only including the British statutes as well as our own; that to compose a new institute, like those of Justinian or Bracton, or that of Blackstone, which was the model proposed by Mr. Pendleton, would be an arduous undertaking, of vast research, of great consideration and judgment; and when reduced to a text, every word of that text, from the imperfection of human language, and its incompetence to express distinctly every shade of idea, would become a subject of question and chicanery, until settled by repeated adjudications; that this would involve us for ages in litigation, and render property uncertain, until, like the statutes of old, every word had been tried and settled by numerous decisions, and by new volumes of reports and commentaries; and that no one of us, probably, would undertake such a work, which, to be systematical, must be the work of one hand. This last was the opinion of Mr. Wythe, Mr. Mason and myself. When we proceeded to the distribution of the work, Mr. Mason excused himself, as, being no lawyer, he felt himself unqualified for the work, and he resigned soon after. Mr. Lee excused himself on the same ground, and died, indeed, in a short time. The other two gentlemen, therefore, and myself, divided the work among us. The common law, and statutes to the 4 James I. (when our separate legislature was established), were assigned to me; the British statutes, from that period to the present day, to Mr. Wythe; and the Virginia colonial laws to Mr. Pendleton. As the law of descents, and the criminal law fell, of course, within my portion, I wished the committee to settle the leading principles of these, as a guide for me in framing them; and with respect to the first I proposed to abolish the law of primogeniture, and to make real estate descendible in parsonry to the next of kin, as personal property is by the statute of distribution. Mr. Pendleton wished to preserve the right of primogeniture, but seeing at once that that could not prevail, he proposed we should adopt the Hebrew principle, and give a double portion to the elder son. I observed

that, if the elder son could eat twice as much, or do double work, it might be a natural evidence of his right to a double portion; but being on a par in his powers and wants with his brothers and sisters, he should be on a par also in the partition of the patrimony; and such was the decision of the other members.

"On the subject of the criminal law, all were agreed that the punishment of death should be abolished, except for treason and murder; and that for other felonies should be substituted hard labor in the public works, and in some cases the *Lex talionis*. How this last revolting principle came to obtain our approbation, I do not remember. There remained, indeed, in our laws, a vestige of it in the single case of a slave; it was the English law in the time of the Anglo-Saxons, copied probably from the Hebrew law of "an eye for an eye, a tooth for a tooth" (Exod. xxi. 24; Levit. xxiv. 20; Deut. ix. 21), and it was the law of several ancient people; but the modern mind had left it far in the rear of its advances. These points, however, being settled, we repaired to our respective homes, for the preparation of the work.

"In the execution of my part, I thought it material not to vary the diction of the ancient statutes by modernizing it, nor to give rise to new questions by new expressions. The text of these statutes had been so fully explained and defined by numerous adjudications, as scarcely ever now to produce a question in our courts. I thought it would be useful also in all new draughts to reform the style of the later British statutes, and of our own acts of Assembly; which from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty, by *said*s and *afterwards*, by *ors* and by *ands*, to make them more plain, are really rendered more perplexed and incomprehensible, not only to common readers, but to lawyers themselves.

"We were employed in this work from that time to February, 1779, when we met at Williamsburg; that is to say, Mr. Pendleton, Mr. Wythe and myself; and meeting day by day, we examined critically our several parts, sentence by sentence, scrutinizing and amending, until we had agreed on the whole. We then returned home, had fair copies made of our several parts, which were reported to the General Assembly, June 18, 1779, by Mr. Wythe and myself, Mr. Pendleton's residence being distant, and he having authorized us by letter to declare his approbation.

"We had in this work brought so much of the common law as it was thought necessary to alter, all the British statutes from *magna charta* to the present day; and all the laws of Virginia, from the establishment of our legislature, 4 Jac. I. (or rather from the date of the first charter of Vir-

ginia, to the present time, which we thought should be retained, within the compass of one hundred and twenty-six bills, making a printed folio of ninety pages only.

"Some bills were taken out occasionally, from time to time, and passed; but the main body of the work was not entered on by the legislature until after the general peace, in 1785, when, by the unwearied exertions of Mr. Madison, in opposition to the endless quibbles, chicaneries, perversions, vexations and delays of lawyers and demi-lawyers, most of the bills were passed by the legislature, with little alteration." (1 Jeff. Mem. 34, &c.; 1 Min. Insts. 6.)

Under these circumstances was our present statute of descents framed. Although enacted into a law in October, 1785, it took effect only from 1st January, 1787. (12 Hen. Stats. 138.)

It is worthy of observation, that although this statute wholly abrogated the common law canons of descent, and substituted therefor an entirely new system, applicable to every possible case which can happen, and governed by new analogies, yet so clear was its framer's perception of his own scheme, and so lucid his language, that no serious controversy as to its meaning arose for forty years, and the question then raised having been settled (*Davis v. Rowe*, 6 Rand. 363, 409, 435), none of consequence has since been suggested, notwithstanding one or two sections, incorporated several years afterwards, have been the subject of repeated litigation. (1 Tuck Com. (B. II.), 196-'7, and n. (a); *Browne & als. v. Turberville & als.* 2 Call, 398, 404; *Templeman v. Steptoe*, 1 Munf. 339; *Dilliard v. Tomlinson*, 1 Munf. 183; *Owen v. Cogbill*, 4 H. & M. 487; *Liggon v. Fuqua*, 6 Munf. 281. See *Garland v. Harrison*, 8 Leigh, 368; *Hepburn & als. v. Dundas & als.* 13 Grat. 223.)

The present statute of descents may be seen V. C. 1873, ch. 119; V. C. 1887, ch. 113. Its provisions may be arranged under the following heads: (1). The subject-matter of descent by the statute; (2). The persons to take by descent; (3). The shares in which several co-heirs are to take; and (4). Miscellaneous provisions;

w. c.

# 1<sup>st</sup>. The Subject-Matter of Descent in Virginia, by the Statute.

The subject-matter of descent, as declared by the statute of descents, is "*title to any real estate of inheritance.*" (V. C. 1873, ch. 119, § 1; V. C. 1887, ch. 113, § 2548.)

## 2<sup>d</sup>. The Persons to Take by Descent in Virginia; w. c.

### 1<sup>st</sup>. The General Rule.

The general rule is that the inheritance shall pass *in parency* to such of the decedent's kindred, *male and female*, as are *not alien enemies*, in the following course: persons *en ventre sa mere* at decedent's death, and born

in ten months thereafter being capable of taking, as if *then in being*. (V. C. 1873, ch. 119, § 1, 8; *Id.* ch. 4, § 18; V. C. 1887, ch. 113, §§ 2548, 2555; *Id.* ch. 6, § 43.)

The kindred to take by descent are, (1), Kindred by blood; and (2), Kindred by marriage;

W. C.

1<sup>h</sup>. Kindred of Decedent *by Blood*.

Kindred by blood, of the decedent, take in the following course (V. C. 1873, ch. 119, § 1 (cl. 1 to 10); V. C. 1887, ch. 113, § 2548 (cl. 1 to 10);

W. C.

1<sup>i</sup>. Children and Their Descendants;

2<sup>i</sup>. Father;

3<sup>i</sup>. Mother, Brothers and Sisters, and their Descendants;

4<sup>i</sup>. The Inheritance is Divided into Two Moieties—One going to the *Paternal*, and the Other to the *Maternal* Kindred in the following Course; and if there be no Kindred on one Side, then the Whole goes to the Other;

W. C.

1<sup>k</sup>. To the Grandfather;

2<sup>k</sup>. To the Grandmother, Uncles and Aunts on the Same Side, and their Descendants;

3<sup>k</sup>. To the Great-Grandfathers, or Great-Grandfather, if there be but One.

4<sup>k</sup>. To the Great-Grandmothers, or Great-Grandmother, if there be but One, and the Brothers and Sisters of the Grandfathers and Grandmothers, and their Descendants.

5<sup>k</sup>. And so on, in other Cases, without End, Passing to the *nearest Lineal Male* Ancestors, and for Want of Them, to the *nearest Lineal Female* Ancestors, in the same Degree, and the Descendants of such Male and Female Ancestors.

This, it will be observed, is the general *law* which the statute has observed in its dispositions, from the failure of children of decedent and their descendants, through the whole course of descent.

2<sup>h</sup>. Kindred of Decedent *by Marriage*.

If there be neither maternal nor paternal kindred, the whole inheritance goes as follows:

W. C.

1<sup>i</sup>. To the Husband or Wife of Decedent.

2<sup>i</sup>. To the Kindred of Husband or Wife, in Like Course as if He or She had Survived the Decedent, and Died Entitled to the Estate.

2<sup>e</sup>. Exceptions to the General Rule; W. C.

1<sup>h</sup>. Where Decedent leaves neither Kindred *by Blood* nor Connections (by *Marriage*), Capable to Take.

The inheritance in this case *escheats to the common-*



*wealth*, for the benefit of the literary fund, and is dedicated *exclusively* to the *common schools*. (V. C. 1873, ch. 109, §§ 3 & seq.; Id. ch. 78, § 66; V. C. 1887, ch. 105, §§ 2374 & seq.; Id. ch. 66 § 1505; Const. 1869, Art. VIII., §§ 7, 8.)

- 2<sup>h</sup>. Where an Infant Dies without Issue, having Title to Real Estate, derived by Gift, Devise, or Descent, *from One of his Parents*.

The whole shall pass in this case to his kindred on the side of that *parent* from whom it was derived, if any such kindred be living at the death of the infant. If there be none such, then it shall pass to his kindred on the side of the other parent. (V. C. 1873, ch. 119, § 9; V. C. 1887, ch. 113, § 2556.)

This provision mars the symmetry of the original law of descents, and comes not out of Mr. Jefferson's "quiver of choice arrows." It arose out of a solicitude to prevent estates going out of the families where they originally belonged, and it is the only instance where any respect is paid by the statute to the blood of the *first purchaser*. It was enacted substantially in 1790 (13 Hen. Stat. 122), and again with modifications in 1792 (1 Stats. at Large, N. S. 99), and has given occasion to most of the litigation connected with our law of descents. (1 Tuck. Com. (B. II.), 196 & seq., and n. ca.; Browne v. Turberville, 2 Call. 398, 404; Tomlinson v. Dilliard, 3 Call. 105; Dilliard v. Tomlinson, 1 Munf. 183; Templeman v. Steptoe, 1 Munf. 337; Addison & ux. v. Gore's Adm'r, 2 Munf. 279; Liggon v. Fuqua, 6 Munf. 281.)

A noteworthy illustration of the application of this enactment is afforded by the case of *Vaughan v. Jones*, 23 Grat. 444, 458 & seq. In that case, the real estate of R, a female infant, was sold under a decree in chancery, for the purpose of partition and re-investment, under V. C. 1873, ch. 120, § 3; V. C. 1887, ch. 114, § 2564, and V. C. 1873, ch. 124, §§ 2 & seq.; V. C. 1887, ch. 117, §§ 2626 & seq.; and the proceeds committed to V, her guardian, upon his giving bond and security faithfully to account therefor; and in 1862, R, when she was past the age of eighteen, married B, to whom her guardian, V, paid over such proceeds; and R died in 1864, still under the age of twenty-one years, leaving a child which survived her but a few hours, and her husband, who survived the child. It was held that R having died *an infant*, the proceeds of her real estate, in pursuance of V. C. 1873, ch. 124, § 12; V. C. 1887, ch. 117, § 2626, descended *as real estate* to her child, subject to her husband's curtesy, and upon the death of the child passed, still as real estate, to the heirs of the child *on the part of the mother*.

3<sup>d</sup>. The Shares in which, when several Heirs Come Together to the Inheritance, they Take it; w. c.

1<sup>st</sup>. The General Rule.

The statute sets forth the general rule in the terms following:

"When the children of the intestate, or his mother, brothers and sisters, or his grandmother, uncles and aunts, or any of his female ancestors living, with the children of his deceased lineal ancestors, male and female, in the same degree come into the partition, they shall take *per capita*, or by persons, and where a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take *per stirpes*, or by stocks, that is to say, the shares of their deceased parents; but whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take *per capita* or by persons."

These provisions may be paraphrased thus:

If the heirs are all in the *same degree of relationship* to the decedent, they take *per capita*, or by persons (that is, *equally*); if in *unequal degree*, the nearest take *per capita*, and the more remote take *per stirpes*, or by stocks; that is to say, the shares of their deceased ancestors, being in the degree of the nearest. (V. C. 1873, ch. 119, § 3; V. C. 1887, ch. 113, § 2550; Davis v. Rowe, 6 Rand. 355; Ball v. Ball, 27 Grat. 326.)

This was the single particular wherein the statute, as it came from Mr. Jefferson's hands, was wanting in perspicuity. As it was originally enacted, it ran thus:

"§ XIV. And where the children of the intestate, or his mother, brothers and sisters, or his grandmother, uncles and aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female in the same degree come into the partition, they shall take *per capita*, that is to say by persons; and where a part of them being dead, and a part living, the issue of those dead have a right to partition, such issue shall take *per stirpes*, or by stocks, that is to say, the share of their deceased parent." (12 Hen. Stats. 139.)

It was re-enacted in the same terms as § 16 in the act of 1792 (1 Stats. at Large, N. S. 100), and under it in that form arose the case of Davis v. Rowe, 6 Rand. 355.

The statute in that form, it will be observed, contemplates and provides for the case where several heirs of named classes come together to the inheritance, and *all are living*, in which case they are to take *per capita*; it also contemplates and provides for the case where some of the persons of any of the named classes are dead, whilst others are living, directing that the issue of those dead

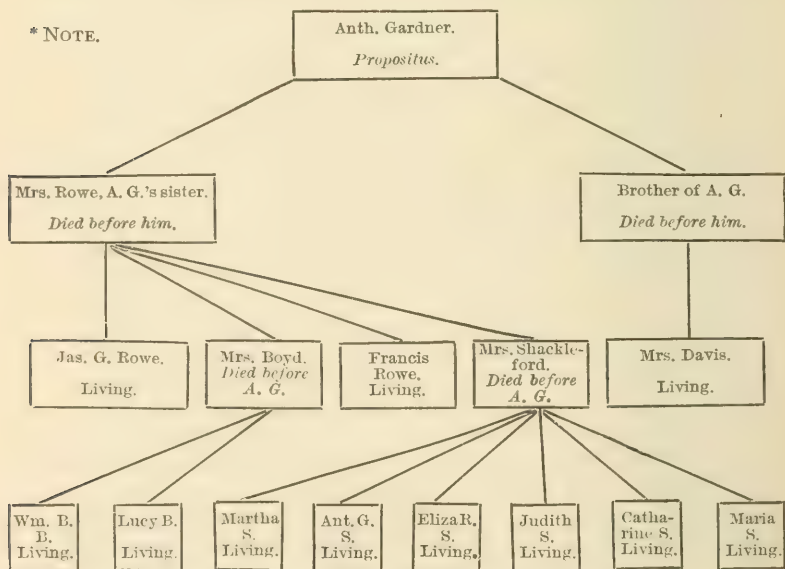
should take *per stirpes*. But unfortunately the statute did not contemplate nor specially provide for the case where *all* the individuals of any of the classes named were dead, leaving issue, and *Davis v. Rowe* was that case. It was as follows :

Anthony Gardner died in 1819, unmarried, leaving a large estate, real and personal, and only collateral relatives. He had had a brother and a sister, both of whom died before him, leaving children. The only child of the brother was Mrs. Davis. The sister, Mrs. Rowe, had four children, James and Francis Rowe, Mrs. Boyd and Mrs. Shackelford. Mrs. Boyd and Mrs. Shackelford also died in Anthony Gardner's life-time ; the first leaving two children, and the last six. The question was, how the estate should be divided among these eleven relations. A diagram will best exhibit the respective claims of the parties. See note (\*).

Mrs. Davis insisted that the case was not provided for at all by the statute, and that being *casus omissus*, the common law applied, which would give her, as the representative of her father (Canon IV., *Ante*, pp. 531-2), one-half of the estate. But it was held by three judges out of five :

1st, That the statute had wholly abrogated the common law (as had been previously decided in *Brown v. Turber-*

\* NOTE.



ville, 2 Call, 390, and *Templeman v. Steptoe*, 1 Munf. 339, and had provided a rule for *every case which could happen*. (6 Rand. 363, &c., 368, 409, 437, 439.)

2nd, That the statute was founded on the *affections of the heart*, and follows the current in its natural flow, preferring as heirs the *classes* nearest in blood; and in the same class, whatever that class may be, giving to those *individuals* nearest the intestate larger portions, and allowing the more remote to take *per stirpes*; to this end (*i. e.*, to determine the shares amongst the members of a class), and to this end alone, calling the *jus representationis* to its aid. (Id. 365, 419, 436, 441.)

3rd, That the statute is to be interpreted according to the analogies of the statute of distribution of a decedent's personal property, and of the civil law, whence this statute, as well as the statute of distributions, was in most particulars taken. (Id. 368, &c., 374, 436.)

4th, That the inheritance in the present case, was therefore to be divided into five equal parts, of which Mrs. Davis, J. G., and Francis Rowe, should each have one (taking *per capita*), and the other two parts should be divided respectively between the children of Mrs. Boyd and Mrs. Shackelford, who would thus take *per stirpes*, the shares of their deceased ancestors being in the degree of the nearest.

The present statute has incorporated the principal doctrine of *Davis v. Rowe* (stated above as the 2nd) into its text. (V. C. 1873, ch. 119, § 3; V. C. 1887, ch. 113, § 2550; see *Ball v. Ball*, 27 Grat. 325.)

## 2<sup>d</sup>. Qualifications of the General Rule; w. c.

1<sup>b</sup>. Collaterals of the Half-Blood take *only Half-Shares*.

"Collaterals of the half-blood shall inherit only half so much as those of the whole blood. But if all the collaterals be of the half-blood, the ascending kindred (if any) shall have double portions." (V. C. 1873, ch. 119, § 2; V. C. 1887, ch. 113, § 2549; *Blunt & al. v. Gee & al.* 5 Call, 489; *Garland v. Harrison*, 8 Leigh, 368; *Hepburn & als. v. Dundas & als.* 13 Grat. 223.)

2<sup>b</sup>. Doctrine of Hotchpot.

"Where any *descendant* of a person dying intestate as to his estate, or *any part* thereof, shall have received *from such intestate* in his life-time, or *under his will*, any estate, *real or personal*, by way of *advancement*, and he, or *any descendant* of his, shall come into the *partition and distribution* of the estate with the other parceners and distributees, such advancement shall be brought *into hotchpot* with the whole estate, *real and personal*, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, *real and*



*personal.*" (V. C. 1873, ch. 119, § 14; V. C. 1887, ch. 113, § 2561.)

The origin and nature of the doctrine of hotchpot, and the leading principles applicable thereto, have been already stated in treating of estates in co-parcenary. See *Ante*, pp. 512, &c.

#### 4<sup>t</sup>. Miscellaneous Provisions; w. c.

##### 1<sup>st</sup>. Alienage of Ancestor (whether Living or Dead) is no Bar to Making Title by Descent.

At common law, aliens, upon a principle of civil policy, are incapable of taking by descent, being allowed to have no inheritable blood in them. Hence, it is held by Sir Edward Coke, not without some show of reason (2 Th. Co. Lit. 191), that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects, and one of them purchase lands in fee, and dieth without issue, his brother shall not be his heir; for there was never any inheritable blood between the father and them. And although this particular application of the principle, as between *brothers*, has been since overruled (*Godfrey v. Dixon*, 3 Cro. (Jac.) 539; *Collingwood v. Pace*, 1 Lev. 60), yet it was upon the ground that descent between brothers is *immediate*, and not through the father; so that in other cases, the alienage of an ancestor through whom the kindred must be derived did still operate at common law to preclude one subject from inheriting to another. In order, therefore, to obviate a principle logical enough, but leading to harsh results not warranted by sound policy, the statute 11 & 12 Wm. III., c. 6, was enacted, to the effect that alienage of the ancestor through whom one derives his pedigree shall be no bar to his making his title by descent. (2 Bl. Com. 249, to 251.) And this statute having been in substance adopted in Virginia (12 Hen. Stats. 139), it was held under it (*Jackson, &c. v. Saunders*, 2 Leigh, 109), that an alien naturalized might derive title by descent from a citizen-uncle, although his mother, the uncle's sister, was still living and a non-resident alien; and now the statute itself embodies that principle, declaring that in making the title by descent, it shall be no bar that any ancestor (whether *living or dead*), through whom he derives his descent from the intestate, is or hath been an alien. (V. C. 1873, ch. 119, § 4; V. C. 1887, ch. 113, § 2551.)

##### 2<sup>nd</sup>. Alien-Friends may Take by Descent in Virginia.

"Any alien, *not an enemy*, may acquire by purchase or descent, and *hold* real estate in this State; and the same may be *transmitted* in the same manner as real estate held by citizens." (V. C. 1873, ch. 4, § 18; V. C. 1887, ch. 6, § 43.)

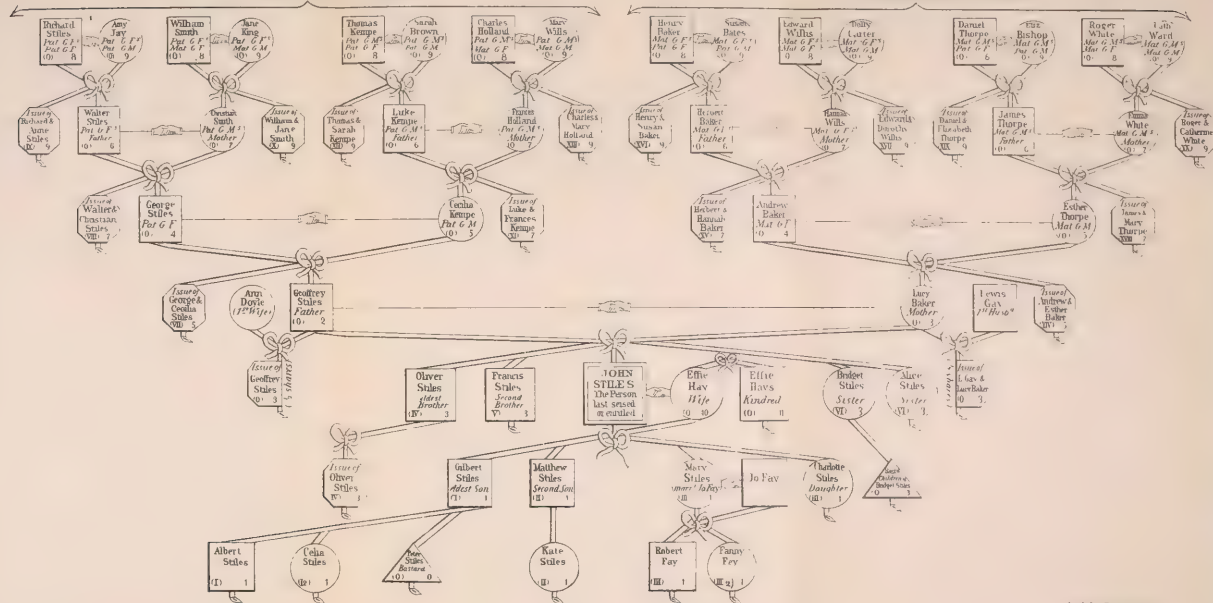


# Table of Descents

NOTE. The Roman numerals enclosed in brackets (I. II. III. etc.) denote the Common law order of descent, the Arabic numerals (1, 2, 3, etc.) the order in Virginia.

## Paternal Line

## Maternal Line



3<sup>g</sup>. Persons in Order to Inherit, must be Either in Being at Decedent's Death, or then *en Ventre sa Mere*, and *Born within Ten Months Thereafter*.

The statute of descents provides that "any person *en ventre sa mere*, who may be born in ten months after the death of the intestate, shall be capable of taking by inheritance in the same manner as if he were in being at the time of such death." (V. C. 1873, ch. 119, § 8; (V. C. 1887, ch. 113 § 2555; 2 Bl. Com. 208, and n. (9); *Idole*, p. 526.)

4<sup>g</sup>. Bastards are Capable of Inheriting and Transmitting Inheritance on the *Part of Their Mother*, as if Lawfully Begotten.

See V. C. 1873, ch. 119, § 5; V. C. 1887, ch. 113, § 2552; *Garland v Harrison*, 8 Leigh, 368; *Hepburn & als. v. Dundas & als.* 13 Grat. 219.

5<sup>g</sup>. Bastards at Common Law, in Some Instances are *Made Legitimate* in Virginia; w. c.

1<sup>h</sup>. Where the Father Afterwards Intermarries with the Mother, and Recognizes the Child *Before or After the Marriage, the Child is Deemed Legitimate*.

See V. C. 1873, ch. 119, § 6; V. C. 1887, ch. 113, § 2553. And that whether the child be *living or dead*. (*Ash v. Way's Admr.*, &c. 2 Grat. 203.)

2<sup>h</sup>. The Issue of Marriages Deemed Null in Law, or Dissolved by a Court, is *Nevertheless Legitimate*.

See V. C. 1873, ch. 119, § 7; V. C. 1887, ch. 113, § 2554. *Stones v. Keeling*, 5 Call, 143; S. C. 3 H. & M. 228, note.

## CHAPTER XV.

### OF TITLE BY PURCHASE: AND I. BY ESCHEAT.

2<sup>d</sup>. Title to Lands by Purchase, or act of the Parties.

We will advert under this head, to (1), The meaning of Purchase; (2), When words are deemed words of Purchase, and when words of Limitation; (3), Differences in effect between the acquisition of title by Purchase and by Descent; and (4), Methods of acquiring Real property by Purchase:

w. c.

1<sup>e</sup>. Meaning of Purchase.

Purchase (*perquisitio*), taken in its largest sense, is defined by Littleton (2 Th. Co. Lit. 184), to be "the possession of lands or tenements that a man hath *by his deed or agreement*, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but *by his own deed*;" and thus it stands in direct opposition to descent, and includes *every other method* of coming to an estate, but *merely that by inheritance*, as by gift or devise, as well as by conveyance for value. (2 Bl. Com. 241.)



- 2<sup>e</sup>. When Words are to be Deemed Words of Purchase, and when Words of Limitation.

See 2 Bl. Com. 241-'2, and n. (2); V. C. 1873, ch. 112, § 11; V. C. 1887, ch. 107, § 2423; *Ante*, pp. 404, &c.

- 3<sup>e</sup>. Differences in Effect, between Acquisition of Title by Purchase, and by Descent; w. c.

- 1<sup>f</sup>. By Purchase the Estate Acquires a *New Inheritable Quality*.

See 2 Bl. Com. 243; 2 Th. Co. Lit. 185, n. (A.); 2 Lom. Dig. 773-'4; *Ante*, pp. 522-'3.

This first difference does not exist in Virginia; no change being wrought, under our law of descents, in the inheritable quality of an estate by purchase. (V. C. 1873, ch. 119, §§ 1, 9; V. C. 1887, ch. 113, §§ 2548, 2556; *Ante*, p. 522.)

- 2<sup>f</sup>. An Estate taken by Purchase will not make the Taker Answerable for the Acts of the *Antecessor or Seller*, as an Estate by Descent will.

See 2 Bl. Com. 243-'4; 2 Th. Co. Lit. 185-'6, n. (A.); 1 Lom. Dig. 773-'4; *Ante*, pp. 522-'3.

This difference is greater in Virginia than it was at common law; inasmuch as with us a man's lands in the hands of his heir are charged with *all his debts*, whereas at common law, they were liable only for debts of record, and debts of specialty *expressly* binding the heir. (V. C. 1873, ch. 127, § 3; V. C. 1887, ch. 120, § 2665; *Ante*, pp. 522-'3, 2<sup>d</sup>.)

- 4<sup>e</sup>. Methods of Acquiring Real Property by Purchase.

The methods of acquiring real property by purchase are as follows, viz.: (1), By escheat; (2), By occupancy; (3), By prescription; (4), By forfeiture; and (5), By alienation.

w. c.

- 1<sup>f</sup>. Title to Real Property by ESCHEAT.

Let us observe, (1), The origin and nature of title by escheat; (2), The steps necessary to perfect the title by escheat; and (3), The circumstances under which escheat occurs.

w. c.

- 1<sup>g</sup>. The Origin and Nature of Title by Escheat.

Title by escheat is of feudal origin, and is founded upon this single principle, that the inheritable blood of the last owner of the fee-simple is, by some means or other, *utterly extinct and gone*; and since none by the feudal law can inherit his estate but such as are of his blood and consanguinity, it follows that, when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given. Escheat, it will be remembered, was one of the fruits and consequences of feudal tenure. (*Ante*, p. 73; 2 Bl. Com. 72.) The word

itself is Norman or French, in which language it signifies *chance* or *accident*, and denotes a determination of the *tenure* by some unforeseen contingency. (2 Bl. Com. 244 & seq.)

In Virginia, escheat denotes the determination by some unforeseen contingency of the tenant's *estate* (not of his *tenure*, there being no tenure with us of fee-simple estates; *Ante*, p. 79), and the consequent appropriation of it, under authority of the statute law, by the commonwealth, the *politic*, if not the *natural* successor, to all property having no other owner. (V. C. 1873, ch. 109, § 3; *Id.* ch. 78, § 66; V. C. 1887, ch. 105, § 2374; *Id.* ch. 66, § 1505; Va. Const., 69, Art. VIII., § 7.)

2<sup>g</sup>. The Steps Necessary to *Perfect the Title by Escheat*.

We must note under this head, (1), The escheator, his mode of appointment and his duties; (2), The escheator's proceedings to escheat lands; and (3), The redress afforded in Virginia to persons aggrieved by an inquisition of escheat;

W. C.

1<sup>h</sup>. The Escheator: His Mode of Appointment, and His Duties.

The antiquity and original of the office of escheator in England, and the early history of the office in Virginia, are sufficiently described in 1 Min. Insts. 149. It may be desirable, however, briefly to recapitulate from the same source, some particulars as to the mode of his appointment with us, his duties, and the mode of proceeding to escheat lands. (1 Min. Insts. 149-50.)

W. C.

1<sup>i</sup>. Mode of Appointment, etc., of Escheator in Virginia.

One escheator is appointed by the governor for every county and city, to hold office during good behavior, and subject to be removed by the governor, for misbehavior, incapacity, or neglect of official duty; or by the appointment and qualification of a successor; or by judgment of a competent court, upon conviction of malfeasance, non-feasance, removal from sphere of duty, etc. And his fidelity is secured by the customary oaths of office (V. C. 1873, ch. 12, § 1; V. C. 1887, ch. 13, §§ 168, 169), and by an official bond with good security, in the penalty of \$3,000, payable to the commonwealth. (V. C. 1873, ch. 109, §§ 1, 2; *Id.* ch. 12 § 6; V. C. 1887, ch. 105, §§ 2371, 2372 &c.; *Id.* ch. 13 § 177; Bac. Abr. Offices, (M.) and (N).)

The bond thus required is intended to secure the escheator's fidelity when the care of lands is committed to him during the proceedings to escheat (V. C. 1887, ch. 105, § 2383); or when, under direction of the governor, he makes sale of the same after the sentence

of escheat is pronounced. (V. C. 1887, ch. 105, § 2387.)

2<sup>d</sup>. Duties of Escheator in Virginia.

His function is to ascertain what lands in his county or city are liable to escheat, and to take the needful steps to cause them to be escheated. To that end the statute directs that, upon information from the commissioner of the revenue of the county or city (which it is the commissioner's duty annually to furnish), or from any other person, *in writing, under oath, of any lands in his county or city, as to which any one who was seised thereof, has died intestate, and without known heir, or to which no person is known by him to be entitled*, to proceed to cause the same to be escheated to the commonwealth. (V. C. 1873, ch. 109, §§ 3 & seq.; V. C. 1887, ch. 105 §§ 2374 etc.)

In respect to the necessity for an inquisition of escheat, in order to vest in the commonwealth lands liable to be escheated, a distinction must be noted between the case of an *alien* (or, as it seems, of a *corporation*) acquiring lands by *purchase*, and of an owner of land dying without heirs, or at least without heirs capable of inheriting. In the case of the alien (or corporation) purchaser an inquisition is indispensable. The title of the alien (or corporation) must be divested by *office found*, followed, if the possession be not *vacant*, by the *entry* of the escheator. But where a land-owner dies without heirs, or without heirs capable of inheriting, the land vests immediately in the commonwealth *by operation of law*, and no inquest of office or entry is needful; although it may sometimes be *expedient*, as where some one is in possession, claiming as heir of the decedent, the State taking the land as the heir would have taken it, subject to any liens created by the owner, and also to any valid debts contracted by him. (2 Th. Co. Lit. 212; 4 Kent's Com. (12th ed.) 424; Case of the Sadler's Co. 4 Co. 58 a; Jackson v. Lunn, 3 John. Cas. (N. Y.) 109, Johnson v. Hart, 3 Do. 332; Mooers v. White, 6 Johns. Ch. (N. Y.) 365; Stevenson v. Dunlap, 7 Monr. (Ky.) 134; White v. White, 2 Mete. (Ky.) 185; Fairfax v. Hunter, 7 Cr. 603; Sands v. Lynham, 27 Grat. 296 & seq.)

2<sup>h</sup>. Proceedings by Escheator in Virginia to Escheat Lands.

Public notice of the inquest designed to be held is to be given by advertisement at the door of the court-house of the county or city for *thirty days*, including a court-day, and thereupon the sheriff or sergeant is to summon for the inquest sixteen *freeholders*, of whom at least twelve shall be impanelled as jurors. They are required to meet at the *court-house* and to *sit in public*, and may be adjourned by the escheator from day to day; and every person shall be suffered to give evidence openly, in the presence of the

jury. (V. C. 1873, ch. 109, §§ 4, 5, 6; V. C. 1887 ch. 105, §§ 2375, to 2378; 1 Min. Insts. 151 '2.)

Twelve at least of the jurors must concur in the verdict of escheat, and must *sign the same*, together with the escheator, whose duty it is, within sixty days, to transmit the substance of it to the register of the land office, and within thirty days to return the inquisition to the *clerk of the circuit court*, who, within thirty days from the receipt of it, is required to transmit a copy to the clerk of the county or corporation court, to be recorded. (V. C. 1873, ch. 109, § 14, 7; V. C. 1887, ch. 105, §§ 2385, 2378; 1 Min. Insts. 151.)

If the title liable to escheat be *equitable*, the escheator and his jury have no cognizance, and the escheator must proceed to enforce the rights of the commonwealth by a *bill in equity*, in which he himself is to be plaintiff, and the party having the legal title, and whosoever may be beneficially interested, are to be defendants. (Bac. Abr. Alien, (C.); Commonwealth v. Martin, 5 Munf. 117; Hubbard v. Goodwin, 3 Leigh. 510 & seq.)

Various interests in lands which are liable to escheat, or at least which might seem to be so liable, are expressly reserved to the parties beneficially concerned in them. Thus, lands which for *twenty years* have been in the actual possession of the person claiming the same, or of those under whom he holds, and upon which taxes have been paid *within that time*, are declared not to be liable to escheat. And whilst the *equitable* or beneficial title is not less subject to escheat than the legal, the *naked legal title*, vested in one merely as trustee, is not so liable. So, a term for years in lands escheated, or a rent or other profit issuing out of the same, is not divested by the office found, but the party entitled enjoys the lease, rent, or other profit, whether the same be found in the inquisition or not. And, in like manner, the debts of the last owner are always subject to be paid out of the escheated lands, after his personal estate has been applied to that purpose, a proceeding in equity in the *circuit court*, to which the escheator is defendant, being allowed in order to enforce payment. (V. C. 1873, ch. 109, §§ 3, 25 to 28; V. C. 1887, ch. 105, §§ 2374, 2396 to 2399; Hubbard v. Goodwin, 3 Leigh. 508; Ferguson v. Franklins, 6 Munf. 305.)

It must be observed that, unless the possession be *vacant*, the inquisition alone does not generally vest a complete title in the commonwealth. Besides the inquest of office, or some equivalent proceedings in equity equally indispensable, the commonwealth, by its officer, *must enter upon the lands* before the possession can be ad-



judged to be in it. But when the possession is *vacant*, no entry by the officer is requisite. (Bac. Abr. Alien, (C.); Page's Case, 5 Co. 52; 1 Th. Co. Lit. 91, and n. (9); Fairfax De'vees v. Hunter, &c. 7 Cr. 620; Hubbard v. Goodwin, 3 Leigh, 492; Com'th v. Hite, 6 Leigh, 588; Craig v. Leslie, 3 Wheat. 589; Gouverneur's Heirs v. Robertson, 11 Wheat. 356; 1 Min Insts. 165.)

3<sup>d</sup>. Redress Afforded in Virginia to Persons Aggrieved by the Inquisition of Escheat.

Redress is afforded to persons aggrieved by the inquisition of escheat in several ways, of which some originate in the common law, and others have been devised, or at least improved by statute. They consist of, (1), The petition of right; (2), The *monstrans de droit*; (3), The traverse of office; (4), Petition to the circuit court of the county, etc., where the land lies; and (5), Petition or bill in chancery to the circuit court of the city of Richmond.

W. C.

1<sup>st</sup>. Petition of Right.

The petition of right is a proceeding *in the Ordinary Court of Chancery*, originating at common law. It is in the nature of a *real action*, prosecuted by leave of the sovereign to recover lands, etc., illegally seized by public authority; and like other real actions is at common law liable to be obstructed by many vexatious delays. (3 Bl. Com. 256; Bac. Abr. Prerogative, (E.); 1 Th. Co. Lit. 303 & seq., and n's (N.) and (O).)

2<sup>d</sup>. *Monstrans De Droit*.

The proceeding by *monstrans de droit* is likewise in England *in the Ordinary Court of Chancery*. At common law it lies when the whole case, as well the finding on behalf of the crown, as the adverse title of the claimant, *appears of record*. Thus, if a disseisor dies seized of the lands, and without heir, and the inquisition finds as well the disseisin and the better title of the claimant, as the fact of the disseisor's death without heirs, a *monstrans de droit* is proper, the whole case appearing of record; but if the inquisition is silent as to the disseisin, and the claimant's better title, it is necessary at common law to resort to a *petition of right* for the purpose of suggesting the title of the crown as dependent only on the inquisition, and setting forth the claimant's superior right before the disseisin made. It is seldom that a record, by inquisition or otherwise, would be so complete as to show the claimant's title, and the proceeding by *petition of right* being dilatory and expensive, that by *monstrans de droit* was much enlarged, and rendered well nigh universal by several statutes, particularly by 36 Edw. III., c. 13, and 2 & 3 Edw. VI., c. 8, which latter also allowed inquisitions of office

to be *traversed* or denied, wherever the right of a subject is concerned, except in a very few cases: and the effect of these statutes is probably retained with us by the statute V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2, § 3; which reserves the benefit of all *writs remedial and judicial* made in aid of the common law, prior to 4 Jac. I., of a general nature not local to England, so far as may consist with the constitution of the State and acts of Assembly. It militates, however, somewhat against this suggestion, that even if the *monstrans de droit* can properly be styled a *writ remedial*, etc., there were in the Code of 1819 (1 R. C. 295, ch. 82, § 7; 298, §§ 18 to 20), special provisions recognizing the petition of right, the *monstrans de droit*, and the traverse of office, all of which are omitted in the subsequent Codes (1849, 1873 and 1887), and perhaps were designed to be substituted (V. C. 1873, ch. 109, §§ 8, &c.; V. C. 1887, ch. 105, § 2379), by the *petition to the circuit court*, presently to be mentioned. (3 Bl. Com. 256-7; Bac. Abr. Prerog. (E.); 2 Tidd's Pract. 1075; Case of Warden, &c. of Sadler's Co., 4 Co. 55 a & b; Edwards v. Van Bibber, 1 Leigh, 194; French & al. v. Commonwealth, 5 Leigh, 516 & seq.; Fiott & als. v. Commonwealth, 12 Grat. 565.)

### 3<sup>i</sup>. Traverse of Office.

The *traverse of office* is a proceeding first allowed by statute 2 & 3 Edw. VI., c. 8, whereby the subject was permitted to *contest and deny* the truth and validity of inquests of office. It was recognized in terms by the Revised Code of 1819 (1 R. C. 295, ch. 82, § 7; 298, §§ 18 to 20), but these provisions being omitted in the subsequent Codes (1849, 1873 and 1887), and substituted as it appears, by a proceeding by *petition to the circuit court*, presently to be mentioned (V. C. 1873, ch. 109, §§ 8, &c.; V. C. 1887, ch. 105, §§ 2379, &c.); it may possibly be doubted if the *traverse of office* is reserved by the statute (V. C. 1873, ch. 15, § 2; V. C. 1887 ch. 2, § 3.), saving remedial and judicial writs given by any act of parliament prior to 4 Jac. I., &c. See 3 Bl. Com. 256-7; Bac. Abr. Prerog. (E.); 2 Tidd's Pr. 1075; Case of Warden, &c., of Sadler's Co. 4 Co. 55 a & b; French & al. v. Commonwealth, 5 Leigh, 516 and seq.

### 4<sup>i</sup>. Petition to the Circuit Court.

Whether the interest of the party be legal or equitable, he may, before the sale of the land, apply for redress by *petition* (which is understood to be equivalent to a *bill in equity*) to the *circuit court* of the county or corporation where the proceeding of escheat took place, making the escheator a defendant, who shall file an answer; and upon the petition, answer, and evidence,

the case shall be heard without unnecessary delay. Disputed facts are ascertained *by a jury*, whose verdict, however, the court, if it sees fit, may set aside, and have a new jury empanelled. Its decision shall be such as the rights of the parties may require. The lands pending the petition may be committed to the claimant, on his giving bond, with good security, to pay the rents and profits to the commonwealth, if the right be found in its favor; or if not so committed, they remain in the escheator's hands, to be leased out by him, he being answerable (according as the right is determined), to the commonwealth, or to the claimant, for the rents and profits, and for *waste*. (V. C. 1873, ch. 109, §§ 8 to 12, 28; V. C. 1887, ch. 105, § 2382, 2383; *Edwards v. Van Bibber*, 1 Leigh, 194; *Hite's Case*, 6 Leigh, 588; *Fiott & al. v. Commonwealth*, 12 Grat. 564.)

- 5<sup>i</sup>. Petition or Bill in Chancery, to the Circuit Court of the City of Richmond.

Where a person has *any claim* against the commonwealth, other than a pecuniary one, cognizable by the auditor of public accounts, redress may be obtained in the circuit court of the city of Richmond, by a petition or by a bill in chancery, according to the nature of the case. The auditor is to be made defendant, and is to answer the complaint; and the cause is to be heard without unnecessary delay upon the petition, or bill and answer, and the evidence. Facts disputed may be submitted to a jury, and the sentence of the court shall be such as law and equity may require, (V. C. 1873, ch. 44, §§ 1 to 3; V. C. 1887, ch. 32, §§ 746 to 749.)

The remedy thus given, it is said, comprehends every right *in law and equity* which any person may be entitled to demand of the commonwealth. (*Attorney General v. Turpin*, 3 H. & M. 548; *Commonwealth v. Beaumarchais*, 3 Call, 122.)

- 3<sup>g</sup>. The Circumstances under which Escheat Occurs.

Escheat takes place, as we have already seen, wherever *inheritable blood is wanting*, so that the inquiry must be as to the cases where that occurs. They are sometimes divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*; the one sort, where the tenant dies without *heirs*; the other, where his blood is *attainted*. But both these species may properly be comprehended under the first denomination only, since he that is attainted has, at common law, no *inheritable* blood. (2 Bl Com. 245-'6.)

W. C.

- 1<sup>b</sup>. The Circumstances under which Escheat Occurs in *England*; W. C.

1<sup>i</sup>. Where *no Blood Relations Whatsoever* Survive the Decedent.

This, like the next two, results from the rules of descent already explained. (2 Bl. Com. 208 & seq.; Id. 246; *Ante*, pp. 541, &c.)

2<sup>i</sup>. Where Decedent Dies without any Relations on the Part of the *Last Purchaser*, or of the Person *Last Entitled*.

At common law, escheat occurred where a decedent died without any relations on the part of those ancestors from whom his estate descended; that is, on the part of the *first purchaser*. (2 Bl. Com. 220 & seq.) The doctrine, according to the modifications wrought by the statutes 3 and 4 Wm. IV., c. 106, and 22 and 23 Vict. c. 35, is believed to be as stated above in the caption. (Wms. Real Prop. 118-'19, 122; *Ante*, pp. 536-'7.

3<sup>i</sup>. Where Decedent Dies without any Relations of the *Whole Blood*.

By the common law canons of descent, the inheritance, under no circumstances, was allowed to pass to the half-blood (2 Bl. Com. 224 & seq.; *Ante*, p. 534-'5); but by the statutes referred to under the preceding head, the half-blood is only *postponed*, not *excluded*. (*Ante*, p. 536-'7; Wms. Real Prop. 121.)

4<sup>i</sup>. Where Decedent Dies with no Other Relation than a *Monster*.

A monster, which *has not human shape*, but bears evidently in any part the resemblance of the brute creation (being supposed to be the product of bestial connexion), has no inheritable blood, and cannot be heir, though born in marriage, it being necessarily illegitimate. But no deformity, if the creature has human shape, will disqualify it to inherit. This is a very ancient rule of the English law, being mentioned by Bracton, who probably derived it, as he did very many of his doctrines, from the Roman law. *Qui contra formam humani generis converso more procreantur, ut si mulier monstrosam vel prodigiosam enixa sit, inter liberos non computantur*. Such a birth is without authenticated example, and is believed to be physiologically impossible, so that the rule is practically superfluous. (2 Bl. Com. 246, and n. (g).)

5<sup>i</sup>. Where Decedent Dies with no other Relations than a *Bastard*; w. c.

1<sup>k</sup>. The General Doctrine.

Bastards are, by the common law, not reckoned amongst children: and being the sons of nobody (*nullius filii*) cannot be in law either of the blood of the first purchaser, or of any one else, and so have no inheritable blood, not even *on the mother's side*. (2 Bl. Com. 247.)



2<sup>k</sup>. The Case of *Bastard Eigné*, and *Mulier Puisné*.

When a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, called in the dialect of the old law *a mulier*, or, as Glanvil expresses it, *filius mulieratus* (the woman before marriage being *concubina*, and afterwards *mulier*); the elder son being bastard-born, is called *bastard eigné*, and the younger son being of legitimate birth is styled *mulier puisné*. If, then, the father dies, and the *bastard eigné* enters and enjoys the inheritance until his death, and dies seised thereof, whereby the same descends to his issue, the *mulier puisné*, and all other heirs, are totally barred of their right; for the law will not suffer a man to be *bastardized after his death*, who entered as heir and died seised, and so passed for legitimate in his life-time. (2 Bl. Com. 248: 1 Th. Co. Lit. 150, n. (I).)

6<sup>i</sup>. Where Decedent Dies with no other Relations than an *Alien*.

Aliens, by the common law, are allowed to have no inheritable blood, upon a principle of universal, national or civil policy, rather than for reasons exclusively feudal. For aliens, owing no allegiance to the country, to acquire possession of its lands, the law considers to be of pernicious, and even of dangerous tendency. And as it does not permit aliens to *hold* lands which they obtain by their own act, it would be incongruous to cast lands by descent, which is the *act of the law*, upon an alien heir. As aliens cannot *hold* lands acquired by purchase, nor *acquire* them by inheritance, they can of course, themselves, have no heirs, having nothing to be inherited, and so they are said to have in them no inheritable blood. (2 Bl. Com. 249.)

We have seen that one brother may, at common law, inherit to another (both being citizens), although the father be an alien; the descent being said to be *immediate*, and not through the father. And by statute 11 & 12 Wm. III., c. 6, all persons, being natural-born subjects, may inherit and make title by descent from any of their ancestors, lineal or collateral, although the ancestor through whom they derive their pedigrees be an alien. (2 Bl. Com. 251.)

7<sup>i</sup>. Where Decedent Dies *Attainted*, or Leaves no Relation other than a *Person Attainted*.

At common law, when one dies attainted of treason or other felony, his blood is so corrupted as to be rendered no longer inheritable. And so, when the ancestor leaves no relation other than a person so attainted, such a person is not capable of inheriting, and there being

no other relation, the land escheats. 2 Bl. Com. 251 to 253.)

Care must be taken to distinguish this doctrine of *escheat* where the ancestor is attainted, and therefore can have no *inheritable blood*, from *forfeiture*, which the common law attaches as part of the punishment of crime. Forfeiture of lands, and generally of the offender's possessions, was a doctrine of the *old Saxon law*. It has no connection with the feudal system, but being ordained upon general considerations of civil policy, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which escheat undoubtedly is. Escheat, therefore, operates in subordination to the superior law of forfeiture. A second difference also between escheat and forfeiture is, that forfeiture accrues always to the crown, whilst escheat accrues to the benefit of the lord of the fee, who may be the king, but may also be a subject. (2 Bl. Com. 252.)

In consequence of the corruption and extinction of hereditary blood by attainder, the land of all felons would immediately revert to the lord by escheat, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in case of treason, for ever; in case of other felony, only for the life of the felon, and a year and a day (or as it is often expressed, for *only a year and a day*); after which time, in the case of felony, it goes to the lord in a regular course of escheat, as it would have done to the heir of the felon in case the feudal tenures had never been introduced. (2 Bl. Com. 252 & seq.; 4 Bl. Com. 385.)

One singular instance must be mentioned, where, at common law, lands held in fee-simple are not liable to escheat, even when their owner is no more, and has left no heirs to inherit them. This is the case of a *corporation*; for if that comes by any means to be dissolved, whilst the personalty belonging to it devolves on the crown, the donor or his heirs shall, at common law, have the land again, by a sort of reversion, upon like principles, however, as in case of escheat: which is, perhaps, the only instance where a reversion can be expectant on a grant in fee-simple absolute. (2 Bl. Com. 256; 1 Th. Co. Lit. 195 '6; Ang. & A. Corp. § 195.)

The student must be warned, however, that of late a disposition has been manifested by the courts to *legislate away* this long-established principle of the common law, and to *enact* (as the proper law-making department in Virginia has long ago enacted, V. C. 1873, ch. 56, § 31; V. C. 1887, ch. 46, § 1103;) that, notwithstanding the dissolu-

tion of a corporation, in contemplation of law it still continues to exist, for the purpose of disposing of its property, real and personal, collecting and paying its debts and distributing the residue amongst the shareholders. (Broughton v. Pensacola, 3 Otto (93 U. S.) 268; Meriwether v. Garrett, 12 Otto (102 U. S.) 512; State v. Bank of Tennessee, 5 Baxt. (Tenn.) 101; O'Connor v. City of Memphis, Supreme Court of Tennessee, Am. Law Reg. Jan'y, 1882, p. 182.)

These, says Blackstone, are the several deficiencies of hereditary blood recognized by the law of England, which, so often as they happen, occasion lands to escheat to the *original proprietor or lord*. (2 Bl. Com. 258.)

2<sup>h</sup>. The Circumstance under which Escheat Occurs in Virginia.

We have seen (*Ante*, p. 549,) that with us escheat has nothing feudal in it, all feudal tenures having been abolished by the act of 1779 (10 Hen. Stats. 64-5); but that which is called by that name is merely an expedient of civil policy, to provide, in the person of the commonwealth, an owner for lands which turn out to have no other owner. It takes place, therefore, in Virginia, as at common law, whenever there is a complete failure of such persons as the law appoints to be heirs. The circumstances, however, under which such failure occurs here are not precisely the same as at common law, as will appear from the exposition following. (V. C. 1873, ch. 109, § 3; Id. ch. 78, § 66; V. C. 1887, ch. 105, § 2374; Id. ch. 66, § 1505; Va. Const. 1869, Art. VIII., § 7; 1 Lom. Dig. 777 & seq.)

W. C.

1<sup>i</sup>. Where Decedent Dies and Leaves Surviving Him in Being, or *En Ventre sa Mere*, and Born within Ten Months thereafter, No Person Connected with Him by Blood or Affinity Capable of being His Heir.

This depends on the provisions of the statute of descents, as already explained. (V. C. 1873, ch. 119, §§ 1, 8; Id. ch. 4, § 18; V. C. 1887, ch. 113, §§ 2548, 2555; Id. ch. 6, § 43; *Ante*, pp. 541, 1<sup>e</sup> & 2<sup>e</sup>.)

The second and third of the circumstances under which escheat takes place at common law, as already explained (*Ante*, p. 555, 2<sup>i</sup> & 3<sup>o</sup>), do not exist in Virginia, as appears from the consideration of our law of descents (*Ante*, p. 541, 546), which does away with the preference of the blood of the *first* or of the *last purchaser*, or of the person *last entitled*, or at least with the *exclusion* of any other relative; and also abolishes the exclusion of the half-blood.

2<sup>i</sup>. Where Decedent Dies with no Other Relation or Connection than a *Monster*.

- The doctrine is the same as at common law: that is, the production of such a being is physiologically impossible. (2 Bl. Com. 246, n. (g); *Ante*, p. 555, 4<sup>i</sup>.)
- 3<sup>i</sup>. Where Decedent Dies with no Other Relation or Connection than a *Bastard*.

The doctrine in Virginia touching bastards is considerably modified by statute, not only in respect to the *rights of bastards*, but in respect also to *who are bastards*.

W. C.

1<sup>k</sup>. Who are Bastards in Virginia.

Those are bastards in Virginia who are bastards at common law, except, 1st, That where the father afterwards intermarries with the mother, and recognizes the child before or after the marriage, and whether it be then living or dead, the child is deemed legitimate (V. C. 1873, ch. 119, § 6; V. C. 1887, ch. 113, § 2553; *Ash v. Way's Adm'r*, 2 Grat. 203); and 2ndly, That the issue of marriages deemed *null in law*, or dissolved by a court, is nevertheless legitimate. (V. C. 1873, ch. 119, § 7; V. C. 1887, ch. 113, § 2553; *Stones v. Keeling*, 5 Call, 143.) But this provision does not apply to and legitimate the offspring of a cohabitation in Virginia between a white person and a negro, when the parents have subsequently been married outside of Virginia, in a place where such a marriage is lawful. (*Greenhow v. James' Ex'or*, 80 Va. 636.) But see the dissenting opinions of J's Lewis and Richardson.

2<sup>k</sup>. The Rights of Bastards in Respect to the Inheritance.

When by the foregoing criterion one is ascertained to be a bastard, so far as relates to his *father*, or his relations *by the father's side*, his disability to inherit is the same as at common law. (*Ante*, p. 555, 5<sup>i</sup>.) But on the mother's side it is widely different, it being enacted that bastards shall be capable of inheriting, and transmitting inheritance *on the part of their mother*, as if lawfully begotten. (V. C. 1873, ch. 119, § 5; V. C. 1887, ch. 113, § 2552; *Garland v. Harrison*, 8 Leigh, 368 *Hepburn & als. v. Dundas & als.* 13 Grat. 219.)

4<sup>i</sup>. Where Decedent Dies with no Other Relation or Connection than an *Alien*.

If the sole relation or connection be an *alien enemy*, the doctrine is the same as at common law. (*Ante*, p. 556, 6<sup>i</sup>.) But if he be an *alien friend*, he may inherit or purchase, and may hold lands freely. "Any alien, *not an enemy*," says the statute, "may acquire by purchase or descent, and hold real estate;" "and the same may be transmitted in the same manner as real estate held by citizens." (V. C. 1873, ch. 4, § 18; V. C. 1887, ch. 6, § 43.) And another statute enacts that "in making title by descent it shall be no bar to a party that any



ancestor (whether living or dead), through whom he derives his descent from the intestate, is or hath been an alien." (V. C. 1887, ch. 113, § 2551; *Jackson v. Sanders*, 2 Leigh, 109.)

It is provided in Virginia by statute, that no suicide nor attainder of felony shall *work a corruption of blood*, or forfeiture of estate. (V. C. 1873, ch. 195, § 5; V. C. 1887, ch. 190, § 3883.) Hence, with us, a person attainted of felony (which includes treason) is in no wise incapacitated either to transmit an inheritance as ancestor, or to inherit as heir. (1 Lom. Dig. 815.)

## CHAPTER XVI.

### II. OF TITLE BY OCCUPANCY.

#### 2<sup>d</sup>. Title by Occupancy.

Title by occupancy arises from the actual taking of possession of property which before *belonged to nobody*, although capable of being appropriated. It may be expected that instances of such title will, in any well-ordered state, be very rare, for as it cannot but be unpropitious to the general tranquillity of society to have in its midst subjects of property liable to be seized by the first taker, pains will generally be used to appoint by law a definite owner for every such subject. Accordingly, the right of occupancy, so far as it concerns real property, is confined by the common law, within a very narrow compass, and by statutes, as well in Virginia as in England, has become well nigh, if not totally, extinct. (2 Bl. Com. 258.)

The common law extends the right by occupancy to *but a single instance*, namely, where a man is tenant *pur autre vie*, (by a grant to him for the *life of another*), and dies during the life of *cestui que vie*; that is, of him for whose life the land is holden; in this case he that can first enter into the land may, by *right of occupancy*, lawfully retain the possession, so long as *cestui que vie* lives. For it does not revert to the grantor, who cannot claim against his own deed; it does not escheat to the lord, for all escheats are of the entire fee-simple, and not of particular estates carved out of it; it does not belong to the grantee, because he is dead; nor does it descend to his heirs, because it is not an estate of inheritance; nor vest in his personal representatives, for personal representatives never succeed to a *freehold*. Belonging, therefore, to nobody, the common law leaves it open to be seized and appropriated by the first person that can enter upon it, during the life of *cestui que vie*, under the name of an *occupant*. (2 Bl. Com. 258-9; 1 Lom. Dig. 55.)

In further discussing the doctrine of occupancy, we may

advert to, (1), The doctrine applicable to estates *per auter vie*; (2), The doctrine applicable to sole corporations; and (3), The doctrine applicable in case of *alluvion* and of *islands* newly arising;

w. c.

1<sup>st</sup>. Doctrine Applicable to Estates *Pur Auter Vie*; w. c.

1<sup>a</sup>. Doctrine Applicable to Estates *Pur Auter Vie*, at Common Law.

1<sup>i</sup>. Doctrine of *Common or General* Occupancy at Common Law.

Where an estate *pur auter vie* is not limited to the grantee's heirs (e. g. grant to A, for life of Z), and the grantee dies, living the *cestui qui vie*, any person who can first get possession of the land, after the death of the tenant, is entitled to hold it during *cestui que vie*'s life, by *common or general occupancy*. (2 Bl. Com. 259; 1 Lom. Dig. 55.)

2<sup>i</sup>. Doctrine of *Special* Occupancy at Common Law.

Where an estate *pur auter vie* is limited to the grantee and his heirs (e. g. grant to A and his heirs, for life of Z), and the grantee dies, living Z, the heir of the tenant (in order to avoid the mischiefs incident to common occupancy) is allowed, at common law, to enter and hold possession, not, indeed, as *heir* (for the estate is not one of inheritance), but as *special occupant*. (2 Bl. Com. 259; 1 Lom. Dig. 55.)

2<sup>b</sup>. Doctrine in Virginia, Applicable to Estates *Pur Auter Vie* by Statute.

Our statute in Virginia pursues the general policy of the English statutes, 29 Car. II., c. 3, and 14 Geo. II., c. 20, but not without some simplification of their provisions, corresponding to 7 Wm. IV., and 1 Viet. c. 26, § 6. (2 Bl. Com. 254-'60, and n. (1); Wms. Real Prop. 30, 21.) Thus, it enacts that "any estate *for the life of another* shall go to the *personal representative* of the party entitled to the estate, and be assets in his hands, and be applied and distributed as the *personal estate of such party*." (V. C. 1873, ch. 126, § 18; V. C. 1887, ch. 119, § 2653; 1 Lom. Dig. 56 & seq.)

It is worthy of observation that at common law there can be no *common* occupancy of incorporeal hereditaments, such as rents, commons and the like, because such subjects admitted of no *actual entry* or corporal seisin. And therefore, where a rent was granted to A during the life of B, and A died, living B, the rent was held to be entirely determined. For the grant being made to A only, when he died no one could claim it as occupant, because there could be no entry upon it; nor could any claim it under the deed, because it was limited to the grantee only. And so as no one could take it under the grant, the rent ceased. (1 Lom.

Dig. 55: Bac. Abr. Est. for Life, (B.) 3; Bowles v. Poore, 3 Cro. (Jac.), 282; Hassell v. Gowthwaite, Willes' R. 505; Rawlinson v. Duchess of Montague; 3 P. Wms., 264, n. (D.); Bearpark v. Hutchinson, 7 Bingh. (20 E. C. L.) 178.)

But if the rent had been granted to A *and his heirs*, during the life of B, and A died, living B, his heirs would take as *special occupants*; for though in point of property the rent is not capable of occupation, yet since the heirs were expressly included in the grant, and they are capable of taking the freehold as representatives of the grantee, it is but reason that the rent should not determine while any person comprised in the grant is capable of taking. (1 Lom. Dig. 55; Bac. Abr. Est. for Life, (B.), 3; Bowles v. Poore 3 Cro. (Jac.), 282.)

The question now presents itself, whether in such a case as that last stated, namely, where a *rent* is granted to A *and his heirs* for the life of B, and A dies, living B, the heirs of A take as special occupants, according to the common law doctrine, or by the application of the statute, the rent belongs to A's personal representative. And it seems pretty well settled in favor of the application of the statute, and of the personal representative of the grantee for life, because it is within the terms of the statute, being in *common parlance* at least, a case of special occupancy, and such construction is moreover more consistent with the spirit and intention of the statute (1 Lom. Dig. 57; Bearpark v. Hutchinson, 7 Bingh. (20 E. C. L.) 178; Rawlinson v. Montague, 3 P. Wms. 265 n. (D.); Hassell v. Gowthwaite, Willes' R. 505.)

And a similar question arises in a case of special occupancy of *lands*, namely, when a grant of lands is made to A *and his heirs*, for the life of B, and A dies, living B. In this case also it is supposed that the spirit and intention of the statute must be invoked, and that the land would be vested in the personal representatives of A, and not in his heirs. (2 Bl. Com. 260; 1 Lom. Dig. 55, 57-8, and cases above cited.)

As already remarked, the title by *occupancy* is by the common law restricted to the single instance of a tenant *par auter vie*; but as several other cases present a state of things where the succession is not very apparent, either because the property is newly come into existence, as in the case of *alluvion*; or because there is a temporary suspension of the line of succession, as in the case of a *corporation sole*, it is proper to advert to those cases, although they are not cases of *occupancy*, but cases where the law, by very definite, although not very obvious rules, designates who the owner or successor shall be.

## 2<sup>d</sup>. Doctrine Applicable to *Sole Corporations*.

When, in case of a sole corporation, the incumbent (*e. g.* a parson) dies or resigns, though there is no *actual* owner of the *glebe-land* until a successor be appointed, yet there is a *legal potential* ownership subsisting in contemplation of law; and when a successor is named, the appointment has *relation back* to the commencement of the vacancy, so as to entitle him to all the profits from that time. And in all other instances, as we have seen, where the owner dies intestate and *without heirs*, the ownership vests by escheat, in England in the king or other lord of the fee by the common law, and in Virginia by statute (*Ante*, p. 559) in the commonwealth. (2 Bl. Com. 261.)

### 3<sup>d</sup>. Doctrine Applicable in Case of *Alluvion* and of Islands Newly Arising; w. c.

#### 1<sup>h</sup>. Doctrine in Case of *Alluvion*.

*Alluvion* is the gradual and imperceptible increase of land annexed to the shore of the sea or any other water, and the doctrine applicable thereto, as well as to the corresponding case of land left bare by the gradual and imperceptible receding or *dereliction* of the water, is that the soil belongs to the proprietor of the adjacent land which is thus extended. In order that this doctrine may prevail, the gain, whether by *alluvion* or by *dereliction*, must be by *little and little*, by small and imperceptible degrees; *i. e.*, by *a progress not perceptible*. For *de minimis lex non curat*, and besides these riparian owners being often losers by the breaking in or incursions of the water, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible loss or charge. But if the increment or dereliction be sudden and considerable, in this case it belongs, not to the owner of the adjacent shore, but to the *proprietor of the bed* where the new land is. In *public* (that is *navigable*) waters, including at common law the sea, and all waters in which the tide ebbs and flows, and in the United States all waters which are *actually navigable* for vessels employed in commerce, say those of *twenty tons* burden and upwards (1 Abb. U. S. Pract. 20, 291-'2, 352 to 353), the commonwealth, or in England the crown, is the proprietor of the bed, and therefore to the commonwealth (or in case of the *open sea*, in close proximity to the coast, perhaps to the *United States*), and in England to the crown, belong such sudden and considerable accessions. In *private* waters, on the other hand, the bed belongs to one or other, or to both, of the adjacent riparian proprietors, and such sudden and considerable accessions belong to him. (2 Bl. Com. 261 & seq., and n. (6); 1 Lom. Dig. 661-'63; Bac. Abr. Prerog. (B.), 3; 3 Kent's Com. 428; *Ante*, p. 20-'3; Hay v. Bowman, 1 Rand. 417; Meade v. Haynes, 3 Rand. 33; Hoome v. Richards, 4 Call, 441, Crenshaw v. Slate River



Co. 6 Rand. 245 ; The King v. Lord Yarborough, 3 B. & Cr. (10 E. C. L.), 91 ; Scratten v. Brown, 4 B. & Cr. (10 E. C. L.), 485 ; *In re Hull & Selby Railway*, 5 M. & W. 331 ; Abbot of Ramsay's case, 3 Dyer, 326 b ; The King v. Smith, 2 Dougl. 444.)

2<sup>d</sup>. Doctrine in Case of *Islands Newly Arising*.

Islands newly arising belong to the proprietor of the *bed of the water* out of which they arise. If it be a *public water*, the bed belongs to the public, and the new island follows the ownership of the bed. If the *water be private*, the bed is generally private, and belongs, for the most part, to the riparian owner or owners. (3 Kent's Com. 428 ; *Ante*, p. 21.)

## CHAPTER XVII.

### III. OF TITLE BY PRESCRIPTION.

#### 2<sup>d</sup>. Title by Prescription.

The doctrine touching title by prescription may be discussed with reference to, (1), The nature of title by prescription ; (2), The proper distinction between prescription and custom ; (3), The several species of things which may or may not be prescribed for ; (4), The rules applicable to title by prescription ; and (5), The doctrines prevailing in the application of the statute of limitations to claims for real property ; w. c.

#### 1<sup>st</sup>. Nature of Title by Prescription.

When a person, and those under whom he claims, have been used to enjoy certain property *immemorially*, that is, for a time such that the memory of man (whether by the proper knowledge of any man living, or by record or sufficient matter of writing), *runneth not to the contrary*, and his possession has been also *honest, uninterrupted and adverse*, he acquires thereby what is known as a *title by prescription* ; which is founded on the natural presumption that he who has a quiet and uninterrupted possession for a certain number of years, has a just right to the subject possessed, or else he would not have been suffered to continue in the enjoyment of it. Such protracted acquiescence on the part of other claimants, in an *adverse* possession, supposing it to be *honest* and unaccompanied by fraud, necessarily supposes some good reason, though perhaps unknown, for which the claim was forborne, and requires in sound policy, and with a view to the peace of society, that any opposing title should be regarded as abandoned. (3 Bl. Com. 262 ; 2 Th. Co. Lit. 198 ; 3 Lom. Dig. 783 & seq.)

#### 2<sup>d</sup>. The proper Distinction between Prescription and Custom.

Custom is properly a *local law*, owing its force and effect to immemorial continuance in a certain local district, and is

applicable, in general terms, to *all persons and affairs* in the district, which are within the purview or scope of the custom; *e. g.*, the custom of *gavel-kind*, of *borough-English*, etc. (1 Bl. Com. 74, &c.; 1 Min. Insts. 37, &c.) Prescription, on the other hand, is a *source of private title to property*; or, as it is expressed by Blackstone (2 Bl. Com. 263), merely a *personal usage*; as that J. S. and his ancestors, or those whose estates he hath, have used time out of mind, to have such an advantage or privilege. Thus, a usage in the parish of D, that *all the inhabitants* may dance on a certain close, at all times, for their recreation, is a *custom*; for it applies to the place in general, and not to any *particular persons*; but if the tenant in fee of the manor of A alleges that he and his ancestors, or he and all those whose estate he hath, in the said manor, have used time out of mind to have *common of pasture* in such a close, that is properly called a *prescription*; for this is a usage annexed to the *person* of the owner of the estate, and a source merely of private title.

There can be no *local custom* in Virginia, because when our ancestors came hither in 1607, they brought with them the *common law* of England, and the general statutes made in aid thereof, but not any *local customs*, none of which, therefore, in that year existed in the colony. If, then, any custom or local law be alleged now to exist, it is certain that it must have originated since that period, and so cannot be *immemorial*. (Harris v. Carson, 7 Leigh, 632; Mason v. Moyers, 2 Rob. 606; Gross v. Criss, 3 Grat. 262; Delaplane v. Crenshaw, 15 Grat. 457.)

It has been said by very high authority, that as no *custom* can be immemorial in Virginia, so neither can *prescription* be, and that the latter can no more exist than the former. (1 Tuck. Com. (B. II.), 211; 1 Lom. Dig. 786.) This position is predicated upon the assumption that *immemoriality* is properly referable to the first year of Richard I. (2 Bl. Com. 31; 1 Tuck. Com. (B. I.), 24), whence it is argued that the comparatively recent settlement of the American colonies excludes the idea of such immemorial use. The assumption, however, is mentioned by Littleton and Coke only to deny and refute it, both declaring that at common law time out of mind is limited to no certain period, but means only that the memory of man runneth not to the contrary of the matter; not merely the memory, or proper knowledge of any man living, but also the knowledge by proof, as by record, or sufficient matter of writing. (1 Th. Co. Lit. 36, 37.) But even though the assumption be admitted, it must be remembered that, as prescription relates to *title to property*, of the first origin of which in Virginia we have no certain account, it not depending upon, but being possibly antecedent to government, even to the first landing of Europeans on these

shores, so it is impossible to say that the enjoyment of certain rights *could not* have been immemorial. Accordingly, the authorities irresistibly show that there may be a title by prescription in Virginia, where the possession has been *honest, uninterrupted adverse and immemorial*; and they show, moreover, that a continued possession for more than twenty years, if the other circumstances exist, is *conclusive proof of immemorial* enjoyment, provided such immemorial enjoyment be, in the nature of things, *possible*. (3 Kent's Com. 441; 1 Lom. Dig. 786-'7; Coalter v. Hunter, 4 Rand. 64; Stokes, &c. v. Upper Appomattox Co. 3 Leigh, 318; 2 Bl. Com. 31 n. (14).)

3<sup>d</sup>. The Several Species of *Things which may or may not be Prescribed for*.

Nothing but *incorporeal things* can be claimed by prescription; such as a right of way, or of common, a franchise, fishery, right to the use of water, etc. But no prescription, properly so called, can give title to *lands*. There seems, indeed, no very sufficient reason for making such a distinction, the peace and general interests of society requiring that the long and quiet enjoyment of lands should confer a title, no less than the long and quiet enjoyment of incorporeal rights. And so Bracton seems to have laid down the law: *longa enim possessio (sicut jus), parit jus possidendi, et tollit actionem vero domino*. (1 Lom. Dig. 787.) But at a very early period the diversity was established, possibly in consequence of the enactment of a statute limiting actions for lands, and if not so established, it has at all events been fostered and rendered more prominent by the long succession of such statutes. Thus, Lord Coke says (3 Th. Co. Lit. 230): "In ancient time the limitation in a writ of right was from the time of Hen. I."\* . . . "After that by the statute of Merton (20 Hen. III., c. 8), the limitation was from the time of Hen. II., and by the statute of West. I. (3 Edw. I., c. 39), and West. II. (13 Edw. I., c. 46), the limitation was from the time of Rich. I.," . . . "since altered by a profitable and necessary statute, made anno 32 Henry VIII. (c. 2), and by that act the former limitation in time in a writ of right is changed and reduced to *three score years* next before the *teste* of writ; and so of other actions, as by the statute appeareth."

Whilst, therefore, *prescription* properly applies to give a title to *incorporeal things only*, yet long, uninterrupted, and adverse possession will, under the effect of the *statutes of limitation*, confer a title in respect to lands also, although it

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\* This would seem to have been by virtue of some statute or assize, which is not extant: the earliest statute whose complete text survives being *Magna Charta*, or 9 Hen. III. See Hale's Hist. Com. Law, 152, 156, 171-'2; 1 Reeve's Hist. Eng. Law, 264, 316; 2 Do. 124.

is held to do so rather by extinguishing the remedy of the adverse claimant, than by giving the land directly to him in possession. (*Davenport v. Tyrrel*, 1 Wm. Bl. 678.) The doctrines prevailing in the application of the statutes of limitation to claims for lands will be referred to under the appropriate heads below.

4<sup>th</sup>. The Doctrine, or Rules, Applicable to Title by Prescription;  
W. C.

1<sup>h</sup>. A Prescription Relating to an Incorporeal Right *Annexed to Land*, must always be Laid in Him that is *Tenant of the Fee*.

A tenant for life, for years, or at will, cannot prescribe, by reason of the imbecility of his estate. For as prescription is usage beyond legal memory, it is absurd that such a tenant should pretend to prescribe for anything, when his estate commenced within the memory of man. These particular tenants, therefore, must prescribe by virtue of the enjoyment of the subject, pleading that J. S. and his ancestors had immemorially used to have the right in question (*e. g.*, a right of common), as appurtenant to the land, and that J. S. had leased the land to the particular tenant for the term, etc. And, indeed, even a tenant in fee-simple, when he claims by prescription a right appurtenant to land, must allege his *seisin in fee*, and then aver that he *and all those whose estate he hath* in the land, from time whereof the memory of man is not to the contrary, had, and of right ought to have had, the privilege in question; which is termed from the phrase, "*those whose estate he hath*," prescribing in a *que estate*. (2 Bl. Com. 264-5; *Miller v. Spateman*, 1 Saund. 346.)

2<sup>h</sup>. A Prescription cannot be for a Thing which *cannot Arise from Grant*.

For the law allows prescription upon the supposition of a grant which by lapse of time is lost, and, therefore, if the right in question could not have arisen from a grant at all, the ground-work of the title fails. However, every prescriptive claim may be good, supposing it to be accompanied by honest, uninterrupted, adverse, and immemorial possession, wherever it might *by possibility* have had a lawful commencement. (2 Bl. Com. 265, & n. (4).)

3<sup>h</sup>. What is to Arise by *Matter of Record* cannot be Prescribed for.

This principle, or rule, is analogous to the one preceding. For if the right or interest claimed can arise by matter of record alone, then it *cannot arise by a mere grant*. Thus, in respect to the royal franchises of *deadlands*, *of felon's goods*, etc., as they are not forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself, or rather the right



to the forfeiture, cannot be claimed by an inferior title. On the other hand, the franchises of treasure-trove, waifs, estrays, etc., as they exist in England, may be claimed by prescription; for they arise from contingencies *in pais*, and not from any matter of record. (2 Bl. Com. 265; 2 Th. Co. Lit. 200.)

- 4<sup>h</sup>. Distinction in Claims by Prescription, whether one Prescribes *in a Que Estate*, or in *Himself and His Ancestors*.

When one prescribes in a *que estate* (that is, in himself, and those whose estate he has), nothing can be included in his claim but such things as are *appendant* or *appurtenant*, that is, incident to lands; for it would be absurd to claim anything as the consequence or appendix of an estate with which the thing claimed has no connection. But if he prescribe *in himself and his ancestors*, he may prescribe for anything whatsoever that lies in grant, not only things appurtenant to land, but also things *in gross*. Thus, he may prescribe in a *que estate*, for a right of common appurtenant to a certain tract of land, but for a common in gross he can prescribe only in himself and his ancestors. (2 Bl. Com. 266; Mellor v. Spotswood, 1 Saund, 346.)

- 5<sup>h</sup>. One Must not Prescribe for that which *is of Common Right*.

Thus, the right of fishing in the sea being a right common to all, a prescription for such a right as annexed to certain tenements, is bad. (Ward v. Cresswell, Willes, 268; Bac. Abr. Common, (A).)

- 6<sup>h</sup>. A Prescriptive Right is Liable to be Extinguished by *Unity of Seisin*.

This principle is most frequently illustrated in *rights of way*, arising by prescription. Thus, where the owner of closes (A) and (B) acquires by immemorial enjoyment by him and his predecessors, a right of way from one to the other across the intervening tract (Z), and then purchases (Z) in fee, the prescriptive right of way over (Z) is thereby *extinguished*, the lesser right, *that of way*, being *merged* in the *entire ownership* of the land; for it is absurd for him to whom the premises (Z) belong *for all purposes*, to claim a mere easement therein as a distinct right. (2 Bl. Com. 35, n. (28).)

- 5<sup>g</sup>. The Doctrine Prevailing in the Application of the Statute of Limitations to *Claims for Real Property*.

We have seen that, from a very early period of the law, that is, from the twelfth century, probably in consequence of some *non-ertant* statute or assize, (*Ante*, pp. 565-6), in *ancient time*, as Coke expresses it, there was a limitation imposed on real actions, even on that most favored one, the *writ of right*, namely, that it should not avail to recover real property where the right of the claimant accrued prior to the time of Henry I., that is, *the first year of his reign*, (A. D. 1100);

that afterwards, by 20 Henry III., c. 8, the limitation was reduced to the time of Henry II., (A. D. 1154); and later still, by 3 Edw. I., c. 39, and 13 Edw. I., c. 46, to 1 Richard I., (A. D. 1189); when after an interval so long as practically to interpose no limitation at all, by 32 Henry VIII., c. 2 (A. D. 1541), and 21 Jac. I., c. 16, (A. D. 1624), a *period of years* was fixed as a bar, not to writs of right only, but to most of the other remedies for things real; so that, by one constant law, certain limitations might serve with equal convenience, both for the time present, and for all times to come. (Bac. Abr. Limitation, (B).)

We will take notice of the doctrine touching the application to claims to real property of (1), The *English* statutes of limitation; and (2), The *Virginia* statutes;  
w. c.

1<sup>h</sup>. The Doctrine Touching the Application of the *English Statutes of Limitation* to claims for Real Property.

The English statutes of limitation to be noted are, (1), The statute of Merton, 20 Hen. III., c. 8; (2), Statutes of 3 Edw. I., c. 29, and 13 Edw. I., c. 46; (3), Statutes of 32 Hen. VIII., c. 2, and 21 Jac. I., c. 16; and (4), The more recent English statute of 3 & 4 Wm. IV., c. 27, &c.:

w. c.

1<sup>l</sup>. Statute of Merton, 20 Hen. III., c. 8.

This statute fixes the limitation on writs of right from the time of King Henry II., which is understood to be the *first year* of his reign, (A. D. 1154), and on other real actions from other dates. (Bac. Abr. Limit'n of Actions, (A.); 1 Lom. Dig. 787-8.)

2<sup>l</sup>. Statutes of 3 Edw. I., c. 29, and 13 Edw. I., c. 46.

These statutes date the limitation of writs of right from 1 Richard I. (A. D. 1189).

3<sup>l</sup>. Statutes of 32 Hen VIII., ch. 2, and 21 Jac. I., c. 16; (A. D. 1540 and 1624.)

These statutes prescribed limitations to real actions by *periods of time*, varying from twenty to sixty years, instead of reckoning from a fixed epoch, and made provision, the first named, that there should be allowed to *femes covert*, infants, persons in prison or out of the realm at the *time of the statute made* (A. D. 1540), six years after the removal of those several disabilities; and the second (applicable only to writs of *formedon* and entries on lands for which it prescribed a limitation of twenty years), that if, at the *time of the right accrued*, the party entitled be an infant, *feme covert*, *non compos mentis*, imprisoned or beyond seas, he or his heirs shall have ten years after the removal of his disabilities, *or his death*, to bring his action or to make his entry. (Bac. Abr. Lim'n, (B.); 1 Lom Dig. 803; 4 Eng. Stat. at Large, 752; 3 Do. 293).

w. c.

1<sup>k</sup>. Writs of Right.

Writs of right and prescriptions, founded on one's ancestor's or predecessor's seisin or possession, were, by statute 32 Hen. VIII., c. 2, limited to *sixty* years; and, when founded on one's own seisin or possession, to *thirty* years. (Bac. Abr. Limitation, &c. (B.); 1 Lom Dig. 788; 3 Eng. Stat. at Large, 292.)

In order to maintain a writ of right, it was always held in England (and this statute gave additional sanction to the doctrine), that the demandant must have been *actually seised*, and that as the best, and in general, the only proof of such actual seisin, he must have taken the *esplees* (expletia), or *profits* of the land. (1 Lom. Dig. 789-'90.)

2<sup>k</sup>. Possessory Actions.

Possessory actions (*e. g.*, writs of assize, of *mort d'ancestor*, *cosinage*, *ayel*, *entry sur disseisin*, &c., (3 Bl. Com. 183, &c.), founded upon one's ancestor's or predecessor's seisin or possession, were, by 32 Hen. VIII., c. 2 limited to *fifty* years (Bac. Abr. Limitation, &c. (B.); 1 Lom. Dig. 789); and when founded upon one's own seisin, limited to *thirty* years.

In this case *seisin in law* suffices to enable the demandant to recover. (1 Lom. Dig. 789.)

3<sup>k</sup>. Avowry or Cognizance for any Rent, Suit, or Service.

These are limited by the statute 32 Hen. VIII., c. 2, § 4, to *fifty* years, and *seisin in law* is sufficient. (Bac. Abr. Limitation, &c. (B.); 1 Lom. Dig. 790-'91; 3 Eng. Stat. at Large, 292.)

4<sup>k</sup>. Writs of *Formedon in Descender, Remainder and Reverter*.

These by statute 32 Hen. VIII., c. 2, § 5, are limited to *fifty* years after cause of action fallen; and by 21 Jac. I., c. 16, § 1, to *twenty* years. (Bac. Abr. Limitation, &c. (B.); 1 Lom. Dig. 792.)

The statute of 21 Jac. I., c. 16, extends only to writs of *formedon* and to *entries* on lands, allowing in case of the disabilities of infancy, coverture, insanity, imprisonment, and absence beyond seas, ten years after the removal of the disabilities, or death of the claimant. (Bac. Abr. Limitation, &c. (B.); 4 Eng. Stat. at Large, 751-'2.)

5<sup>k</sup>. Entry on Lands.

Entry on lands (and consequently the action of *ejectment*, which depends on the right of entry), is limited to *twenty* years, subject to the allowance for the same disabilities as in the writ of *formedon*. (21 Jac. I., c. 16, § 1; Bac. Abr. Limitations, (B.); 1 Lom. Dig. 792.)

4<sup>i</sup>. The More Recent English Statutes.

The statutes 3 and 4 Wm. IV., c. 27; 7 Wm. IV., and 1

Vict. c. 28, prescribe a limitation of twenty years from the time of the *right accrued* to all actions for lands, extending the time, in case of a *written acknowledgment of title*, to twenty years from such acknowledgment; and allowing in case of infancy, coverture, insanity, and absence beyond seas, *ten years* from the expiration of the disability, or from the death of the person entitled, but so as in no case to exceed *forty years*. (Wms. Real. Prop. 416-'17.)

2<sup>h</sup>. The Doctrine Touching the Application of the Virginia Statutes of Limitations to Claims for Real Property.

We are here to examine, (1), The statute contained in the Code of 1819, ch. 128, §§ 3, 90; (2), The statute of limitations in force 2nd July, 1850, when the Code of 1849 took effect; and (3), The statute *now* in force (1891), prescribing limitations to remedies for real property;

W. C.

1<sup>i</sup>. Statute in the Code of 1819, ch. 128, §§ 3, 90.

This statute provides that *actual possession* need not be proved to maintain a writ of right (1 R. C. 1819, c. 128, § 90); a doctrine which, independently of the statute, had been previously adopted by the courts, as a modification of the common law of England made necessary by the condition of the country amongst us, where so large a part of the real property consisted, and yet consists, of wild and uncultivated lands, remote from any settlement (Green v. Lister, 8 Cr. 229; Clay v. White, 1 Munf. 162; Watts v. Coles, 2 Leigh, 664; Taylor v. Burnside, 1 Grat. 189); and by an inadvertence in transcribing the statute, 32, Hen. VIII, c. 2, from which our legislation was derived, *possessory actions* have been confounded with *writs of right*, the limitation prescribed being applied to "*writs of right, and other possessory actions*," (1 R. C. 1819, c. 128, § 3); meaning, perhaps, *other droiturel actions* (3 Bl. Com. 191), or more probably "*any possessory action*." The mistake arose from attempting to blend section one of 32 Hen. VIII., which relates to writs of right alone, with section two, which relates to writs of assize of mort d'ancestor, cosinage, ayel, etc., "or any other action possessory."

The statute of 1819 contains no saving in favor of persons laboring under disabilities of infancy, etc., so far as relates to *writs of right, and actions possessory*, and to *forcible entry*, etc.; but there is such a saving (taken from 21 Jac. I, c. 16), applicable to writs of *formedon*, and *entries on lands*, in favor of the disabilities of infancy, coverture, insanity, imprisonment, and absence from the commonwealth; and ten years in addition are allowed next after the disabilities removed, or the death of the party claiming. (1 R. C. 1819, c. 128, §§ 2, 1; 1 Lom. Dig. 803.)

W. C.



1<sup>k</sup>. Writs of Right.

Writs of right upon the possession or seisin of one's ancestor or predecessor, are by this statute limited to *fifty years*; and upon one's own possession or seisin to *thirty years*. (1 R. C. 1819, c. 128, § 3.)

2<sup>k</sup>. Possessory Actions.

Possessory actions (3 Bl. Com. 180 & seq. 190), founded upon the possession or seisin of one's ancestor or predecessor, are limited to *forty years*; upon one's own seisin or possession, to *thirty years*. (1 R. C. 1819, c. 128, § 3.)

3<sup>k</sup>. Writs of Formedon.

Writs of *formedon* in descender, remainder, or reverter, are limited to *twenty years* next after the title accrued. (1 R. C. 1819, ch. 128, § 1.)

Writs of *formedon* are designed to recover lands by virtue of a conveyance in tail, *per formam doni*. If instituted by the *issue*, it is styled a *formedon* in the *descender*, if by the remainderman, a *formedon* in *remainder*, and if by the reversioner, a *formedon* in the *reverter*. Seeing that the action in all its branches ceased to be of any real application in practice after the abolition of estates-tail in Virginia (7th October, 1776), it is remarkable that a limitation to it should have been retained in our Code until the revisal of 1849 took effect, on the first day of July, 1850.

4<sup>k</sup>. Entry upon Lands.

Entry is limited to twenty years next after title accrued, and so the action of *ejectment* is in like manner limited. (1 R. C. 1819, ch. 128, § 1.)

5<sup>k</sup>. Forceful Entry, etc.

Proceedings for *forceful* entry (notwithstanding *peaceable* entry might have been lawful), for *unlawful* entry, or for unlawful *detainer*, are limited to *three years*. (1 R. C. 1819, c. 115, § 1 to 3 & seq.)

2<sup>i</sup>. Statute of Limitation in Force in Virginia, 2d July, 1850, when the Code of 1849 Took Effect.

In the interval between 1819 and 1850, several alterations were made in the law of limitations applicable to things real in respect to the periods prescribed. (Supplement, R. C. ch. 201, §§ 1, 2.)

A saving is provided in these statutes of the disabilities of infancy, coverture, insanity, and imprisonment, applicable to all the cases except the proceeding for *forceful entry*, etc., and five years after such disability removed is allowed. (Sup. R. C. ch. 201, §§ 1, 2);

W. C.

1<sup>k</sup>. Writs of Right, and *Other Actions Possessory*.

Writs of right, and *other actions possessory* (still employing the inaccurate phraseology of the act of 1819),

founded upon the possession or seisin of one's ancestor or predecessor, are limited to *twenty-five years*; upon one's own seisin or possession to *twenty years*. (Sup. R. C. ch. 201, § 2.)

2<sup>k</sup>. Writs of *Formedon*.

Writs of *formedon*, in descender, remainder, or reverter, are limited to *fifteen years*. (Sup. R. C. ch. 201, § 1.)

See *Ante*, p. 572.

3<sup>k</sup>. Entry on Lands.

Entry is limited to *fifteen years*. (Sup. R. C. ch. 201, § 1.)

4<sup>k</sup>. Forcible Entry, etc.

The limitation to the proceeding for forcible entry, unlawful entry, or unlawful detainer, is *three years* from the loss of possession—no change having been made in the limitation herein.

3<sup>l</sup>. Statutes in Force in 1887 (and in 1891 still in force) Prescribing Limitations to Remedies for Real Property.

Writs of right, of *formedon*, and of entry, are abolished in Virginia, since 1st July, 1850 (V. C. 1873, ch. 131, § 38; V. C. 1887, ch. 124, § 2759); and it is provided that the action of ejectment may be brought where, at common law it might be, and also in the same cases as a writ of right might have been before its abolition, by any person claiming real estate in fee, or for life or years, either as heir, devisee, or purchaser, or otherwise. (V. C. 1873, ch. 131, §§ 1, 2; V. C. 1887, ch. 124, §§ 2722, 2723.) Hence, whilst there are both *droiturel* and possessory actions for lands yet *theoretically* subsisting in Virginia, *practically* the remedies whereby to recover real estate are reduced to these three, namely, entry, writ of forcible entry, etc., and ejectment. The savings provided for are infancy, insanity, and coverture, which, however, are not applicable to forcible entry, etc. *Ten years* after removal of the disability, or the death of the claimant, whichever shall first happen, are allowed, so that in no case shall any remedy be had after the lapse of *twenty years* from the right accrued. (V. C. 1873, ch. 146, §§ 4, 5; V. C. 1887, ch. 139, §§ 2917, 2918.)

The exposition of the statute now in force, which prescribes a limitation to remedies for real property, will refer itself to the following heads, namely: (1), The periods of limitation prescribed; (2), Continual claim as prolonging the period; (3), Disabilities of plaintiff as prolonging the period; (4), The doctrine that descent tolls entry; (5), The effect of possession in barring the entry of the adverse claimant; (6), The effect of the acquisition of a *new right*; (7), The entry required in order to preserve a right of pos-

session; and (8), The application of the statutes to *suits in equity*.

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1<sup>k</sup>. The Periods of Limitation Prescribed in Virginia at Present, to the Several Remedies for Real Property;

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1<sup>l</sup>. Writ of Forcible Entry, etc.

The proceeding for forcible entry, unlawful entry, or unlawful detainer, is limited to *three years*, and no saving in consequence of any disability is allowed. (V. C. 1873, ch. 130, § 1; V. C. 1887, ch. 123, § 2716.)

2<sup>l</sup>. Entry on and Action for Real Property.

An entry on, or action (including *any action*, other than forcible entry, etc.), to recover any land, is limited to *fifteen years east*, and *ten years west*, of the Alleghany mountains: saving for the disabilities of infancy, insanity, and coverture, *ten years* next after the removal of the disability, or death of the claimant, which shall first happen; but the time in no case is to exceed *twenty years*. And this allowance of a prolonged time for action or entry is not to apply to a married woman having the right to make an entry on, or bring an action to recover land which is her *separate estate*. (V. C. 1873, ch. 146, §§ 1, 4, 5; V. C. 1887, ch. 139, §§ 2915, 2917, 2918; 1 Lom. Dig. 792.)

The plaintiff need not prove an actual entry on or possession of the premises demanded, or receipt of any profits thereof, nor any lease, entry, or ouster, except as otherwise provided herein. But it shall be sufficient for him to show a right to the possession of the premises at the time of the commencement of the suit. (V. C. 1873, ch. 131, § 14; V. C. 1887, ch. 124, § 2735.)

The statute of limitations is generally thought of as interposing a bar on the part of the *defendant*, to a recovery of property, real or personal, by a plaintiff; but it may also be a *source of title* to which the plaintiff may himself appeal, as indeed appears from the preceding paragraph. Thus, where one has been in honest, uninterrupted and adverse possession of the subject in question for the period prescribed by the statute as a bar, say of lands for fifteen years, and of chattels for five, and is then deprived of the possession, he may found his title upon his previous possession, and maintain an action for the subject accordingly. Lapse of time in such cases not only bars the remedy, but extinguishes the adversary's right. (Stocker v. Berney, 1 Ld. Raym. 741; Barwick v. Thompson, 7 T. R. 492; Newby v. Blakey, 3 H. & M. 37, 66; Brent v. Chapman, 5 Cr. 358, 361; Shelby v. Guy, 11 Wheat. 361; Turpin v.

Saunders, 32 Grat. 37; Denn v. Barnard, Cowp. 597; Taylor v. Horde, 1 Burr. 60, 119, 126; Leffingwell v. Warren, 2 Black, 605; Croxall v. Shererd, 5 Wal. 269, 289; Dickerson v. Colgrove, 100 U. S. 583; Bicknell v. Comstock, 113 U. S. 152; Campbell v. Holt, 115 U. S. 623.)

At common law no lapse of time barred the king's title, the maxim being *nullum tempus occurrit regi*. And so it is in respect to the commonwealth with us, except where it is otherwise provided by statute (Kemp v. Commonwealth, 1 H. & M. 85; Gore v. Lawson, 8 Leigh, 462; Nimmo's Ex'or v. Commonwealth, 4 H. & M. 57; Bac. Abr. Limitation); a principle which is further affirmed by express enactment, declaring (V. C. 1873, ch. 40, § 23; V. C. 1887, ch. 139, § 2937), that "no statute of limitation which shall not in express terms apply to the commonwealth shall be deemed a bar to any proceeding by or on behalf of the same." And the same proposition is true as to *any restriction* upon the rights of the commonwealth. In order to avail, such restriction must be clearly proved to have been designed by the statute. (Com'th v. Ford, 29 Grat. 687.) Several limitations, however, have been expressly imposed upon the commonwealth: as that no land shall be *liable to escheat* which for twenty years has been in the possession of the person claiming the same, or those under whom he holds, and upon which taxes *have been paid* within that time (V. C. 1873, ch. 109, § 3; V. C. 1887, ch. 105, § 2374, overruling the doctrine of French & al. v. Commonwealth, 5 Leigh, 516, 519); and also that no *location of a land office warrant* shall be made on any land which shall have been *continuously settled* for five years previously, upon which taxes have been paid at any time within that five years, by the person having settled the same, or any person claiming under him; and any title of the commonwealth to such lands is relinquished. (V. C. 1873, ch. 108, § 41; V. C. 1887, ch. 104, § 2339; Tichenel v. Roe, 2 Rob. 288.) It is held, indeed, that, independently of statute, as between a junior patentee and one in possession who traces back his title for upwards of seventy years, it is a *presumption of law* that a grant has issued for the land, and it is not, therefore, subject to entry and grant as waste and unappropriated. (Matthews v. Burton, 17 Grat. 317; Archer v. Saddler, 2 H. & M. 370; Bullard v. Barksdale, 11 Ired. Law (N. C.) 461.)

2<sup>k</sup>. Continual Claim as Prolonging the Period of Limitation.

We have seen elsewhere that if one is prevented by



threats or violence from entering on lands where he has a right of entry, and will make his claim as near the premises as may be, and will repeat it from year to year, he does, at common law, by such *continual claim*, as it is called, keep alive his right of entry and of action (2 Bl. Com. 316; 3 Id. 175; 1 Lom. Dig. 802.) But in Virginia it is declared by statute, that no continual or other claim upon or near any land shall preserve a right of entry or of action. (V. C. 1873, ch. 146, § 3; V. C. 1887, ch. 139, § 2916.)

### 3<sup>k</sup>. Disabilities of Plaintiff as Prolonging the Period of Limitation.

The disabilities which prolong the period of limitation, as we have seen, are infancy, coverture, (with considerable qualifications in case of the married woman's *separate property*, as to which the disability of coverture is not allowed); and insanity, which *existed at the time when the right of entry or of action first accrued*, and none others. (V. C. 1873, ch. 146, § 4; V. C. 1887, ch. 139, § 2917; *Parsons v. McCracken & ux.* 9 Leigh, 495.)

Hence, if a person labor under several disabilities when the cause of action accrued, he may avail himself of that which continues longest; but when the period of limitation prescribed by the statute once begins to run, it will continue to do so, notwithstanding any disability in the party himself or in another. Neither can a disability which arises *after the title accrued* be taken advantage of with us, though the latter one occurs before the first is at an end; or, as it is commonly expressed, one disability *cannot be tacked* to another. (1 Lom. Dig. 804, 805, 806; *Doe v. Barksdale*, 2 Brock. 436.)

In case of joint-tenants, and much more in case of coparceners and tenants in common, if there be an *ouster* of all, the disability of one does not preserve the title of another, but merely his own title. (1 Lom. Dig. 807; *Marsteller & als. v. McClean*, 7 Cr. 156; *Doe v. Barksdale*, 2 Brock. 444-5.)

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### 1<sup>l</sup>. The Extent to which the Period of Limitation is Prolonged.

The period of limitation, where a disability exists, is prolonged for *ten years* next after the time at which the person to whom the right has first accrued shall have ceased to be under such disability as *existed when the same so accrued*, or shall have *died*, whichever shall first have happened. (V. C. 1873, ch. 146, § 4; V. C. 1887, ch. 139 § 2917; 1 Lom. Dig. 807.)

### 2<sup>l</sup>. The *Maximum* Period to which the Limitation can be Prolonged.

The entry or the action must be within *twenty years*

next after the time at which the right shall have first accrued, although the person then under disability may have remained incapacitated during the whole twenty years, or although the term of *ten years* from the period when his disability ceased, or when he died, shall not have expired. (V. C. 1873, ch. 146, § 5; V. C. 1887, ch. 139, § 2918.)

- 3<sup>l</sup>. Effect on the Period of Limitation where the Claimant Dies still under Disability, and is Succeeded by Another also under Disability.

The time of bringing the suit or making the entry is not thereby prolonged. No time to make an entry or to bring an action beyond the fifteen years next after the right of such person shall have first accrued, or the ten years next after the period of his death, is allowed by reason of any disability of any other person. (V. C. 1873, ch. 146, § 5; V. C. 1887, ch. 139 § 2918; 1 Lom. Dig. 804 & seq.)

- 4<sup>k</sup>. Doctrine that *Descent Tolls Entry*.

The nature of this doctrine has been explained, (*Ante* pp. 518-'19; 2 Bl. Com. 196-'7.) It may suffice now to say that it is declared by statute, that the right of entry on, or action for land, shall *not be tolled* or defeated by descent cast. (V. C. 1873, ch. 129, § 4; V. C. 1887, ch. 122, § 2715.)

- 5<sup>k</sup>. Effect of Possession in Barring Entry, etc., of Adverse Claimant.

In order that possession may have the effect of barring the entry etc., of a claimant, it must be *long, uninterrupted, honest, and adverse*.  
w. c.

- 1<sup>l</sup>. Possession *Must be Long*.

The period of duration is prescribed by the statute, being, in order to repel the action of forcible entry, etc., *three years*, and in order to repel the entry of the claimant, or any other action by him than forcible entry, etc., *fifteen years* east, and *ten years* west of the Alleghany mountains. (V. C. 1873, ch. 130, § 1; Id. ch. 146, § 1; V. C. 1887, ch. 123, § 2716; Id. ch. 139, § 2915.)

- 2<sup>l</sup>. Possession *must be Uninterrupted*.

Uninterrupted, honest, and adverse possession for the period prescribed by the statute not only gives a right of possession which cannot be divested by entry, but also gives a right of entry and of action, if the party is plaintiff, which will enable him to recover, even against the strongest proof of a title which, independently of such continued adversary possession, would be a better title. (*Ante*, p. 574. 1 Lom. Dig. 794; Bac. Abr. Lim'n, (B.); Kinney v. Beverley, 2 H. & M. 341; Tay-

lor's Dev'ees v. Burnsidcs, 1 Grat. 189, 202; Moody v. McKim, 5 Munf. 374; Middleton v. Johns, 4 Grat. 129.)

3<sup>l</sup>. Possession *Must be Honest*.

A fraudulent possession can prove nothing as to the proper right of the party who insists on such possession, or as to any presumed relinquishment of the adverse claimant. It is an acknowledged principle, at least in courts of equity, that in cases of fraud the statute of limitations commences not to run, in general, until the fraud is discovered. (4 Min. Insts. (2d ed.) 556; Hunter's Ex'ors v. Spottswood, 1 Wash. 145; Kane v. Bloodgood, 7 Johns. C. R. 122; Kitty v. Fitzlugh, 4 Rand. 600; Evans & als. v. Spurgin & als. 11 Grat. 623; Rowe v. Bentley, 29. Grat. 760; Massie v. Heiskell, 80 Va. 804; 2 Stor. eq., §§ 1521, 1521 a; Badger v. Badger, 2 Wal. 92.)

4. Possession *Must be Adverse*.

As no one can be barred by the statute of limitations unless he is out of possession, and as the possession of one claiming *under* another is considered as in fact the possession of the latter, it follows that, in order to plead the statute of limitations successfully, the possession must be *adverse* to that of the opposing claimant. (1 Lon. Dig. 794; Williams v. Lewis, 5 Leigh, 691; Coalter v. Hunter, 5 Rand. 58.) Hence, in the case of a future contingent limitation, as the title of the party under it does not accrue until the happening of the contingency and the expiration of the preceding estate entitle him to the possession, the statute begins not to run against him until that time. (Clarkson & als. v. Booth, 17 Grat. 490, 498 & seq.; Layne v. Norris, 16 Grat. 236, 239 & seq.; Elys v. Wynne, 22 Grat. 229.)

It will be necessary to observe, (1), what constitutes an adverse possession; (2), The extent of adversary possession; and (3), The cases where an adversary possession is negatived.

1<sup>m</sup>. What Constitutes an *Adverse Possession*.

By an adverse possession is to be understood one dependent upon an *adverse and conflicting title*, grounded upon an *ouster* or dispossession of the rightful owner, which in case of a *freehold*, is known as a *disseisin*. Littleton defines a disseisin (3 Th. Co. Lit. 5), to be "where a man entereth into any lands or tenements, when his entry is not *congeable* (lawful), and *ousteth* him which hath the *freehold*." The mere entry, however wrongful, does not of itself amount to a disseisin; there must be an *intention* to oust the other, and to possess himself of the freehold. Hence, to constitute an adverse possession, there must be a possession *under claim of title*; or in reference to conflicting claims, and the statutory prescriptive

bar, it must consist of an actual, exclusive, continued, visible, notorious, and hostile possession, under a colorable claim of title. (3 Th. Co. Lit. 4; 1 Lom. Dig. 795; Dyche v. Goss, 3 Yerger, (Tenn.) 397; Love v. Shields, Id. 405; Moore v. Webb, 2 B. Monr. (Ky.) 282; Trotter v. Cassady, 3 A. K. Marsh. (Ky.) 365; S. C. 13 Am. Dec. 185, *note*; Dawson v. Watkins, 2 Rob. 269; Taylor's Dev'ees v. Burnside, 1 Grat. 186, 190; Thomas v. Jones, 28 Grat. 383, 387; Nowlin v. Reynolds, 25 Grat. 141; Bowie v. Poor. School Soc., 75 Va. 304-'5; Stonestreet v. Doyle, 75 Va. 370, 371; Creekmur v. Creekmur, 75 Va. 434, etc.; Hollingsworth v. Sherman, 81 Va. 673, etc.; Hodykin v. McVeigh, 86 Va. 751.)

Where the origin of the possession is not accounted for, and would be unlawful unless there had been a grant, length of possession is *prima facie* evidence, but only *prima facie*, from which a jury might or might not have presumed a conveyance. (Fenwick v. Reed, 5 B. & Ald. (7 E. C. L.) 232.) But no length of possession will warrant a presumption of title, when the origin of the possession is shown to be consistent with the title of the rightful owner. (Callender v. Sherman, 5 Fred. (N. C.) 74.) Nor does a possession beginning in privity with the opposing claimant become adverse, until the privity has been clearly disclaimed and determined, with the knowledge of the other party. And the burden of proof to establish such a change in the character of the possession is on the holder. (Zeller v. Echert, 4 How. 289, 295-296; Kane v. Bloodgood, 7 Johns. (Ch. (N. Y.) 121-'2, 123-'4; Hovenden v. Ld. Annesly, 2 Sch. & Lefr. 636-'7; Pellett v. Ferrers, 2 Bos. & P. 542.)

Possession may be sometimes *constructive* only. Thus, when the commonwealth grants lands to a first patentee, it puts him *constructively* into possession, notwithstanding at the time of the emanation of the patent there was an actual occupation of the premises by another person, for such person's possession (as the commonwealth is incapable of being disseised), *cannot be adversary*. And such elder patentee's seisin continues until some one actually enters by a *pedispositio* under an adverse claim of title, when the grantee being dispossessed, the statute of limitations begins to run against him, and in a competent time, if the actual adversary possession *continues*, will bar his claim; but a junior grant from the commonwealth does not of itself have the effect of determining the first patentee's constructive seisin. Hence, where a patentee of the commonwealth, having no *actual*, but only the *constructive* seisin arising from the commonwealth's grant, brings



an action against an occupant of the land who claims title by possession, it is competent to the defendant to prove a prior commonwealth's grant (although he has no privity with the grantee therein), because that defeats the plaintiff's *constructive* seisin, by an adverse constructive seisin in the first patentee, and so destroys all title to recover of the occupant, the plaintiff having neither actual nor constructive possession. (Dawson v. Watkins, 2 Rob. 259; Taylor's Devises v. Burnside's, 1 Grat. 201 & seq.; V. C. 1873, ch. 131, § 14; V. C. 1887, ch. 124, § 2735; Green v. Watkins, 7 Wheat. 27; Green v. Lister, 8 Cr. 229; Shanks and als. v. Lancaster, 5 Grat. 110; Koiner v. Rankin, 11 Grat. 420; Cline v. Catron, 22 Grat. 392; Carter v. Hayan, 75 Va. 557.)

As the possession, in order to avail against the constructive seisin of a prior patentee, must be continuous, exclusive and unambiguously under a claim of title, the mere entry upon the land by a junior patentee or his agent, for the purpose of surveying the same, or of cutting and sawing timber, the possession being transient, is not enough to operate a disseisin of the rightful owner; nor if it were, is it such continuous, exclusive, and notorious possession as can by itself support a claim of title in opposition to the superior constructive seisin of the prior patentee. (Dawson v. Watkins, 2 Rob. 269; Pasley v. English, 5 Grat. 141, 152, 157; Anderson v. Harvey, 10 Grat. 397.) It is not needful, indeed, that the land should be enclosed or built upon, or actually cultivated or cleared, but the entry must be made under the claim of title, with the *intention of taking possession*, and being accompanied with such visible acts of ownership as from their nature indicate a notorious claim of property in the land. (Ewing v. Burnett, 11 Pet. 53; Barclay & als. v. Howell's Lessee, 6 Pet. 513.) The character of the acts necessary to give to the party the seisin required, must, of course, vary with the situation of the land, and the condition of the country. In a settled and cultivated region, an actual occupation and permanency of the profits may be requisite; whilst in the wilderness, a possession less definite might suffice, if it appeared that the property was not susceptible of a stricter occupation; but it must always be an actual, visible, notorious and continued possession. And hence wild and uncultivated lands, remaining completely in a state of nature, cannot be the subject of adversary possession. If such notoriety, exclusiveness, and continuousness of seisin in the adverse claimant were not demanded, any proprietor of vacant lands might be disseised and deprived of his

lands without his knowledge, or the possibility of protecting himself. (Dawson v. Watkins, 2 Rob. 269-70; Overton's Heirs v. Davison, 1 Grat. 217, 225; Taylor v. Burnside, 1 Grat. 190, 198, 208, 210; Turpin v. Saunders, 32 Grat. 35-6.)

Such being the character of adversary possession, it has been made a question whether such possession can be had of lands *covered with water*. There is no doubt, however, that acts of ownership may be habitually and notoriously exercised in respect to lands so situated, as by staking them off, insisting upon the exclusive right to use and enjoy them, and in other like ways, and so an adversary possession may be established. (Power v. Tazewell, 25 Grat. 786; Norfolk City v. Cooke, 27 Grat. 436-7.)

From what has been said, it follows that the tenant cannot sustain his defence of *continued* adversary possession, if, within the period of limitation, the premises have been abandoned by him, or those under whom he claims; nor if the demandant, or those under whom he claims, did within that period enter upon the land, and take and hold actual and continuous possession thereof, by residence, improvement, cultivation, or other open, notorious, and habitual acts of ownership. But the entry and possession of the demandant, or of those under whom he claims, if confined to that part of his elder grant which is not within the limits of the latter one, do not oust the tenant, if at the time he had actual possession of the land embraced by his grant. (Taylor v. Burnside, 1 Grat. 208, 210.)

## 2<sup>m</sup>. The Extent of Adversary Possession.

The *extent* of the adversary possession is often a question of great interest. There are two cases to be distinguished:

1st, Where one enters *not under any deed or written title*, but merely assumes the possession, with a claim of right.

In this case his ouster of his predecessor, and his own subsequent possession, extends no farther than what he occupies, cultivates, encloses, or otherwise excludes the owner from;

2nd, Where one enters under color of title *by deed or other writing*.

In this case the law holds that he acquires an actual possession to the extent of the boundaries contained in the writing, and this though the title conveyed by the writing be worthless. (1 Lom. Dig. 797; Taylor v. Horde (1 Burr. 60), 2 Smith's L. C. 324, 396.)

In reference to cases of conflicting possession, it is

provided (V. C. 1873, ch. 131, § 19; V. C. 1887, ch. 124, § 2740), that "in a controversy affecting real estate, possession of part shall not be construed as possession of the whole where actual adverse possession can be proved."

In applying those principles to the case of conflicting grants from the commonwealth to different persons (and the same principles are applicable in the case of conflicting private grants), it is to be observed,

1st, That where the older patentee has had *no actual possession* of the land contained in his grant, and the later patentee enters upon the land, and takes and holds possession of any part thereof *claiming title to all within the bounds of his grant*, it is an adversary possession of the whole, to the extent of the limits of the later patent; and to that extent is an ouster of the seisin or possession of the older patentee as to those lands (Overton v. Davisson, 1 Grat. 223-24; Koimer v. Rankin's Heirs, 11 Grat. 427-28; Cline v. Catron, 22 Grat. 392);

2nd, That if the elder patentee is in the *actual possession* of any part of the *land in controversy*, at the time of the junior patentee's entry thereon, the latter by such entry gains no adversary possession beyond the limits of his mere enclosure, cultivation, or actual use, without an actual ouster of the older patentee from the whole of the disputed territory (Overton v. Davisson, 1 Grat. 224; Koimer v. Rankin's Heirs, 11 Grat. 420, 427-28; Cline v. Catron, 22 Id. 392; Turpin v. Saunders, 32 Grat. 37-39, 40);

3rd, That when the elder patentee is in *actual possession* of part of his own grant, but not of any part included in the junior patent, the entry and possession of the junior patentee upon a part of his grant which yet is not a part of the land in controversy, will be limited to his mere enclosure or actual use (Green v. Liter, 8 Cr. 229; Taylor v. Burnside's, 1 Grat. 196-97; Overton v. Davisson, 1 Grat. 224; Koimer v. Rankin, 11 Grat. 427-29; Cline v. Catron, 22 Id. 392; Turpin v. Saunders, 32 Grat. 37-40); and

4th, That where the senior patentee is in *actual possession* of the lands of his patent, lying without the bounds of the junior patentee, and the latter enters on and holds part of the lands *in controversy* which are embraced within his patent, it is an *ouster* of the senior patentee not only to the limits of the junior patentee's *actual close* or use, but to the limits of his *grant*. (Green v. Liter, 8 Cr. 229, 250.) See Overton's Heirs v. Davisson, 1 Grat. 224-225; Taylor v. Burnside's, 1 Grat. 196-97; Koimer v. Rankin, 11 Grat. 420,

427-'8; *Cline v. Catron*, 22 Id. 392; *Turpin v. Saunders*, 32 Grat. 37-40.)

3<sup>m</sup>. Cases where an Adversary Possession is Negatived.

An *adverse possession* is negatived in the following cases, namely: (1), Where the parties claim under the same title; (2), Where the possession of one party is consistent with the title of the other; (3), Where the party claiming title has never, in contemplation of law, been out of possession; and (4), Where the possessor has acknowledged a title in the claimant;

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1<sup>a</sup>. Where the Parties Claim under the Same Title.

The instances falling under this head are derived chiefly from England, our own cases affording few or none. Thus, if a father die seised in fee leaving two sons, and his younger son enters to the prejudice of the elder, and before him, although it amounts properly to an ouster of the elder by *abatement*, yet the statute does not operate against the elder son, because the law *intends* that the younger entered claiming the land as *heir to his father* in order to preserve the inheritance in the family, and not as designing a wrong to his brother, and so his possession is the possession of the elder, who claims by the same title. (3 Th. Co. Lit. 47-'8, and n. (Y.), 50 & seq.; 1 Lom. Dig. 709.) So, also, if a sister enters upon the land descended from her father, before her brother, the legal heir, can do so, and remain in possession more than the time prescribed by the statute of limitations, yet will it not avail her, for a like reason, because the law will intend that she entered as heir to the father, to preserve the inheritance, and not adversely to the brother, who, claiming by the same title, her possession enures as his. (1 Lom. Dig. 709.)

It must be observed that in both of these cases, if the lawful heir enters, and then is *ousted* by the younger brother or sister, it would be impossible to assign so charitable an interpretation to his act, and the possession of the wrongdoer is adverse. (3 Th. Co. Lit. 50.)

2<sup>a</sup>. Where the Possession of One Party is Consistent with the Title of the Other.

This is the case where the possession of one is the possession of the other, as in the instance of agent relatively to the principal, or of a tenant in respect to his landlord; or where the estate of the party in possession and that of the claimant form different parts of one and the same estate, as in the instance of a particular tenant and the remainderman; or where the re-



lation of trustee and *cestui que trust*, or of mortgagor and mortgagee subsists between the parties. (1 Lom. Dig. 799, 800; Pownal v. Taylor, 10 Leigh, 181 to 184; Rose's Adm'r v. Burgess, 10 Leigh, 196; Evans & ux. v. Spurgin, 6 Grat. 118; Creigh v. Henson, 10 Grat. 231; Clarke v. McClure, 10 Grat. 305; Nowlin v. Reynolds, 25 Grat. 141.)

3<sup>n</sup>. Where the Party Claiming Title has Never, in Contemplation of Law, been out of Possession.

Where the party claiming title has, in contemplation of law, never been out of possession, no possession of another *can be adverse to him*. Thus, where two parties are in joint occupancy, the law adjudges it to be the possession of him who has the right; and, therefore, where a devisee in fee and a stranger entered, and took the profits together for twenty years, the devisee was allowed to recover of the stranger, notwithstanding his twenty years' participation in the profits, because such participation was not adverse to the devisee's title; for a man cannot disseise another of an undivided moiety, as he might of a part of the land. (1 Lom. Dig. 800; Reading v. Rawsterne, 2 Lord Raymond, 830.)

So, as the possession of one joint-tenant, tenant in common, or parcener, is *prima facie* the possession of his fellow, it follows that the possession of one is never adverse to the title of the other, unless there be proved an *actual ouster*, or disseisin or, (as it is expressed in Virginia by statute,) unless the plaintiff "prove actual ouster, or some other act amounting to total denial of the plaintiff's right as co-tenant." (V. C. 1873, ch. 131, § 15; V. C. 1887, ch. 124, § 2736.) The exclusive enjoyment of the property, accompanied with a denial of all right on the part of those claiming as co-parceners, etc., is such an adverse possession as is protected by the statute. (1 Lom. Dig. 800, 801; Taylor & als. v. Hill, 10 Leigh, 457; Purcell & als. v. Wilson, 4 Grat. 16, 21; Caperton & als. v. Gregory & als. 11 Grat. 508.)

So the possession of a lessee is that of the lessor, as long as the lease subsists, and that although no rent be paid; but when the rent is not a merely nominal one, the omission to pay it, or to make any other acknowledgment of a tenancy for a great number of years, might be evidence of an adverse possession. (1 Lom. Dig. 801.) And even after the end of the term the lessee's possession is still not adverse, unless he does some act amounting to a disseisin, as by conveying to another. (Wiseley v. Findlay, 3 Rand. 367.)

4<sup>n</sup>. Where the Possessor has Acknowledged a Title in the Claimant.

Where the possessor has acknowledged a title in the claimant, the possession is not deemed adverse, the acknowledgment negating such an idea. (1 Lom. Dig. 801; *Roe v. Farrars*, 2 Bos. & P. 546; *Hatcher v. Fineaux*, 1 Lord Raym. 740; *Jackson v. Sears*, 10 Johns. (N. Y.) 435, 441; *Hunt v. Hunt*, 3 Mete. (Mass.) 175; *Burghardt v. Turner*, 12 Pick. (Mass.) 534; *Platt v. Vattier*, 9 Pet. 416.)

6<sup>k</sup>. Effect of the Acquisition of a New Right.

Where a claimant acquires a new right, he is allowed a new period to pursue his remedy, though he has neglected the first. Thus, a remainderman expectant on an estate for life or years, to whom a right to enter or bring an ejectment is given, by a forfeiture or an eviction incurred by the tenant for life or years, is not bound to do so; so that if he comes with his action within fifteen years after the remainder attached, it will be in time, although more than fifteen years have elapsed since his title by means of the forfeiture accrued. (1 Lom. Dig. 862; *Kemp v. Westbrook*, 1 Ves. Sr., 278-'9.) And so a reversioner may enter at any time within fifteen years after the termination of the particular estate, notwithstanding there may have been a disseisin of the particular tenant, and an adverse possession for more than fifteen years; for the proper title of the reversioner does not accrue until the particular estate is at an end. (1 Lom. Dig. 802.)

7<sup>k</sup>. The Entry which is Required in Order to Preserve a Right of Possession.

The entry must, of course, appear to have been upon the *land claimed*, and it must also appear that it was not a mere *casual entry*, but made *animo clamandi*, intending to assert his claim and was followed by a possession, continuous and actual, by means of residence, improvement, cultivation, or other open, notorious, and habitual acts of ownership. (1 Lom. Dig. 802; *Ewing v. Burnet*, 11 Pet. 53; *Barclay & als. v. Howell's Lessee*, 6 Pet. 513; *Dawson v. Watkins*, 2 Rob. 269-'70; *Overton's Heirs v. Davisson*, 1 Grat. 217, 225; *Taylor's Devisees v. Burnsides*, 1 Grat. 208, 210.)

It is admitted that an entry into one of several parcels of land in the same county may avail as an entry into all, provided the entry is made in the name of all, and the several parcels are, as to the freehold, in the hands of the same person. But if the freehold is in different parties, or if it be in different counties, or if the entry is not made in the name of all the parcels, it is good for no more than the parcel actually entered upon. Hence, if there be three several disseisors of different parcels, as each is a several tenant

of the freehold of his parcel, there must be a separate entry upon every one, and not upon one in the name of all. So, also, there must be a separate entry if a disseisor of an entire parcel let the land for life, say in three parcels, to three several tenants. But if, in the latter case, he should let it *for years* to three several tenants, an entry into any one of the parcels, in the name of all, will serve for the whole. (3 Th. Co. Lit. 15 to 17; Ang. Lim'n's, § 377.) And it should be observed that the entry of the *equitable owner* (e. g., the *cestui que trust*), is as effective to repel the bar of the statute of limitations as that of the possessor of the *legal title*. (1 Lom. Dig. 803; Gree v. Rolle, 1 Ld. Raym. 716.)

8<sup>k</sup>. Application of the Statute of Limitations to Suits in Equity.

The statute of limitations in Virginia interposes an *express* bar to *suits in equity* in only two classes of cases, namely: 1st, In case of gifts, conveyances, assignments, transfers or charges which are not on consideration deemed valuable in law, where the suit of any creditor to vacate them is limited to *five years* after the right to avoid such gifts has accrued; and 2ndly, In case of grants of land by the commonwealth, in order to repeal the same in whole or in part, in which case the suit must be brought within *ten years* next after date of the grant; reserving in both cases, to persons who at the time the right accrues, are under the disabilities of infancy, coverture or insanity, the same time after the removal of the disability as at first, but in no case to exceed twenty years from the right accrued. But this reservation is not to affect a married woman as to *her separate estate*. (V. C. 1873, ch. 146, §§ 16, 17; V. C. 1887, ch. 139, §§ 2929, 2930; Snoddy v. Haskins & als. 12 Grat. 368.) The limitations to suits prescribed in all other instances relate to actions or proceedings in the *courts of law*; and by the earlier statutes fixing the periods within which proceedings must be had, as well with us as in England, no cases at all in chancery are included. Limitations to suits, however, being recognized as a wholesome policy, and having, indeed, prevailed in the courts of chancery, although with no definite periods, from the origin of their extraordinary jurisdiction, in consequence of their reasonable wish to discountenance *laches* and neglect, when the legislature prescribed certain fixed periods within which actions at law must be set on foot, equity had no difficulty in adopting by analogy similar periods in corresponding cases, especially as to do so was in accord with one of its professedly favorite maxims that *equity follows the law*. Thus, in cases of *equitable titles* to lands, equity re-

quires relief to be sought within the same period in which an *ejectment* would lie at law; and in cases of equitable personal claims, it also requires relief to be sought within the period prescribed for legal demands of a like nature. (1 Lom. Dig. 809-'10; 1 Stor. Eq. § 55 a; Id. § 529; Ang. Limitations, §§ 25 & seq.) Indeed, when the demand is strictly of a legal nature, but it is more convenient for some particular reason, under the circumstances, to invoke the aid of chancery, the court of equity governs itself absolutely by the same limitations as are prescribed by the statute for such cases, not so much on the ground of *analogy*, as positively in obedience to the statute. (1 Stor. Eq. § 529; 2 Do. § 1520; Ang. Lim'ns, § 26; Hovenden v. Ld. Annesley, 2 Sch. & Lefr. 607, 629, 630.)

But there are some cases where equity, not being bound by the *terms* of the statute of limitations, has not deemed it politic and wise to be ruled by its provisions. The most noted instances of this are *cases of trust*, and *of fraud*;

W. C.

#### 1<sup>1</sup>. Cases of *Trust* not within the Statute of Limitations.

The proposition that a trust is not within the statute of limitations applies, of course, only as between *cestui que trust* and trustee, and not as between those parties on the one side and a stranger on the other. In this latter case the statute is as much applicable as if no trust were concerned. (1 Lom. Dig. 810; Harmood v. Oglander, 6 Ves. 415.) As between *cestui que trust* and trustee (if the trust be constituted by the act of the parties), the possession of the trustee *can never be adverse* to the *cestui que trust*, and therefore *no length of possession* can bar the latter's title. Where the trust is forced by the doctrines of equity upon the *conscience* of the trustee (that is, in case of *constructive* trusts), in consequence of his fraudulent conduct, etc., this proposition requires to be somewhat qualified. In that case, when the party beneficially concerned becomes cognizant of the fraud, &c., the possession of the *quasi* trustee is adverse from the time the fraud, etc., is discovered, and from that time the statute runs. (1 Lom. Dig. 810-'11; 2 Stor. Eq. § 1521; Ang. Limitations, §§ 30, 183, &c., 471; Beckford v. Wade, 17 Ves. 97; Kane v. Bloodgood, 7 Johns. C. R. 123; Sheppards v. Turpin, &c. 3 Grat. 395; Rowe v. Bentley, 29 Grat. 760 '61; Massie v. Heiskell, 80 Va. 804.)

As to legacies charged on lands, see 1 Lom. Dig. 813-814; Jones v. Turberville, 2 Ves. Jr. 11.

#### 2<sup>1</sup>. Cases of *Fraud* not within the Statute of Limitations.

When fraud is charged, the defendant cannot plead



the statute of limitations to the discovery of his title (at least he cannot do it except from the time that the claimant became cognizant of the fraud), but he must answer to the fraud. (1 Lom. Dig. 813; Ang. Limitations, §§ 30, 183, &c., *Cresap v. McLean*, 5 Leigh, 389.)

We have seen that the Virginia statute of limitations restricts the proceeding in equity or otherwise, to set aside a conveyance alleged to be fraudulent as to creditors, etc., because *not for valuable consideration*, to five years from the time the right to avoid the conveyance has accrued. (V. C. 1873, ch. 146, § 16; V. C. 1887, ch. 139, § 2929); but this provision does not apply where there is an *actual fraud*. Cases of actual fraud are governed by the principles applicable to *constructive* trusts, already stated, that is, the statute begins to run from the time the fraudulent intent came to the knowledge of the parties concerned, or from the time when the creditor's execution or judgment was delayed, hindered, or defrauded by the operation of the fraudulent conveyance. (*Snoddy v. Haskins*, 12 Grat. 363; *Wilson v. Buchanan*, 7 Grat. 334; *Rowe v. Bentley*, 29 Grat. 760-761; *Massie v. Heiskell*, 80 Va. 804; 2 Stor Eq. § 1521.)

But although this right may remain unasserted for a period long enough to raise a bar to its assertion, even in equity; yet the forbearance may be satisfactorily accounted for, not only by the savings in the statute, of infancy, insanity, and coverture, but sometimes by other circumstances also, as by the fact that the adverse claimant was amused and diverted from the purpose to sue, by proposals of compromise or adjustment, etc. (1 Lom. Dig. 814; *Eustace v. Gaskins*, 1 Wash. 185.)

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## CHAPTER XVIII.

### IV. OF TITLE BY FORFEITURE.

#### 4<sup>l</sup>. Title by Forfeiture.

Title by forfeiture arises in those cases where forfeiture of lands and tenements is annexed by law as a punishment to some illegal act or negligence in the owner of the property; whereby he loses all his interest therein, and the property goes either to the party injured, as a recompense for the wrong done him, or to the crown or commonwealth. The illegal acts or omissions which induce the forfeiture, for the most part relate to the lands and tenements which are forfeited; but at common law a very notable exception occurs in the case of certain *crimes*, which occasion the forfeiture of all the offender's lands and tenements, the same being upon his conviction vested in the crown. Although it will involve some repetition,

it will be best to state first, the causes of forfeiture in England, and secondly, the causes of forfeiture in Virginia. (2 Bl. Com. 267.)

W. C.

# 1<sup>a</sup>. The Causes of Forfeiture in England.

The causes of forfeiture of lands and tenements in England are these: (1), Crimes and misdemeanors; (2), Alienation of lands and tenements contrary to law, and other kindred wrongs; (3), Non-presentation to a *church-benefice*, when the forfeiture is denominated a *lapse*; (4), Simony; (5), Non-performance of conditions; (6), Waste; (7), Breach of copyhold customs; (8), Bankruptcy. (2 Bl. Com. 267; 1 Steph. Com. 421; Id. 277; 4 Do. 447.) Of these causes of forfeiture, only the 2nd and 5th at present exist in Virginia.

W. C.

# 1<sup>b</sup>. Forfeiture of Lands, etc., for Crimes and Misdemeanors.

In England lands and tenements are, at *common law*, forfeited to the crown for treason and for felony; the forfeiture taking effect upon conviction, but then having relation back to the commission of the act, so as to include whatever lands or tenements the party had then or at any time afterwards. For *treason*, the forfeiture is for ever; and for *felony* (at least for *murder*), during the felon's life, and a year and a day afterwards (4 Bl. Com. 381, 385); but for any other felony, for the felon's life-time only. (4 Steph. Com. 447, 450-51.) In other cases where forfeiture of land for offences is exacted, it is by various *statutes*, and for different terms, as in case of misprision of treason, (4 Steph. Com. 200); of *praemunire* (Id. 217); and of drawing a weapon on a judge or striking any one in the principal courts of justice. (Id. 251.)

In Virginia, it is enacted (V. C. 1873, ch. 195, § 5; V. C. 1887, ch. 190, § 3883), that no attainder of felony shall work any forfeiture of estate. And the Constitution of the United States (Art. III., § iii., 2) provides that no attainder of *treason* shall work a forfeiture except *during the life* of the person attainted. If, by this provision, it was intended to prevent party rage from imposing vindictive forfeitures in periods of political excitement, the clause seems to be very little adapted to accomplish the end designed, as the forfeiture may be annexed to some collateral act, or to some cognate offence, and the restriction thus may be readily evaded. Thus, we find it declared by act of Congress of 6th August, 1861, (12 U. S. Stats. 319; Rev. Stats. U. S. § 5308), an act that the United States Supreme Court has pronounced constitutional, that property of *any kind*, employed or acquired, or disposed of with intent to use or employ it, in aiding, abetting or promoting an *insurrection or resistance* to the laws of the United States, shall be sub-

ject to be confiscated. (See *Alexander's Cotton*, 2 Wal. 420, &c.; *Armstrong's Foundry*, 6 Wal. 766, 769; *Confiscation Cases*, 7 Wal. 454; *Morris & al. v. U. States*, 7 Wal. 578; *Morris's Cotton*, 8 Wal. 510 & seq.; *Miller v. U. States*, 11 Wal. 268; *McVeigh v. U. States*, 11 Wal. 259; *Tyler v. De-frees*, 11 Wal. 331.)

- 2<sup>h</sup>. Forfeiture of Lands, etc., for *Alienation Contrary to Law*, and other kindred Wrongs.

*Alienation contrary to law* is either (1), *Alienation in mortmain*; (2), *Alienation to an alien*, or (3), *Alienation by particular tenants*; and the *kindred wrongs* referred to, are (4), *Disclaiming* by a tenant in a court of record, to hold of the lord; and (5), *His claiming* (also in a court of record), to hold a *greater estate* than was granted him. (2 Bl. Com. 258, 275-6.)

W. C.

- 1<sup>i</sup>. *Alienation in Mortmain.*

*Alienation in mortmain (in mortua manu)*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been in early times made chiefly by *religious houses* (e. g. monasteries, &c.), in consequence whereof the lands became perpetually inherent in one *dead hand* (monks being esteemed *civilly dead*), this has occasioned the general appellation of *mortmain* to be applied to alienations to all corporations, and the religious houses themselves to be principally considered in forming the statutes of *mortmain*. And it will be curious, in deducing the history of these statutes, to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the pertinacity with which successive parliaments pursued them through all their artifices; how new remedies still begot new evasions, till the legislature at last, though not without repeated failures, obtained a decisive victory. (2 Bl. Com. 268.)

We are to observe, (1), The general doctrine at common law, as to alienation of lands, &c., to corporations; (2), The devices whereby the restrictions upon the alienation of lands, &c., to corporations were evaded, and the successive restrictions imposed by statute in England; (3), The prohibition of superstitious uses; (4), The restrictions upon charitable uses; and (5), The doctrine in Virginia as to conveyances to corporations;

W. C.

- 1<sup>k</sup>. *General Doctrine at Common Law, as to Alienation of Lands, &c., to Corporations.*

By the common law, after the feudal restraints upon alienation were worn away, any man might dispose of his lands to any other *private* person at his own discretion,

and a corporation is as capable of *purchasing* as an individual. (Case of Sutton's Hospital, 10 Co. 306; 1 Th. Co. Lit. 188 to 190.) But in consequence of feudal policy, in part, but also from high considerations of general expediency, it was always, and in England still is, necessary for *corporations* to have a license in *mortmain* from the crown, to enable them, not indeed to *purchase*, but to *hold* lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats, and other feudal profits by the vesting of lands in tenants that can never be attainted, or die. And indeed such licenses in *mortmain* seem to have been necessary before the Norman conquest. But besides this general license from the king, as lord paramount of the kingdom, it was also requisite, whenever there was an intermediate lord between the king and the alienor, to obtain his license also (upon the same feudal principles), for the alienation of the specific land. And if no such license was obtained, the king or other lord might respectively enter on the land so aliened in *mortmain* as a forfeiture. Yet such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) the most considerable dotations to religious houses happened within less than two centuries after the Conquest. (2 Bl. Com. 268-'9; 1 Steph. Com. 422.)

2<sup>k</sup>. The Devices Whereby the Restrictions upon Alienation of Lands, &c., to Corporations were evaded; w. c.

1<sup>l</sup>. The First Device to Evade Restrictions upon Alienation to Corporations, and the First Statute of *Mortmain*.

The *first device* in order to evade the necessity for a license seems to have been this: The tenant who meant to alienate first *conveyed* his lands to the religious house, and *instantly* took them back again to hold as *tenant to the monastery*; which kind of instantaneous seisin was probably held not to occasion any forfeiture; and then, by pretext of some other forfeiture, or escheat accruing in consequence of the feudal relation, the society entered into these lands in right of such their newly acquired seignior, as immediate lords of the fee. But when these dotations began to grow numerous, it was observed that the feudal services ordained for the defence of the kingdom were every day visibly withdrawn; that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs, etc.; and that the circulation of landed property from man to man (a vastly important element of prosperity in every state), began to stagnate; and, therefore, in order to arrest those mischiefs, it was ordered by the second of Henry III.'s great charters, and afterwards by that



printed in the statute-book (9 Hen. III., c. 36, A. D. 1225), which, by the way, is the earliest English statute now extant (2 Reeves' Hist. E. L. 84-5), that none should "give his lands to any *Religious House*" and that all such contrivances should be void, and the land be *forfeited to the lord of the fee*. (2 Bl. Com. 269-70; 1 Steph. Com. 422-3, and n. (g); 1 Stats. at Large, 9 Hen. III., c. 36.)

- 2<sup>d</sup>. The Second Device to Evade Restrictions upon Alienation to Corporations, and the Second Statute of *Mortmain*.

As the prohibition contained in *magna charta* extended only to religious *houses*, bishops, and other *sole corporations*, were not included therein; and the *aggregate* ecclesiastical bodies also found means to creep out of this statute, by buying in lands that were *bona fide* holden of themselves, as lords of the fee, and thereby evading the forfeiture; or by taking *long leases for years*. This was the *second device* adopted in order to evade the necessity for a license. It was speedily met by the statute *de religiosis* (7 Edw. I. St. 2, A. D. 1279); which provided that *no person*, religious or other whatsoever, should buy or sell, or receive under pretence of a gift or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself any lands or tenements *in mortmain*; upon pain that the immediate lord of the fee, or on his default for one year, the lords paramount, and in default of them, the king, might enter thereon as for a forfeiture. (2 Bl. Com. 270; 1 Steph. Com. 423; 2 Reeves' Hist. E. Law, 154.)

- 3<sup>d</sup>. The Third Device to Evade Restrictions upon Alienation to Corporations, and the Third Statute of *Mortmain*.

Notwithstanding the solicitude with which this statute seems to have been penned, a method of evasion (their *third device*) was soon discovered by the ecclesiastics. This was to recover lands by default, in a *collusive suit* brought by the religious house against the person who had in contemplation to bestow lands in mortmain; for although this proceeding, being by consent, was in fraud of the policy of the law, yet, as the statute 7 Edw. I., extended only to *gifts and conveyances* between the parties, the justices held that the religious and ecclesiastical persons did not appropriate such lands *per titulum doni vel alterius alienationis*, as it was expressed in the statute, and that they were not within the words *aut alio quovismodo arte vel ingenio*; because the recoveries being prosecuted in a course of law, they were presumed to be just and lawful, and therefore it was de-

terminated that they were not within the statute. And thus the ecclesiastics had the honor of inventing those fictitious adjudications of right, which constituted for several centuries the great assurance of the kingdom, under the name of *common recoveries*. But upon this, parliament intervened again, and by statute West. II., 13 Edw. I., c. 32 (A. D. 1285), enacted that in such cases a jury shall try the *true right* of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin, otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the default of the immediate or other lord; and when in the eighteenth year of the same sovereign, the statute *Quia Emptores* was passed, allowing all men to alienate their lands, a proviso was inserted that this should not extend to authorize any kind of alienation in *mortmain*. (2 Bl. Com. 271.)

- 4<sup>1</sup>. The Fourth Device to Evade Restrictions upon Alienations to Corporations, and the Fourth Statute of *Mortmain*.

The *fourth device* was more ingenious and more far-reaching in its consequences than any of the preceding. For almost a hundred years after 13 Edw. I., c. 32, (A. D. 1285,) the clergy were constrained to content themselves with such acquisitions of lands as they could obtain a license for from the crown. In the latter part of the reign of Edward III., however (say about A. D. 1370), they fell upon a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees (whom in modern times we should style *trustees*) to the use of the religious houses; thus distinguishing between the *possession* and the *use*, and themselves receiving the actual profits, while the *seisin* of the land remained in the nominal feoffee; who was held by the courts of equity, after some fluctuations, to be bound *in conscience* to account to his *cestui que use* (so the beneficiary was called), for the rents and profits of the estate. And it is to this invention, the idea of which was derived from the *fidei commissa* of the Roman law, that the Anglican world is indebted for the introduction of *uses* and *trusts*, the nature of which we have already seen (*Ante*, p. 204 & seq.), and which enter so largely into modern property arrangements. But unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device, for the statute 15 Rich. II., c. 5 (A. D. 1392,) enacts that the lands which had been so purchased to uses should be *annorised* (that is, conveyed in *mortmain*), by license

from the crown, or else be aliened to some other use; and that all future purchases in that way were to be considered as within the statutes of *mortmain*. And civil or lay, as well as ecclesiastical corporations, are also declared to be within the mischief, and of course within the remedy, provided by those laws. (2 Bl. Com. 271-'2; 1 Steph. Com. 425-'6; 3 Reeve's Hist. E. L. 178-'9; Bur-  
rill's Law Dict. *Amortise*.)

3<sup>k</sup>. The Prohibition of *Superstitious Uses*.

The clergy, finding that the legislature was as persistent in annulling and obviating their contrivances as they had been fruitful and ingenious in devising them, now gave up the contest, and no more attempted to thwart the settled policy of the realm. There was, however, another statute passed, 23 Hen. VIII., c. 10, (A. D. 1532), prohibiting the conveyance of lands in trust for parish-churches, or other institutions, "*erected and made for devotion*," at least for a longer term than twenty years; a provision which was held to extend only to what are denominated *superstitious uses*, and, therefore, not to include gifts of lands for the maintenance of a school, or the sustenance of the poor, or any other *charitable uses*. (2 Bl. Com. 272 to 274.)

In more recent times, the policy, so adverse to gifts in *mortmain*, and for *superstitious uses* (so called), has been considerably relaxed. Thus, by 29 Car. II., c. 8, extended by 1 and 2 Wm. IV., c. 45, and 1 and 2 Vict. c. 107, augmentations of poor church-livings are allowed to be made in a manner therein provided, free from the restrictions of the statutes of *mortmain*; and upon like principles, provisions have been made relaxing the laws of *mortmain* in favor of the governors of Queen Anne's bounty. (1 Steph. Com. 427-'8.)

The policy in Virginia is at present favorable to trusts for the use or benefit of *religious societies*, and with less distinctness, to benevolent and literary associations also. As to religious societies it is mapped out with considerable detail and clearness. Lands, it is enacted, may be *conveyed*, but *not devised*, "for the use or benefit of any religious congregation, as a place for public worship, or as a burial place, or a residence for a minister, or for the use or benefit of any church or religious society, as a residence for a bishop or other minister, or clergyman, who, though not in special charge of a congregation, is yet an officer of such church or religious society, and employed under its authority and about its business; and the land shall be held for such use or benefit, and for such purpose, and not otherwise." (V. C. 1873, ch. 76, § 8; V. C. 1887, ch. 64, §§ 1398 &c.)

But "such trustees shall not take or hold, at any one time, more than *two acres* of land in an incorporated town, nor more than seventy-five acres out of such town." (V. C. 1873, ch. 76, § 12; V. C. 1887, ch. 64, § 1403.)

And when "*books or furniture* shall be given or acquired for the benefit of such congregation, church, or religious society, to be used *on the said land*, in the ceremonies of public worship, or at the residence of the minister, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, and upon the same trusts." (V. C. 1873, ch. 76, § 10; V. C. 1887, ch. 64, § 1409.)

Provisions designed apparently to be somewhat similar, but more obscure in their application, are made in favor of *benevolent* and of *literary* associations. (V. C. 1873, ch. 76, §§ 13-16; V. C. 1887, ch. 64, §§ 1407 & seq.)

The appointment and control of the trustees for such *religious* and *benevolent* associations, are vested in the *circuit* or *corporation court* of the county or corporation where there may be any parcel of such land. (V. C. 1873, ch. 76, §§ 9, 11, 13; V. C. 1887, ch. 64, §§ 1399, 1402, 1404 & seq.)

See 1 Min. Insts. 540 & seq.; Bapt. Assoc. v. Hart, 4 Wheat. 1; Gallego v. Atto. Gen. 461-'2, 465-'6; Brooke v. Shacklett, 13 Grat. 309-'10, 301, 313-'14, 317-'18 & seq.; Hoskinson v. Pusey, 32 Grat. 428, 431-440; Allen v. Paul, 24 Grat. 541-'2; Wade v. Hancock, 76 Va. 620.

#### 4<sup>k</sup>. Restrictions upon Charitable Uses.

And on the other hand, experience having proved that the favor extended to *charitable uses* was liable to produce mischief by inviting persons on their *death-beds* to make "large and improvident" dispositions even for good purposes, "to the disherison of their lawful heirs," the statute 9 Geo. II., c. 36 (A. D. 1736), enacts that no gifts to *charitable uses* shall be valid, with some exceptions, unless by deed indented, executed in the presence of two witnesses *one year* before the donor's death, and enrolled in chancery within six months from its execution; and unless it take effect immediately, and be without power of revocation. The universities of Cambridge and Oxford, their colleges, and the scholars on the foundations of Eton, Winchester and Westminster, are entirely exempted from the operation of this act, and so also by 5 Geo. IV., ch. 39, is the British Museum. (1 Steph. Com. 428-'9.)

These precautions seem very worthy of imitation amongst us, but similar statutes have never been enacted in Virginia.

It may be proper to say in conclusion of the English doctrine of forfeiture for alienation in *mortmain*, that



whatever doubt might otherwise have existed in respect to the power of the crown to grant a license to a corporation to purchase lands, notwithstanding the peremptory provisions of the several statutes which have been cited, it has been effectually removed by 18 Edw. III., statute 3 chaps. 2. and 7 and 8 Wm. III., c. 37, which declare and confirm the prerogative to grant licenses to aliens and take in *mortmain* in all cases. (2 Bl. Com. 272-'3.)

5<sup>k</sup>. Doctrine in Virginia as to Conveyances to Corporations.

In Virginia corporations have power, where it is not otherwise provided, to purchase, hold and grant estates, real and personal; but they may not *hold* more real estate than is *proper for the purposes* for which they are incorporated (V. C. 1873, ch. 56, §§ 1, 2; V. C. 1887, ch. 46, §§ 1068, 1070.) These provisions are certainly to be liberally construed. Whether the lands purchased by a corporation be "proper for the purpose for which it was incorporated," does not, in its nature, admit of very accurate determination. Thus, where a bank having, by its charter, power to hold such lands only as "shall be requisite for its immediate accommodation," bought a lot of dimensions sufficient, not only for its banking house, but also for a fire-proof building on each side, for the greater security of the banking house, it was held that the charter was not thereby violated (*The Banks v. Poiteaux*, 3 Rand. 141 '2.) What shall be the consequence of a violation of the law in this particular by a corporation, is not prescribed. In the case just cited the charter was supposed, by an *obiter dictum*, to be merely *directory*, and to involve no forfeiture of the excess of lands, even although there had been a clear case of excess, and that opinion is adopted by Judge Lomax (1 Lom. Dig. 14). But such a conclusion, as a general one, seems hardly warranted by the analogies or policy of the law. The law clearly prohibits the corporation to *hold* more than the prescribed quantity of lands. The grantor cannot have the excess against his own deed, and there seems to be no provision made for the ownership thereof, unless it goes as other vacant property does (1 Lom. Dig. 777) to the commonwealth, either by escheat or forfeiture. It seems, indeed, and is by Judge Lomax stated to be a principle of universal law, that where, from any cause, there ceases to be an individual proprietor of land, it reverts back to the community. Our legislature seems to have contemplated that instances of such vacant proprietorship might occur in cases not especially provided for, having dedicated to the literary fund (V. C. 1873, ch. 78, § 66; V. C. 1887, ch. 66, § 1505), whatever shall accrue from escheats, forfeiture,

or fines, &c., "to which no person *is known to be entitled*" (V. C. 1873, ch. 109, § 3; V. C. 1887, ch. 105, § 2374.) It is, therefore, apprehended that if a corporation violates this enactment by acquiring more land than it is allowed to acquire, the commonwealth is entitled to subject the excess to escheat. (V. C. 1873, ch. 109, § 3; V. C. 1887, ch. 105, § 2374.) Whether before proceedings commenced for the purpose of enforcing the commonwealth's claim, the corporation may validly dispose of the excess, may admit of question. The judges in *Banks v. Poiteaux*, 3 Rand. 142, 146, seem to have thought that it might be done, but as an *alien*, independently of statute, cannot thus evade the consequence of a purchase (1 Bl. Com. 372; 2 Do. 274), it is not perceived on what principle a different result can occur in the case of a corporation.

## 2<sup>d</sup>. Alienation to an Alien.

Alienation to an alien is, at common law, a cause of forfeiture to the crown, of the land so aliened; not only on account of the alien's incapacity to *hold* it, which occasions him to be passed by in descents of land, but likewise on account of his presumption, in attempting by an act of his own to acquire any real property contrary to the policy of the law. (2 Bl. Com. 274; 1 Do. 372; 1 Min. Insts. 164 & seq.)

This instance of escheat, involving as it does a forfeiture by way of punishment, upon an alien illegally acquiring landed property, which the law forbids him to *hold*, must be distinguished from that previous instance of escheat, already treated of (*Ante*, pp. 555 & seq.; 2 Bl. Com. 244, &c.), which arises merely from the inability of an alien heir to *inherit*. This instance is closely assimilated to the case of a corporation illegally acquiring lands which it *may not hold*; and, as we have just seen, the same consequence in that case is supposed to follow, although not specifically provided for with us by statute.

In Virginia, as we have seen, (1 Min. Insts. 165-'6), the rigor of the common law, as to admitting aliens to hold lands in this commonwealth, has been gradually relaxed, as the importance of promoting immigration has been more appreciated, until at length, it is provided (V. C. 1873, ch. 4, § 18; V. C. 1887, ch. 6 § 43), that "any alien, *not an enemy*, may acquire by purchase or descent, and *may hold* real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens." And by Article IX. of the treaty of 1794, with Great Britain (known as *Jay's treaty*), it is stipulated that British subjects holding lands in the United States at the *date of the treaty*, and their heirs, so far as respects those lands, and the remedies incident thereto, shall not be *considered as aliens*, and

conversely as to American subjects in respect to lands in England. (Orr v. Hodgson, 4 Wheat. 453; Shanks v. Dupont, 3 Pet. 242; Stephen's Heirs v. Swann, 9 Leigh, 444; Fiott & als. v. Comm'r's, 12 Grat. 564; 1 Min. Insts. 166.)

### 31. Alienation by Particular Tenants.

Alienation by *particular tenants* of estates greater than they possess, when the alienation divests the remainder or reversion, and turns the remainderman or reversioner's *right of entry into a right of action*, is a cause of forfeiture of the *particular estate*, so that the remainderman or reversioner may enter immediately in pursuance of such forfeiture. In order that such an alienation by a particular tenant may be attended by a forfeiture of his estate, it must *divest* the remainder or reversion; an effect which takes place only when the alienation is made by *feoffment with livery*, or by *fine or recovery*. Those conveyances, from considerations of policy, are held to operate so strongly when made by one *in possession*, as to create *prima facie* the estate they purport to create, without reference to the real interest which the grantor may have in the subject; inasmuch that the grantee's estate thereby vested is not liable to be divested *by entry*, that is, at the termination of the particular estate, but exclusively by *an action* on the part of the adverse claimant. Such conveyances, therefore, by feoffment, etc., are styled *tortious conveyances*, because they are liable to work a *tort* or wrong to the reversioner or remainderman. Hence, if tenant for life or for years alienes *in fee*, by feoffment with livery, or by fine or recovery, a forfeiture of the particular estate results to him in remainder or reversion, for which forfeiture he may enter *immediately*. And so, if tenant for his own life alienes by feoffment with livery, or other tortious conveyances, for the *life of another*, as that may last longer than his own life, it is a greater interest than he has power to convey, and so operates a forfeiture of his estate. (2 Bl. Com. 274.)

For exacting this forfeiture there seems to be, at common law, two reasons: *First*, Because such alienation amounts to a renunciation of the feudal connection and dependence; it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one; and it tends in its consequence to *defeat and divest* the remainder or reversion expectant. As, therefore, that is put in jeopardy by such act of the particular tenant, it is but just that, upon discovery of the wrong, the particular estate should be forfeited and taken from him who has shown so manifest an inclination to make an improper use of it. The *Second* reason is, because the particular tenant, by granting a larger estate than his own,

has by his own act put an *entire end* to his own original interest; and on such determination the next taker may well be entitled to enter regularly, as in his remainder or reversion. (2 Bl. Com. 275.)

But in case of such forfeitures by particular tenants, all legal estates by them before created (as if tenant for twenty years makes an under-lease for fifteen), and all charges by him lawfully made on the lands shall be good and available at law. He cannot, by an act of his, defeat an interest which he himself has created. (2 Bl. Com. 275; *Ante*, pp. 56-7.)

It should be observed, that if the alienation is not by feoffment with livery, or by some other *tortious conveyance*, no forfeiture takes place, because nothing passes to the alienee beyond what the alienor has power to convey, and so no injury is done to the reversioner or the remainderman. Hence, no forfeiture results from a conveyance operating under the statute of uses, or of grants, nor from the grant at common law, of an incorporeal thing. (2 Th. Co. Lit. 207; Id. 581, n. (B.); Gilb. Uses, 102, 140; Seymour's Case, 10 Co. 96 a.)

In Virginia it is provided by statute (V. C. 1873, ch. 112, § 7; V. C. 1887, ch. 107, § 2419), that a writing which purports to pass or assure a greater right or interest in real estate than the person making it may lawfully pass or assure, shall operate as an alienation of such right or interest in the said real estate as such person might lawfully convey or assure. And thus, as no such conveyance can prejudice the reversioner or remainderman, it is believed that with us no forfeiture can in any case arise from a particular tenant undertaking to aliene a greater estate than he possesses. (1 Lom. Dig. 593-4, 821.)

4<sup>i</sup>. Disclaimer by Particular Tenant, in a *Court of Record*, to Hold of his Lord.

Where a tenant who holds of any lord, neglects to render him the due services or rent, and upon an action brought to recover them, disclaims to hold of his lord, such disclaimer of tenure, solemnly made in a court of record, is a high offence against feudal policy, and tends not a little to the injury of the reversioner, and therefore is visited with the penalty of forfeiture of the tenement in question. (2 Bl. Com. 275; 2 Th. Co. Lit. 208, and n. (D).)

Notwithstanding the feudal origin of this species of forfeiture, it is believed still to have an existence in Virginia, just as the doctrine of distress, and indeed many other doctrines of feudal origin, are still retained amongst us by the adoption of the common law. (1 Lom. Dig. 821.)

5<sup>i</sup>. The Claim in a *Court of Record* by a Particular Tenant of a Greater Estate than Rightfully Belongs to Him.



Such a claim, solemnly made in a court of record, amounts virtually to a *disclaimer of tenure*. Hence, if a particular tenant claims any greater estate than was granted him at the first infeodation, or takes upon himself those rights which belong only to a tenant of a superior class, if he affirms the reversion to be in a stranger, by attorning as his tenant, collusive pleading and the like ; such behavior, in consequence of the injury which it tends to inflict on the lord or reversioner, amounts at common law to a forfeiture of the particular estate. (2 Bl. Com. 276 ; 2 Th. Co. Lit. 209, and n. (E).)

Forfeiture is believed to result, in Virginia, from this act also, notwithstanding the feudal origin of the doctrine. (1 Lom. Dig. 821.)

3<sup>h</sup>. Forfeiture by Reason of Non-Presentation to a Benefice, or *Lapse*.

Where the patron to whom, in England, a church-living, belongs, upon the occurrence of a vacancy by the death of the parson, the incumbent for the time being, or otherwise, neglects for the space of six months to present a successor to the bishop of the diocese, it being for the interest of religion, and for the public good, that the church should be provided with an officiating minister, the right of presentation is for that time, but not for subsequent vacancies, forfeited, or *lapses* to the bishop, in order to quicken the patron's diligence in finding and nominating a suitable man. And if the bishop neglects in like manner to present, the right devolves *by lapse*, upon the metropolitan or archbishop, and in case of his default, upon the king. (2 Bl. Com. 276 ; Baskerville's Case, 7 Co. 28 a.)

It is hardly needful to say that as we have no established church, there can be no such forfeiture in Virginia as that *by lapse*.

4<sup>h</sup>. Forfeiture by Simony.

Simony is the corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward. It is so called from its supposed resemblance to the sin of Simon Magus (Acts viii. 18, &c.), and vests the right of presentation, *pro hac vice*, in the crown by forfeiture. But it is not simony to sell the right of presentation for money *before a vacancy occurs*. (2 Bl. Com. 278 & seq.)

This cause of forfeiture, of course, cannot exist in Virginia, as we have no established church.

5<sup>h</sup>. Forfeiture by Breach, or Non-Performance of Conditions.

We have seen that an estate is liable to be forfeited by the breach or non-performance of a condition annexed thereto, whether it be annexed expressly by deed, at the original creation of the estate, or impliedly by law, from a

principle of natural reason. (See 2 Bl. Com. 281, 151 & seq.; *Ante*, pp. 261 & seq.)

The same principle and doctrines touching conditions are applicable, in the main, in Virginia as in England, and have already been set forth at length. (See *Ante*, p. 261 & seq.; 1 Lom. Dig. 331 & seq. 821.)

#### 6<sup>h</sup>. Forfeiture by Waste.

The forfeiture of lands in consequence of the commission of waste therein, depends upon the general principle that no tenant of a particular estate is at liberty so to deal with it as to prejudice materially the interests of the reversioner or remainderman. The discussion of the subject will involve the consideration of, (1), The definition of waste; (2), The several kinds of waste; (3), What tenants are punishable for waste; (4), The punishment of waste; (5), What persons are entitled to claim compensation for waste; and (6), The remedies for waste;

W. C.

#### 1<sup>l</sup>. Definition of Waste.

Waste (*vastum*) is a spoil or destruction, not arising from an act of God, or of a public enemy, in houses, gardens, trees, lands, or other *corporeal* hereditaments, to the disherison of him who has the *immediate remainder* or reversion *in fee-simple*, or in England *in fee-tail*. The three general heads of waste, therefore, are in *houses*, in *timber*, and in *land*; although, whatever else tends to the destruction or to the depreciation of the value of the *inheritance*, is likewise waste. (2 Bl. Com. 281-2; 3 Th. Co. Lit. 233 & seq.)

#### 2<sup>l</sup>. The Several Kinds of Waste.

Waste is either *voluntary*, which is an act of *commission*, as by pulling down a house or cutting down timber; or it is *permissive*, being such spoil or destruction as arises from *omission or neglect only*, as by suffering a house to fall for want of necessary reparations, or, as is believed, from the *act or neglect of strangers*; or finally, it is *equitable*, being such as the common law takes no notice of, but is cognizable only in the courts of equity.

But it should be observed, that destruction occasioned without default of the tenant, *directly* by the act of God, or of a public enemy, as by tempest, lightning, and the like, is not waste; although, if *farther damage* ensues from the failure promptly to repair such injury, as to replace a roof taken off by tempest, that is waste. There is no obligation upon the tenant to restore the premises (independently of contract), to the substantial condition in which they were when they received the injury. They must simply be put as promptly as possible into such a plight as to receive no additional damage from the weather, etc.

(2 Bl. Com. 281 ; 3 Th. Co. Lit. 235, 236, n. (E.) ; Bac. Abr. Waste (C.) & (E.).)

And it must be farther noted that, in order that the destruction shall not be waste, it must not only be occasioned *directly* by act of God or of a public enemy, but it must be *without any default* on the tenant's part. Hence, if he suffer the premises to continue long unrepaired, so that at length the house is cast down by tempest, that is waste. So if the sea-walls, which are constructed to keep out the sea, or the banks or *levees*, which confine rivers, are destroyed by a sudden and overwhelming flood, it is not waste, unless the destruction was occasioned by the tenant's neglect to repair or duly to secure them. (3 Th. Co. Lit. 236, and n. (F.) ; Bac. Abr. Waste (E.).)

There are some acts and omissions really very damaging to property, of which yet the common law, originating amongst an uncultured and unrefined people, takes no notice ; *e. g.*, the destruction of *ornamental, shelter and shade trees, &c.* In the progressive refinement of society this was felt to be an increasing grievance, and at length the court of chancery, with very doubtful propriety (the proper recourse being to the legislature to change the law), undertook in such cases to afford relief, thus giving rise to one instance of what has come to be known as *equitable waste*, being cognizable nowhere else but in equity. (2 Stor. Eq. § 915 ; Bac. Abr. Waste, (N.) ; 1 Fonbl. Eq. B. I., c. i., § 5, p. 52 ; Downshire v. Sandys, 6 Ves. 107 ; Burgess v. Lamb, 16 Ves. 185 ; Kane v. Vanderburgh, 1 Johns. Ch. R. (N. Y.) 12 ; Harris v. Thomas, 1 H. & M. 18.)

Other instances of *equitable waste* will be mentioned afterwards, in connection specifically with that subject. (*Post*, pp. 616, &c. ; 2 Stor. Eq. §§ 915 & seq. ; Ad. Eq. 402 & seq.) ;

w. c.

#### 1<sup>k</sup>. Voluntary Waste.

The character in detail, of voluntary waste, will be understood practically by surveying the various instances of it by classes, namely, (1), Pulling down houses ; (2), Altering houses ; (3), Cutting timber ; (4), Changing the course of husbandry ; (5), Opening mines ; and (6), Removing illegally things fixed to the freehold ;

w. c.

#### 1<sup>l</sup>. Pulling Down Houses.

To pull down a house, and rebuild it *less than before*, is certainly waste ; but it seems it is also waste to rebuild it *greater than before*, because it is said, that is to the prejudice of the owner of the inheritance, for it is *more charge to repair*. And Lord Coke holds it to be waste even to build a *new house*, where there was none before.

Burning a house, whether by negligence or mischance, is also waste, at common law; and although by Stat. 6 Anne, c. 31, no action is in England to be prosecuted against any person in whose house or chamber any fire *accidentally begins*; yet no such statute exists in Virginia, so that the rigor of the common law remains with us unmitigated, even in respect of *accidental burning*. (2 Bl. Com. 281; 3 Th. Co. Lit. 233, and n. (A.); Id. 235, and n. (C.); Bac. Abr. Waste, (C.) 5.)

## 2<sup>d</sup>. Altering Houses.

Any *alteration* in a house is waste, and it seems whether it be for the better or the worse. Thus, it is waste to fling down a wall between a parlor and a chamber, or between one chamber and another; or to convert a hall or a parlor into a stable, or to pull down a garret overhead; or to remove a door or window. And so it is waste to convert a house of one description into another, although it be of more value, because the alteration in the nature of the thing may make it less fit for the owner's purpose, and at all events, may impair the evidence as to the identity of the property. (3 Th. Co. Lit. 235, n. (C.); Bac. Abr. Waste, (C.) 5, 6; Cole v. Green, 1 Lev. 309.)

## 3<sup>d</sup>. Cutting Timber.

Timber trees are parcel of the inheritance. The particular tenant has only the *mast* or fruit of them, and the benefit of the shade for his cattle, but the general ownership remains in the proprietor of the inheritance. Hence, if they are severed by the tenant, or any other person, or by tempest or otherwise, they belong to the owner of the inheritance. This proposition, however, must be taken in subordination to several principles: as,

1, To the great principle that in those regions of country where forests are extensive, and where to clear land is worth more than the timber and wood upon it, so that cutting timber, instead of being an injury to the inheritance, enhances its value.—such cutting is no waste;

2, To the doctrine, (*Ante*, p. 101; 2 Bl. Com. 122, 144,) that a tenant for life or years is entitled of common right to take sufficient *estovers* (or supplies of wood) for *house-bote*, *cart-bote*, and *hedge-bote*, unless restrained (which, however, it is usual to do) by particular covenants, or exceptions in the lease: but not to sell the timber, although the proceeds be applied to repairs. (3 Th. Co. Lit. 239; Lee v. Alston, 1 Ves. Jr. 78; Gower v. Eyre, Coop. 160;)

3, To the right which the tenant has, at any reasonable time that he pleases, to cut down *underwood*, so



that he does not destroy the young timber and subsequent growth; and

4, To the tenant's right, acquired *by contract*, express or implied, to take and use wood or timber freely, as in case of land leased along with a furnace for smelting ore, or for making salt from salt wells.

See 2 Bl. Com. 281-'2; 3 Th. Co. Lit. 238; Bac. Abr. Waste, (C.) 2; Findlay v. Smith & ux. 6 Munf. 134; 4 Kent's Com. 76; Macaulay's Ex'ors v. Dismal Swamp Ld. Co. 2 Rob. 507; Jackson v. Brownson. 7 Johns 227.

#### 4<sup>l</sup>. Changing the Course of Husbandry.

To convert land from one species to another, as arable into meadow, or meadow into pasture, or either into wood, or *e converso*, etc., these are all acts of waste; not only because it changes the course of husbandry contrary, perhaps, to the designs and plans of the owner of the inheritance, but because also it affects the evidence as touching the identity of the estate, although this latter reason would be generally of little weight in Virginia, where lands are commonly described by metes and bounds, and seldom by the character which they happen to have at the time, as arable, pasture, etc. But if lands be sometimes meadow, and then pasture, and then arable, the conversion of it from one to another is admitted not to be waste in England; and hence it may be concluded, that it is never waste thus to change the character of the land, according to the *course of approved husbandry*. (2 Bl. Com. 282; Bac. Abr. Waste, (C.) 1.)

To this head more properly than to any other may be referred an injury which resembles waste, and by Blackstone is classed as such, although it does not appear to be with strict propriety so designated. It is the injury done to one who has a *right of common* in land, by destroying or impairing the right. Thus, if one have a *common of estovers* in a tract of land, that is, a right in common with the owner to cut and carry away wood for *house-bote*, *plough-bote*, etc., and the owner of the land cuts down the *whole wood*, and thereby destroys all possibility of taking *estovers*, this is an injury to the commoner, amounting to no less than a *disseisin of the common*, if he chooses so to regard it, for which he has remedy to recover possession and damages, by *writ of assize*, if he is entitled to a *freehold estate* in the common; but if he has only a *chattel interest*, or term for years therein, he can only recover *damages* by an action *on the case*. (3 Bl. Com. 224; Fitz. Nat. Br. 59; Ro. Mary's Case, 9 Co. 112 b & seq., and n's (C.) and (D).)

In this connection it may also be stated, that *manure* made on a farm occupied by a tenant at will, or for years, in the ordinary course of husbandry, the manure consisting of collections from the stable or barn-yard, or of composts formed by an admixture of these with other substances, is by usage, at least in some of these States, so attached to and connected with the realty that, in the absence of any stipulation on the subject, an out-going tenant has no right to remove the manure thus collected, or to sell it to be removed, and for so doing an action lies for the landlord, whilst no property vests by the sale in the vendee; a doctrine which, it will be observed, applies only to agricultural tenants, and, therefore, not to manure made *in a livery stable*. (2 Rob. Pr. (2d ed.) 633; Daniels v. Pond, 21 Pick. 371.)

#### 5<sup>l</sup>. Opening Mines.

To open the land, and take away its mineral contents, such as metal, coal, marble or other rock, or only the ordinary clay, gravel or other substance of the land, is waste; for it is a detriment to the inheritance; but if the mines, pits, or quarries were open before, it is not waste for the tenant to continue the working of them for his own benefit. And it is considered the *same mine* where it consists of the same *stratum* or vein of mineral deposit or a vein or *stratum* underneath the same, and capable of being reached by sinking the original shaft to a greater depth. But if the vein is the same, the tenant is not obliged to confine himself to the original shaft; he may sink new ones at pleasure, within the limits of the land, but so only as to reach the *same mine*, not a new one. (3 Th. Co. Lit. 237, and n. (H.); 1 Do. 581, n. (L.) Bac. Abr. Waste, (C.), 8; Whitfield v. Bewit, 2 P. Wms. 242; Clavering v. Clavering, Id. 388; Slaughter v. Leigh, 1 Taunt. 402; Crouch v. Puryear, 1 Rand. 258; Macaulay v. Dismal Swamp, Ld. Co. 2 Rob. 507; *Ante*, 149-50)

It is worth while to observe, that when one makes a lease for life or years, of land containing minerals, *without mention of mines* in the lease, the lessee may dig and take the profits of such mines only as were open at the time of the making of the lease. And if the owner lease the lands, "*together with the mines therein*," and there are on the land some mines then open, this shall extend to the *open mines alone*, and not to any as yet unwrought. But if at the making of the lease there be no open mines on the land, and the lease is made of the lands, "*together with all mines therein*," the lessee may *open new mines*, for otherwise the mention of the mines would be of *no effect*. (3 Th. Co. Lit. 237; Bac. Abr. Waste, (C.), 3; Jac.

Law. Dict. Mines; Saunder's Case, 5 Co. 12; Astry v. Ballard, 2 Lev. 185; Ld. Darcy v. Askwith, Hob. 234; Whitfield v. Bewit, 2 P. Wms. 242; Ld. Ross v. Whitman, 14 M. & W. 870.)

And it is to be observed, that the tenant may always take from the land, unless restrained by special covenants to the contrary, such of the minerals found therein, (*e. g.*, iron, coal, stone, &c.,) as he may have occasion himself to use, without selling. Thus, he is not guilty of waste, if he digs for and takes gravel, stone or clay for the reparation of the house, or coal or turf for his own fuel, &c. (Bac. Abr. Waste, (C.), 3.)

6<sup>l</sup>. Removing Illegally Things Fixed to the Freehold.

The general principle is, that whatever is once fixed or annexed to the freehold, for any purpose connected therewith, becomes *part of the freehold*, and cannot be removed without doing waste. This rule, in later times, upon motives of public policy, and for the promotion of trade and industry, has been relaxed considerably as between two classes of persons, namely, between landlord and tenant, and between tenant for life, or his personal representative, and the reversioner or remainderman. As between *heir* and *executor* or *administrator* the rule of immovability seems to hold with much less modification; but as between them no question of *waste* can in general arise. (2 Bl. Com. 281 and n. (20); Bac. Abr. Waste, (C.) 6.)

When a thing, as between landlord and tenant, or between life-tenant or his personal representative, and the reversioner or remainderman, is capable of being removed at the tenant's pleasure before his estate expires, without the imputation of committing waste, it is known by the name of *fixture*. And the different degrees of indulgence in this particular, extended respectively, as between landlord and tenant, and tenant for life or his representative, and the reversioner or remainderman, depend upon very plausible considerations of good sense. Between heir and executor, &c., there is no reason why the one should be more favored than the other, or if there were any leaning, the courts would rather be disposed to assist the heir, and to prevent the inheritance from being disfigured, or dismembered. Hence, as we have seen, there is as between these but little relaxation of the ancient law; but whatever is once annexed to the freehold, for purposes connected with its enjoyment, is forever a part of the inheritance, unless disannexed by the owner thereof. If the inheritance cannot be fully enjoyed without the thing in question, the owner could hardly have intended that it should be severed from the

land, to go to the executor or administrator, who could derive from it, in general, comparatively little advantage. Thus, in the case of *salt-pans* fixed with mortar to a brick floor, whilst without them the salt-works would produce no profit, yet if removed they are of little or no value to the personal representative. But the courts are more favorable to a life-tenant, or his executor, against a person in remainder or reversion, because they represent diverse interests, and the interests of trade are, to a large extent, concerned in the removability of the things. The executor of a tenant for life, therefore, may be allowed to remove a steam-engine erected by his decedent at a leased colliery, because the colliery might be worked without it, although not so profitably, and if such things might not be removed by tenants and their personal representatives, they would not be provided ; and thus the productive industry of the country would be seriously cramped and impaired. And with regard to tenant for years, it is fully established that, in view of the opposition of interest between himself and the lessor, which is greater even than in the last case named, and also to encourage the making of whatever constructions tend to facilitate trade, very many erections are removable as fixtures which, in the other two cases are taken to be permanent parts of the freehold and inheritance. (2 Bl. Com. 281, n. (20) ; Bac. Abr. Waste, (C.) 6 ; Van Ness v. Pacard, 2 Pet. 142, 146.)

In discussing more in detail the general doctrine as to fixtures, we shall advert to (1), The general nature of fixtures ; (2), Their characteristic attributes ; and (3), The parties as between whom questions touching them are likely to arise ;

W. C.

### 1<sup>m</sup>. The General Nature of Fixtures.

Fixtures are things which, being originally, in their nature, chattels personal, are annexed in such a manner as to be easily detached, without tearing the freehold, and which are not necessary to the enjoyment or completeness thereof. (Bouv. Law Dict. Fixtures ; Burrill's Do. Fixtures ; 1 Chit. Gen. Pr. 161, 94.)

The term "fixtures" must be admitted to have been unhappily chosen, tending, as it does, to convey an idea directly the reverse of the fact ; and, indeed, by both text-writers and judges it is not seldom used in the opposite sense of something *permanently* made a part of the freehold, passing with it, and not removable save by consent of the owner of the inheritance. The student, therefore, must take care to observe, in reading cases and expositions upon the subject, what precise



meaning is attached by him who makes the exposition, to the word fixtures ; and thus, for the most part, any confusion of *thought* will be avoided, despite the conflict of phraseology. See *Colegrave v. Dios Santos*, 2 B. & Cr. (9 E. C. L.) 76 ; *Hallen v. Runder*, 1 Cr. Mees. & Rose, 276 ; *Sheen v. Rickie*, 5 M. & W. 181 ; *Green v. Phillips*, 26 Grat. 759.

## 2<sup>m</sup>. The Characteristics of Fixtures.

The characteristics of fixtures, derived from the foregoing explanation of their nature, may be stated thus : (1). They are, in their *original nature*, chattels movable ; (2). They are fixed or annexed to the freehold ; (3). They are so fixed or annexed to the freehold that they can be detached without injuring or tearing the same ; and (4). They are not necessary to the completeness and enjoyment of the freehold ;

W. C.

## 1<sup>n</sup>. Fixtures are, in their *Original Nature*, Chattels Movable.

To this class, therefore, belong such things as chimney-pieces of marble or other stone, brewing vessels, coppers, cider-mills, etc.

## 2<sup>n</sup>. Fixtures are *Fixed or Annexed* to the Freehold.

Hence, no matter how bulky a structure may be (*e. g.*, a barn), if not *fixed* to the freehold, but resting merely by its own weight on the ground, or on blocks, etc., it is a mere chattel, and no question as to its removability can arise, any more than in respect to a wheel-barrow, or a cart. (1 Chit. Cont. (11th Am. ed.) 489 & seq. ; 2 Smith's L. C. 204, 203 ; *Elwes v. Mawe*, 3 East. 38 ; *Davis & al. v. Jones & al.* 2 B. & Ald. (4 E. C. L.) 167-'8 ; *Anthony v. Haney*, 8 Bingh. (21 E. C. L.) 186 ; *Naylor & al. v. Collinge*, 1 Taunt. 21.)

## 3<sup>n</sup>. Fixtures are so *Fixed or Annexed* to the Freehold that they *can be Detached* without Tearing or Disturbing the Same.

If a chattel is so fixed by means of screws or pins, that it may be taken away, and no injury would result from the mere act of removal, this requisite is fulfilled, whilst otherwise, the thing having become permanently part of the freehold, it is waste to disannex it. Hence, mirrors, wardrobes, and similar articles of furniture, and sometimes marble mantles, and even wainscotting, fixed by screws, etc., are removable *during the tenant's possession*, without the imputation of waste. (1 Chit. Cont. (11th Am. ed.) 490, 495.)

And yet it must be confessed that in many cases, for the *benefit of trade*, and in order, as it is said, to

promote manufacturing industry and the arts of production, things have been considered as movable by a tenant, without the guilt of waste, where they were so attached to the soil as to be incapable of removal without deranging and tearing it up. *Elwes v. Mawe*, 3 East. 38, was a case of that character. The buildings removed were of brick and mortar, and covered with tiles, and their foundation was about *a foot and a half deep* in the ground, and yet Lord Ellenborough seems to have considered that if they had been *trade*, instead of *agricultural* erections, they would have been removable. In *Penton v. Robart*, 2 East. 88, the building removed consisted of a brick foundation, *let into the ground*, with a chimney belonging to it, and upon this foundation a superstructure of wood, brought by the tenant from another place, and used by him for the purposes of *his trade*, had been erected. It would seem that the tenant took away, not only the wooden superstructure, but the brick foundation and chimney; but that the report of the case leaves in doubt. But Lord Kenyon held that the tenant had done no more than he had a right to do, the erection being *for trade purposes*, and no reference is made to the question whether it was the whole of the building or the superstructure alone that was removed. And in *Van Ness v. Pacard* (2 Pet. 142, 146), buildings were held to be removable when erected by a tenant for years for *purposes of trade*, of which one was two stories high, with a cellar walled with stone or brick, and a brick chimney, and the other was constructed of plank and timber fixed upon posts fastened into the ground. And in this case, Mr. J. Story, delivering the opinion of the court, treats those circumstances as of no importance. "The sole question," says he "is whether it (the erection) is designed *for purposes of trade or not*. A tenant may erect a large as well as a small messuage, or a soap-boilery of one or two stories, and on whatever foundation he may choose." It is in accordance with this idea of having a principal regard to the *promotion of trade and the productive arts*, in determining the removability of appendages to leased premises, that in *Buckland v. Butterfield*, 2 Bro. & B. (6 E. C. L.) 54, a distinction was made in respect to *ornamental* erections, such as a conservatory, which were held to be removable only when so annexed to the freehold as that their detachment therefrom would not injure it; whilst it was implied that erections for *trade purposes* were subject to less rigorous requirements.

In the English cases a very observable diversity is insisted on between annexations to the freehold for the purposes of *trade or manufacture*, and even for *ornament*, on the one side, and those made for the purposes of *agriculture* on the other ; the right of the tenant to remove being strong in the first named, and not in the last. The progress of opinion is interesting. In the Year Book, 42 E. 3, 6, the tenant's right to remove a furnace erected by him is doubted and adjourned. In the Year Book, 20 H. 7, 13 a & b, it is laid down that "if a lessee for years make a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them ; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor. And so of a baker. And it is not waste to remove such things within the term by some ; and this shall be against the opinions aforesaid." But the rule in this extent in favor of tenants is doubted afterwards in 21 H. 7, 27, and narrowed there by allowing that the lessee for years could only remove, within the term, things fixed to the ground, and not to the walls of the principal building. However, in process of time, the rule in favor of the right in the tenant to remove utensils set up in relation to trade became fully established ; and accordingly we find Lord Holt, in Pool's Case, 1 Salk. 368, laying down (in the instance of a soap-boiler tenant) that during the term the soap-boiler might well remove the vats he set up in relation to trade ; and that not by any special custom, but by the common law, in favor of trade and to encourage industry ; but that after the term they became a gift in law to him in reversion, and were not removable. The indulgence in favor of the tenant for years during the term has been since carried still further, and he has been allowed to carry away matters of ornament, such as ornamental marble chimney pieces, pier-glasses, wainscot fixed only by screws, and the like. (Beck v. Rebow, 1 P. Wms. 94 ; *Ex Parte* Quincey, 1 Atk. 477 ; Lawton v. Lawton, 3 Atk. 13, 16, and n. (1) ; Elwes v. Mawe, 3 East. 38.)

But whilst Lord Ellenborough, in his judgment in Elwes v. Mawe, seems to approve of the utmost indulgence being extended to tenants in respect to trade fixtures, he draws the line sharply as to fixtures erected for the purposes of agriculture. Admitting Lord Kenyon's decision in Penton v. Robart, 2 East. 88, to have been a just statement of the law in respect to the direct question involved, because the fixtures

were there for the advancement *of a trade*, he wholly disallows that judge's *dictum* in favor of green-houses and hot-houses for nurserymen, and indeed by implication as to structures by all other tenants of land, insisting that there was no decided case, and, as he believed, no recognized opinion or practice on either side of Westminster Hall, to warrant such an extension. "Lord Kenyon," says he, "seems certainly to have thought buildings erected by tenants for the purposes of farming were, or rather *ought to be*, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always *put and recognized as a known, allowed exception* from the general rule, which obtains as to other buildings." In pursuance of such reasoning, Lord Ellenborough, in that case, held that the tenant, who was the lessee of a *farm*, had no right to remove, during his term, a *beast-house*, carpenter's shop, fuel-house, cart-house, pump-house, &c., of brick and mortar, and let into the ground, which he had himself erected, although he thereby left the premises as he found them. (*Elwes v. Mawe*, 3 East. 38.)

In the United States the tendency is to regard erections by tenants for *agricultural purposes* as entitled to no less favor than those constructed for purposes of trade, manufactures, domestic convenience or ornament. There is with us, considering the unpeopled condition of a vast proportion of our territory, a manifest policy to promote the cultivation and improvement of the country. The owner of the soil, as well as the public (as Mr. J. Story observes, in *Van Ness v. Pacard*, 2 Pet. 145), has every motive to encourage the tenant to devote himself to agriculture, and to favor any erection which shall aid this result; yet in the comparative poverty of the country, what tenant could afford to erect structures of much expense or value if he was to lose his whole interest therein by the very act of erection? Lord Kenyon's pregnant question of like tenor, in the much questioned case of *Penton v. Robart*, 2 East. 88, has received much more respectful treatment on this side of the Atlantic than in England. "What tenant," says he, "will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it? Shall it be said that the great gardeners and nurserymen in the neighborhood of London, who expend thousands of pounds in the erection of green-houses and hot-houses, &c., are obliged to leave all



these things upon the premises, when it is notorious that they are even permitted to *remove trees*, or such as are likely to become such, by the thousand, in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated. This is a description of property divided from the realty."

In Massachusetts a tenant (it seems *any tenant*), has the privilege of removing all improvements from the freehold which he has placed there, when the removal will not injure the premises, or render them in *worse plight than when he entered*. So shrubs and trees on land *leased for a nursery* are personal chattels as between landlord and tenant, and may be removed by the latter. (*Whiting v. Brastow*, 4 Pick. (Mass.) 310; *Miller v. Baker*, 1 Metc. (Mass.) 27.) And in New York a tenant was allowed, upon like liberal principles, to remove a cider-mill and press, erected for his own use, on the premises. (*Holmes v. Tremper*, 20 Johns. (N. Y.) 29.)

- 4<sup>n</sup>. Fixtures, to be properly so called, must not be *necessary to the Completeness and Enjoyment of the Freehold*.

Hence, doors, window-shutters, window-sash, mill-stones, and the like, although capable of being detached without breaking or tearing the house,—nay, although at the time actually detached for a *temporary* purpose,—are yet *not fixtures*, but permanent parts of the freehold, which it is waste to take away, even though the tenant himself caused them to be annexed to the premises. (1 Chit. Cont. (11th Am. ed.) 489; *Winslow v. Merch'ts Insur. Co.* 4 Metc. (Mass.) 314; *Poole's Case*, 1 Salk. 368; *Herlakenden's Case*, 4 Co. 64 a.)

- 3<sup>m</sup>. The Parties as between whom the Question may arise whether Things Annexed to the Freehold *are Fixtures or not*.

As between *heir and executor*, such a question as touching the present subject of *waste* is not likely to occur. It will be remembered, however, that as between them, and also as between vendor and vendee, mortgagor and mortgagee, and debtor and execution-creditor, the original doctrine is adhered to, with little variation, that whatever is once annexed to the freehold for purposes connected with its use and enjoyment, *becomes part of the freehold*, and passes with the inheritance, unless expressly excepted. (*Herlakenden's Case*, 4 Co. 63 b, 64 a; *Elwes v. Mawe*, 3 East. 38; 1 Chit. Cont. (11th Am. ed.) 491; 3 Th. Co. Lit. 234; Bac. Abr.

Waste, (C.) 6; 2 Smith's L. C. 211-'12; Green v. Phillips, 26 Grat. 759; Shelton v. Ficklin, 32 Grat. 727, 735, 741.)

The parties to whom the present inquiry relates are *landlord and tenant*, and *tenant for life*, or his personal representatives, and *remainderman*, or *reversioner*.

W. C.

1<sup>n</sup>. Doctrine as to Fixtures, as between *Landlord and Tenant*.

The rule that whatever is once annexed to the freehold, for purposes connected with its use or enjoyment, *becomes part of it*, and cannot be removed without doing waste, has in latter times, upon motives of public policy, been much relaxed, as we have seen, between *tenant for life* (or his personal representative) and the *remainderman or reversioner*; and still more relaxed as between *landlord and tenant* for term of years. The precise extent of the relaxation it is not easy in either case to define, and still more difficult is it to ascertain in words the exact difference between the two cases. All that can be said by way of general exposition is, that whenever a tenant for years makes erections upon the premises which have the four attributes of fixtures as stated above (*Supra*, pp. 608 & seq., 2<sup>m</sup>), he may, *during the term*, take them away, and that out of regard to the diverse interests of the landlord and tenant in this particular. And because, when the fixture is intended to facilitate the prosecution of a trade, or (in the United States) the conduct of *agricultural* operations, the interests of individual landlords, as well as of the public, are intimately concerned in encouraging tenants to supply freely all mechanical contrivances needful to secure the most advantageous results from those industrial enterprises, the removal may take place without regard to the *mode of annexation*. (2 Bl. Com. 281, n. (20); Bac. Abr. Waste, (C.) 6.)

Let it be observed, that the removal must take place *during the term*, that is, before the possession is relinquished, or in case of a tenant for an undefined period (as for life), within a reasonable time afterwards. If made after the term ended, it is not indeed *waste*, for that can occur only *during a tenancy*; but if it be not waste, it is a *trespass*; for by permitting the articles to remain fixed to the soil, *after the term ended*, they become the property of the landlord. (Penton v. Robart, 2 East. 8; Elwes v. Mawe, 3 East. 38; Lee v. Risdon, 7 Taunt. 188; Horn v. Baker, 9 East. 215;

Davis & al. v. Jones & al. 2 B. & Ald. (4 E. C. L.) 167; Colegrave v. Dias Santos, 2 B. & Cr. (9 E. C. L.) 76; Poole's Case, 1 Salk. 368; Lyde v. Russell, 1 B. & Ald. (20 E. C. L.) 394; 2 Smith's L. C. 208 '9.)

- 2<sup>n</sup>. Doctrine as to Fixtures, as Between *Tenant for Life*, or His Personal Representative, and Reversioner, or Remainderman.

The common law, as we have seen, holds everything once annexed to the freehold, for purposes connected with its enjoyment and use, to be permanently and inseparably a part of it. We have also seen that the greatest relaxation of that doctrine has taken place as between *landlord and tenant for years*, and the least as between *heir and executor*, whilst an intermediate degree of rigor is observed as between *tenant for life*, (or his personal representative), and *the reversioner or remainderman*. The considerations which operated to bring about this relaxation of the common law doctrine as between landlord and tenant for years, operated also, but less strongly, to effect a corresponding change as between tenant for life, or his personal representative, and the reversioner or remainderman. The general ground the courts have gone upon in mitigating the strict construction of the common law is, that it is for the *benefit of the public* to encourage tenants for life to do what is advantageous to the estate during their terms. The tenant for life is, therefore, entitled to remove steam-engines from collieries or other mines, cider-mills, coppers, etc., which he has erected, and thereby not only enjoys the profits of the estate, but likewise carries on a *species of trade*. And if he does not remove them in his life-time, they go to his personal representative. Hence, the engine or utensil (and a building covering the same falls within the same principle), in order to be removable, must, it seems, be an *accessory to a matter of a personal nature*, and relate in part at least to the *carrying on of a trade*; or in the United States, of *agriculture*. (Bac. Abr. Waste, (C.) 6; Lawton v. Lawton, 3 Atk. 15, 16; Dudley v. Warde, 1 Ambl. 113-14; Lawton v. Salmon, 1 H. Bl. 260, n. (6); Ante, pp. 609, &c.; Van Ness v. Pacard, 2 Pet. 105; Harkness v. Sims, (26 Ala. 493), 62 Am. Dec. 743-'4.)

- 2<sup>k</sup>. Permissive Waste.

*Permissive*, sometimes called *negligent* waste, is generally defined, as we have seen, as matter of *omission* only, such as suffering a house to fall, or to be injured, for want of necessary reparations. (2 Bl. Com. 281; 3 Th. Co. Lit.

233; Bac. Abr. Waste, (B.).) It would seem, however, to be somewhat more comprehensive than this language would imply. Thus, if destruction be done by a stranger or a mob, or if fire, originating by the act of an incendiary, or by neglect, in a neighboring tenement, consumes the premises, it is supposed to be undeniably waste (4 Kent's Com. 77; 3 Th. Co. Lit. 248; 1 Do. 644-5, & Hargr., note (19); Co. 2nd Institute, comment on statute of Marlebridge, pp. 144-5; Anon. 3 Dyer, 281 b; Bac. Abr. Waste, (B.), (H.) 1; Parrot v. Barney, 2 Ab. C. C. 197); and yet, as it cannot with propriety be termed *voluntary* waste, which supposes the action of the tenant, it is believed to fall under the designation of such as is *permissive*. Upon this idea, permissive waste would include, not only all destruction arising from neglect of the necessary reparations, but also such as proceeds from the acts of strangers, not public enemies, and from all casualties, not occasioned immediately by an act of God. Thus, it is permissive waste if the tenant suffer the sea-wall to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh becomes sedgey and unprofitable; or if he repair not the banks or walls against rivers or other waters, whereby the meadows or lowlands become rushy, and less capable of profitable use. So, if by not scouring a ditch, or by not removing the water, dirt or dung from them, the ground-sels, or lower timbers of a house, be rotted, it is permissive waste, and we are told waste shall be assigned *in domibus pro non scourando!* (3 Th. Co. Lit. 236, and n. (F.); Bac. Abr. Waste, (C.) 1, 6.) But see United States v. Bostwick, 94 U. S., 53, 68, where C. J. Waite propounds some remarkable views touching *permissive waste*; views which the writer conceives to be unwarranted either by authority or sound policy, and contradictory of the *terms* of the statute of waste.

### 3<sup>k</sup>. Equitable Waste.

Equitable waste is defined to be such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the *legal* rights of the party committing them. (2 Stor. Eq. §§ 915, &c.)

The general nature of equitable waste has already been briefly stated (*Ante*, pp. 601-2), and its source traced in part to the defect of the common law in not taking notice of the ornamental adjuncts to habitations, such as trees reserved or planted for ornament or shelter, and perhaps, by parity of reason, shrubbery, flowers, etc., in which, although they may not directly promote the *interests of trade*, yet



augment the rental of premises, and tend not a little to the public advantage in cultivating a lively sense of the beautiful, and in making the homes of the people more comfortable and attractive. It is certainly a just cause of reproach to the common law courts, that after those appendages of ornamental and sheltering trees, etc., had come to be recognized as adding materially to the annual and to the fee-simple value of tenements occupied as residences, those courts should still stubbornly have refused to admit that the destruction of such things, although it was so detrimental to the inheritance, constituted waste, thereby obliging landlords to go for protection into courts of equity. Thus, in *Packington v. Packington*, 3 Atk. 215-16 (A. D. 1744), Lord Hardwicke restrained a tenant for life, without impeachment of waste, from cutting down ornamental trees, and states several cases of the previous exercise of a similar jurisdiction. And the precedent has since been followed in a number of cases, limiting the interposition at length to such trees as are planted or growing for ornament or for shelter. (*Chamberlayne v. Dummer*, 1 Bro. C. C. 166 to 168; S. C. 3 Do. 549, and Editor's valuable note (a); *Marquis of Downshire v. Lady Sandys*, 6 Ves. 106; *Lord Tamworth v. Lord Ferrers*, 1d. 419; *Williams v. Macnamara*, 8 Ves. 70; *Burges v. Lamb*, 16 Ves. 185; *Day v. Merry*, 13 Ves. 375.)

Another (a *second*) instance of equitable interposition, which is classed as equitable waste, is where a tenant for life, *without impeachment of waste*, is guilty of making an unconscientious use of his power, as by wilful, malicious, extravagant, or "*humorous*" destruction. This principle seems to have been first distinctly declared and acted on by Lord Nottingham, in *Abrahall v. Bubb*, 2 Swanst. 172 (A. D. 1679), S. C. Freem. 53; but it was applied by Lord Cowper at a later period, in the much more famous case of *Vane v. Lord Barnard*, 2 Vern. 738 (A. D. 1716), so that that case is often referred to erroneously, as having established the doctrine. Lord Barnard was tenant for life of Raby Castle, without impeachment of waste, remainder to his son, against whom having conceived some displeasure, he got two hundred workmen together, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors and boards, etc., to the value of £3,000. Lord Chancellor Cowper granted an injunction to stay further waste, and decreed Lord Barnard to repair the injury he had done to the castle, under the direction of one of the masters. See *Chamberlayne v. Dummer*, 3 Bro. C. C. 565; Editor's *valuable note* (a); 2 Stor. Eq. § 915; Bac. Abr. Waste, (N.)

A *third* instance of *equitable waste* is where the party aggrieved has *equitable rights only*; and, indeed, it has been said that the courts of equity will grant an injunction to stop waste more strongly where there is a trust estate. Thus, for instance, in case of a mortgage, or other lien, express or implied, if the party in possession, whether mortgagor or mortgagee, commits waste, or threatens to commit it, an injunction will be granted, although (indeed, *because*) there is no remedy at law. (2 Stor. Eq. § 914; Clark & al. v. Curtis, 11 Leigh, 559.)

### 3<sup>i</sup>. What Tenants are Punishable for Waste.

Let us note, (1), What tenants are punishable for waste *at common law*; (2), What by statute in *England*; and (3), What by statute in *Virginia*;

W. C.

#### 1<sup>k</sup>. What Tenants are Punishable for Waste *at Common Law*.

A very brief reflection will show that an *absolute tenant in fee-simple*, with no incumbrance or charge on the premises, cannot usually be punishable, or in anywise accountable for waste, how great soever the destruction his indiscretion or caprice may prompt him to commit. His *heir*, to be sure, may be the sufferer, with a marred inheritance, but *nemo est heres viventis*; and besides, he has it in his power, by alienation in his life-time, or by devise, to disappoint the expectations of his next of kin, who would otherwise have been his heirs, so that they have no fixed interest in the inheritance until it actually descends upon them. Whilst, therefore, waste of the premises may be as to them undoubtedly *damnum*, it is *damnum absque injuria*. (3 Bl. Com. 224.)

Tenant in tail, and indeed every *tenant of the inheritance*, is likewise privileged to commit what waste he pleases, by virtue of his ownership *of the inheritance*; for since waste is a destruction or permanent injury of the *inheritance*, how can the owner of the inheritance be accountable or punishable therefor? Always supposing that there is no charge or incumbrance thereon; for if there be such charge or incumbrance, the person entitled thereto has his security thereby lessened and impaired, and may reasonably complain of waste, and will *in equity* be protected against it. (Clarke v. Curtis, 11 Leigh, 559; *Ante*, pp. 605-6; 2 Bl. Com. 115.)

No tenant, therefore, is accountable for waste, except one who has an estate *not of inheritance*; and at common law those tenants only of estates *not of inheritance* are so punishable who come to their several estates *by act of the law*, that is, tenants *by the curtesy*, tenants *in dower*, and guardians in chivalry. Those tenants of particular estates

who come in *by the act of the parties*, are at common law liable not otherwise than upon their covenants; and if the landlord make no provision, by express agreement, against waste, he is in those cases (independently of statute) without remedy, and is left to suffer the consequences of his neglect. (2 Bl. Com. 282; 3 Th. Co. Lit. 247; Bac. Abr. Waste, (H).)

It ought to be observed, however, that so accurate a writer as Mr. Reeves is of opinion that, at common law, *all tenants* for life or years are punishable for waste, and that the statutes of Marlebridge (52 Hen. III., c. 23), and of Gloucester (6 Edw. I., c. 5), only made the remedy more specific and certain. (2 Reeves' Hist. Eng. Law, 73, 184.) And, on the other hand, some have thought that *tenants by the curtesy* are not answerable for waste at common law, nor until the statutes of Marlebridge and Gloucester. But upon the whole the doctrine of the common law is believed to be correctly stated in the last paragraph. (Bac. Abr. Waste, (H).)

2<sup>k</sup>. What Tenants are by Statute in England Punished for Waste.

In favor of the owner of the inheritance, it was provided by the statute of Marlebridge (52 Hen. III., c. 23, A. D. 1268), that a man from henceforth shall have a writ of waste against him that holds by the law of England (that is, *by curtesy*), or otherwise for term of life, or for term of years, or a woman in dower. So that for more than six hundred years past in England, all tenants *for life or for years* have been punishable for waste, both permissive and voluntary, unless their leases were made, as sometimes they are, without impeachment of waste (*absque impetitione wastæ*); that is, that no man shall sue the tenant (*impetere*) for waste committed or suffered. But tenant in tail, *after possibility of issue extinct* (a tenancy, it will be remembered, which, in consequence of the abolition of estates-tail (V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107, § 2421, cannot exist in Virginia), is not impeachable for waste; because his estate, at its creation, was an estate of inheritance, and so not within the statute. It is not to be understood, however, when one is *without impeachment of waste* that he is at liberty to commit in the premises what destruction soever it may please him. The original doctrine, indeed, was that the privilege merely exempted the tenant from the penalties of the statute of Gloucester, 6 Edward I., c. 5 (viz.: forfeiture of the place wasted, and *treble* damages), and did not prevent the property in timber severed from the land from passing to the landlord. But ultimately, it was settled that the privilege extended also to vest such timber in the

tenant, and that the only limitation was that the waste should not be malicious, wilful, extravagant, or "humorous." (*Ante*, 615-16; 2 Stor. Eq. § 915; Bac. Abr. Waste, (N.).)

It is said, moreover, that an action of waste lies not for the debtor against *tenant by elegit*, etc., because against him the debtor may have the more convenient remedy of *revire facias ad computandum*, and apply the damages for the waste to discharge the debt; but if the debtor were himself a particular tenant (*e. g.*, for life), it seems that the reversioner or remainderman expectant on the determination of the debtor's own estate, might have an action for the waste. (2 Bl. Com. 283; Bac. Abr. Waste, (H.); 3 Th. Co. Lit. 141, n. (M.); Id. 251, n. (B. 1); Scott v. Lenox, 2 Brock. 57.)

Neither, under the statutes of Marlebridge and Gloucester, does an action for waste lie against a *tenant at will*, the statutes applying in terms only to tenants *for life and for years*. But although a tenant at will cannot be sued for waste *eo nomine*, yet the commission of an *act of destruction*, which in a tenant for years or life would be waste, determines the estate of tenant at will, and he is then liable to an action for the waste as *for a trespass*. Hence, it is frequently, but inaccurately, said that tenant at will is liable for *voluntary waste*, meaning that he is liable for such acts as in other tenants are voluntary waste, but in him are *trespasses*. For *permissive waste*, it is established that, under the statutes in question, tenant at will is not liable, but only by virtue of express stipulations. (1 Th. Co. Lit. 644-5, and n. (19); Bac. Abr. Waste, (H.).)

Under these statutes a husband cannot become liable for waste committed during the coverture upon his wife's lands of inheritance; that is, he is *dispunishable* therefor; not because his interest in the lands makes it impossible for him to be guilty of waste, but because the *unity of person* of husband and wife disables her to maintain an *action at law* against him. Hence, if the husband aliene his right to the land, his alienee cannot pretend to a similar exemption, but is liable for waste like any other tenant for life or years; and although the wife is the reversioner, yet as she cannot sue alone, the action must be in the name of the husband and wife. (*Dejarnette v. Allen & ux.*, 5 Grat. 514; 2 Kent's Com. 131.)

### 3<sup>k</sup>. What Tenants are Punishable for Waste, by Statute in Virginia.

The provisions of our statute are more comprehensive than those of Marlebridge and Gloucester. They apply, respectively, to *any tenant* of land, to tenants in common,



joint-tenants and parceners, to guardians, and to tenants in possession of lands pending suit therefor. (V. C. 1873, ch. 133, §§ 1, 2, 3, 5; V. C. 1887, ch. 126, §§ 2775 & seq.) They enact—

1st, That if *any tenant* of land commit any waste thereon, or after he has aliened it, while he remains in possession, unless by special license to do so, he shall be liable to *any party injured*, for damages;

2d, That if a tenant in common, joint-tenant or parcener, commit waste, he shall be liable to his co-tenants, jointly or severally, for damages;

3d, That if a guardian commit waste of the estate of his ward, he shall be liable to the ward, at the expiration of his guardianship, for damages;

4th, That if the tenant in possession of any land shall, *pending any suit* to recover or charge the same, with knowledge of such suit, *commit any waste* therein, the court in which the suit is, or the judge in vacation, may, on petition of the plaintiff alleging such waste, verified by oath, and after reasonable notice to the tenant, make an order forbidding the commission of *further waste*; disobedience to which order, after the tenant is served with a copy thereof, may be punished as a contempt by the court in term or by the judge in vacation (which is the substitute for what was known at common law as a writ of *estrepement*, whereby the lands were committed to the sheriff to preserve them from waste); and if the plaintiff recover or charge the land, he may, in an action on the case, recover against him who committed the waste, *three times* the amount of the damages assessed therefor. But it is to be provided in the order prohibiting the waste, that it shall not take effect until the plaintiff, or some one for him, shall have given bond with sufficient surety, before the court or the clerk thereof in his office, in such penalty as the court or judge shall prescribe, with condition to pay the tenant, in case the plaintiff does not succeed in recovering or charging the land, such damages as may accrue to the tenant in consequence of the order.

The doctrine as to what constitutes waste under this statute is substantially the same as in England; and at common law (Bac. Abr. Waste, (II.), the diversity is only as to the *parties* who are punishable therefor. However, in respect to the precise acts which amount to waste, although the *principle* is identical, namely, that they are such acts as work permanent injury to the inheritance, yet the very different situation of England and Virginia may, and must sometimes, occasion what is waste there not to be reckoned so here. Even in England, the law of

waste varies, and accommodates itself to the varying wants and situations of the different counties: and on the same principle a similar accommodation must be made here to the situation of our comparatively new and unsettled territory. The clearing of land of timber is with us sometimes a benefit and not a damage to the inheritance, supposing always that a sufficiency is left for the land; and in such cases, where the cutting of timber is a benefit to the premises, it is not waste (*Findlay v. Smith & ux.* 6 Munf. 134, 142, &c.; *Macaulay's Exor. v. Dismal Sw. Ld. Co.* 2 Rob. 528; *Jackson v. Brownson*, 7 Johns. 227; 2 Rob. Pr. (2d ed.) 231-'2.)

4<sup>i</sup>. The Punishment of Waste; w. c.

1<sup>k</sup>. The Doctrine at Common Law Touching the Punishment of Waste.

The punishment for waste, at common law, was only the mere damages thereby occasioned to the owner of the inheritance; or *single damages*, as the common expression is, in contradistinction to the *treble damages* exacted by the statute of Gloucester, 6 Edw. I., c. 5. By *magna charta* (9 Hen. III., c. 4), a guardian also forfeited his wardship for waste; but no additional penalty was imposed on other species of tenants (the statute of Marlebridge, 52 Hen. III., c. 23, only subjecting all tenants for life or years to liability for waste, but saying nothing of the penalty therefor), until the statute of Gloucester just mentioned.

2<sup>k</sup>. The Doctrine Touching the Punishment of Waste, by Statute of Gloucester, 6 Edw. I., c. 5.

By the statute of Gloucester (A. D. 1278), it was enacted that the tenant should "forfeit the *thing* which he hath wasted, and also *treble damages* to him who *hath the inheritance*." The expression, "the *thing wasted*," was construed to include the *place*, not necessarily the whole premises, but that part of them wherein the waste had occurred, if separable from the rest. Hence, if waste were done *sparsim*, that is, here and there over a wood, the whole wood should be recovered; or if in several rooms of a house, the whole house should be forfeited, because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste were done only in one end of the wood (or perhaps in one room of the house), if that can be conveniently separated from the rest, that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner. (2 Bl. Com. 283-'4; 3 Th. Co. Lit. 250, and n. (Z).)

3<sup>k</sup>. The Doctrine Touching the Punishment of Waste in Virginia.

Until the 1st day of July, 1850, the doctrine in Virginia, touching the punishment of waste, was identical with that prescribed in England by the statute of Gloucester, namely, the forfeiture of the *thing* (place) wasted, and treble damages. (1 R. C. 1819, 462-3, c. 117.)

Since 1st July, 1850, the forfeiture of the place wasted is abolished, and the damages are only *single*, unless the "waste be committed *wantonly*," in which case judgment shall be for *three times* the amount of damages assessed therefor. (V. C. 1873, ch. 133, §§ 1 to 4; V. C. 1887, ch. 126, §§ 2778, 2780.)

The precise meaning of "*wanton waste*," has not been yet ascertained, but it may be conceived to be such waste as results from a formed *design* on the tenant's part that permanent injury to the premises shall ensue, in contradistinction to that produced by mere neglect, by the acts of strangers, or even perhaps by the act of the tenant himself, where he appears not to have contemplated the injury which in fact was wrought.

5<sup>i</sup>. What Persons are Entitled to Claim Compensation for Waste; w. c.

1<sup>k</sup>. Doctrine at Common Law, Touching Persons Entitled to Claim Compensation for Waste.

As waste is a permanent injury to the inheritance, it follows that it cannot be committed, at least to be properly styled *waste*, save against one who is the owner of the inheritance, and not against one who is proprietor merely of a less estate, notwithstanding he may be injured by the act in question. (3 Th. Co. Lit. 244 & seq.) It is also an established principle of the common law, that the party complaining must have the *immediate* inheritance without an intermediate estate of *freehold*, for an intervening estate *for years* is no impediment. Hence, if a lease be made to A for life, remainder to B for life, remainder to C in fee, no action of waste lies for C during the continuance of B's estate, but only in case B dies, or surrenders his estate. But if the lease were to A for life, remainder to B *for years*, remainder to C in fee, an action lies presently for any waste committed by A during the term in remainder, the mean term for years being no impediment. (3 Th. Co. Lit. 245.) But although no action of waste lies where there is such an intermediate estate of freehold, yet if waste be done by felling timber, the person entitled to the inheritance may seize or maintain an action for the trees; for as soon as they are severed from the land by an act of God or of the tenant, or otherwise, they become the property of him who has the first estate of inheritance. (3 Th. Co. Lit. 246, n. (Q.); Paget's Case, 5 Co. 79 b; Bowles's Case, 11 Co. 81

b; *Pigot v. Bullock*, 1 Ves. Jr. 484; *Whitefield v. Dewit*, 2 P. Wms. 241.)

Still, it is manifest that the reversioner or remainderman, although he has not the immediate inheritance, and notwithstanding the existence of an intervening freehold, may suffer damage, as the person entitled to such interposed estate also may, from any such destruction or permanent injury to the inheritance; and it would be a reproach to the law if it allowed no redress for that damage, simply because the wrong did not amount to what is technically styled *waste*. Accordingly, such wrong committed against a person who either has not the inheritance, or not the immediate reversion or remainder in fee, is designated *quasi waste*, and is redressed, not by the action of waste, but by action *on the case*, and that whether the waste be voluntary or permissive. (3 Th. Co. Lit. 241, n. (M.); *Greene v. Cole*, 2 Saund. 252, n. (7); *Kinlyside v. Thornton*, 2 Wm. Bl. 1111; *Harnett v. Maitland*, 16 M. & W. 262; *White v. Wagner*, 4 Har. & Johns. (Md.) 373; (7 Am. Dec. 674); *Fay v. Brower*, 3 Pick. (Mass.) 203, 205.) The case of *Gibson v. Wells*, 1 Bos. & Pul. (N. S.) 290, which held that *case* lay not for *permissive waste*, was the case of a *tenant at will*, who in England is not liable for permissive waste at all. *Herne v. Benbow*, 4 Taunt. 664, may also have been the case of a tenant at will; at all events, it relies only on precedents of such tenants. And *Jones v. Hill*, 7 Taunt. 392, which is frequently cited as adverse to the proposition above stated, that case lies for permissive waste, contains not even a *dictum* upon the point. In Virginia, however, all doubt upon the subject is dispelled by the statutory provision declaring that all persons entitled to damages for waste, "may recover the same in an *action on the case*." (V. C. 1873, ch. 133, § 4; V. C. 1887, ch. 126, § 2778.) It is said, however, that as for the maintenance of the action of waste, it is necessary that the reversion should continue in the same state in which it was at the time of the waste done, so the same rule holds in the *action on the case*; and hence, where husband and wife were tenants for their joint lives, remainder to the survivor, and the husband's interest became vested in an assignee, who committed waste in the *husband's life-time*, it was held that, after his death, the wife could not maintain an action on the case against the assignee for the waste. (*Bacon v. Smith & al.* 1 Ad. & El. N. S. (41 E. C. L.) 345.)

And upon the principle that waste is a wrong not in general capable of being completely repaired by damages to all interested in the premises, whether they have an inheritance or not, or the immediate reversion or not,



a court of equity is accustomed to interpose by *way of injunction* to prohibit its commission, and, as incident thereto, to compel an account of the damage already done. Thus, a tenant *for life* in remainder, though he has no property in the timber which may be severed, nor any right to cut it himself when the estate comes into his possession, yet has such an interest in the *mast and shade* of the trees as will justify a court of equity, at his instance, in enjoining the tenant from cutting them. (Perrot v. Perrot, 3 Atk. 95; Roswell's Case, 1 Roll. Abr. 377; Bewick v. Whitfield, 3 P. Wms. 266, 268, n. (F).) So, trustees to preserve contingent remainders may have an injunction against waste, even though the contingent remainderman have not come into *esse*. (Garth v. Cotton, 3 Atk. 754; Perrot v. Perrot, 3 Atk. 95; Stansfield v. Habbergham, 10 Ves. 281.) And although, in such case, there be no person capable of maintaining an action at law, and although, yet further, the party guilty of the waste dies, so that the wrong is finally remediless at common law, yet wherever the question is brought within the cognizance of equity, that court says that unauthorized waste shall not be committed with impunity; and the produce of the wrongful act shall not redound to him who perpetrated it, but shall be laid up for the benefit of the contingent remainderman, and the whole succession of limitations. (Bishop of Winchester v. Knight, 1 P. Wms. 407; Anon. 1 Ves. Jun'r, 93; Williams v. Bolton, 1 Cox, 72; Powlet n. Bolton, 3 Ves. 377; Tullit v. Tullit, 1 Ambl. 376; 2 Bl. Com. 281, n. (18).)

See Pigot v. Bullock, 1 Ves. Jun'r, 479, 484, and *notes*.

And upon like principles, wherever there is an *equitable lien* (e. g., that of vendor), or indeed any *equitable estate*, the party claiming it may obtain redress for and against the waste by injunction in equity. (Clarke v. Curtis, 11 Leigh, 559.)

Tenants in common, joint-tenants, and co-parceners, are not allowed, at common law, to sue one another for waste of the premises, because they may at any time arrest the waste by entering thereon, and possessing themselves of their respective shares. This defect in the law was, in England, remedied by statute 13 Edw. I., c. 22, which, *in terms*, was applicable to *tenants in common* alone, but whose *equity* was held to embrace *joint-tenants* also, although *not co-parceners*, because they could obtain redress by *compelling partition*. In Virginia, joint-tenants, tenants in common, and co-parceners, are all expressly permitted to sue their co-tenants, jointly or severally, for waste. (V. C. 1873, ch. 133, § 2; V. C. 1887,

ch. 126, § 2776; 2 Bl. Com. 183, 194, 188; Bac. Abr. Waste, (G.).)

An heir cannot maintain an action for waste done in the *time of his ancestor*, nor a grantee of the reversion for such as was committed *before the grant*, because neither had any interest at the time the waste was done. (3 Th. Co. Lit. 243-4, n. (N.); *Greene v. Cole*, 3 Saund. 252 n. (7).) And as waste is a *tort* not in itself savoring of *contract*, although it may be a breach of contract, the action for it does not, at common law, survive in favor of the landlord's personal representative, nor against the tenant's, upon the death of either, in pursuance of the common law doctrine, that every action *for tort* dies with the person, although actions *ex contractu* survive. By statute 4 Edw. III., c. 7, this principle was so altered as to admit of the actions surviving in case of torts to *personal property*; but as that statute did not apply to real property, no action for *waste* survived for or against a decedent's estate under it any more than at common law. (1 Chit. Pl. 78 to 80, 102-3; 3 Th. Co. Lit. 244, and n. (O).) Our statute in Virginia, however, is more comprehensive, and allows an action of trespass, or trespass on the case, to be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of, or damages to *any estate of*, or by his decedent. (V. C. 1873, ch. 126, § 20; V. C. 1887, ch. 119, § 2655.)

And *in equity*, even in England, relief may be had, notwithstanding the wrong-doer's death, in pursuance of the general doctrine which prevails in the court of chancery, in all cases of fraud, that the remedy never dies with the person, but that the court will follow the assets of the party liable to the demand into the hands of his personal representatives. (Bac. Abr. Waste, (O.); *Garth v. Cotton*, 1 Ves. Sr. 524, 546.)

## 2<sup>k</sup>. Doctrine by Statute in Virginia.

The doctrine in Virginia is declared by statute to be, that "if any tenant of land commit any waste thereon, or after he has aliened it, while he remains in possession, unless by special licence so to do, he shall be liable to *any party injured* for damages." (V. C. 1873, ch. 133, § 1; V. C. 1887, ch. 126, § 2775. And the statute proceeds further to enact, that if a tenant in common, joint-tenant, or parcener, commit waste, he shall be liable to his co-tenants, jointly or severally, for damages; and also, that if a guardian commit waste of the estate of his ward, he shall be liable to the ward at the expiration of his guardianship, for damages. (V. C. 1873, ch. 133, §§ 2, 3; V. C. 1887, ch. 126, §§ 2776, 2777.)

6<sup>i</sup>. Remedies for Waste.

The redress for the injury of waste is of two kinds; *preventive* and *corrective*; the former of which is either by writ of *estrepement* or by injunction, (although in injunction damages as an incident, are also given); and the corrective redress is by several actions at law. (3 Bl. Com. 225);

W. C.

1<sup>k</sup>. Remedies *Preventive* for Waste; w. c.1<sup>l</sup>. Remedy Preventive for Waste, by Writ of *Estrepement*.

*Estrepement* is an old French word, signifying the same thing as waste; and the writ of *estrepement* lay at common law, *after* judgment obtained in any real action, and before possession was delivered by the sheriff, in order to stop any waste which the vanquished party might be tempted to commit in lands which were determined to be no longer his. But as in some cases there might be just reason to apprehend that the tenant might make waste or *estrepement* pending the suit, well knowing the weakness of his title, the statute of Gloucester (6 Edw. I., c. 13), gave another writ of *estrepement*, *pendente placito*, commanding the sheriff to inhibit the defendant from committing any waste pending the suit, "*ne faciat vastum vel estrepementum pendente placito dicto indiscusso.*" It was at first held that this latter writ pending the suit could be had only in actions strictly *real*, namely, those where the possession *only* could be recovered, without damages; it being supposed that if damages were recoverable, the jury, in assessing them, would consider and allow for any waste which might have been done. But the modern and more reasonable construction of the statute of Gloucester, in advancement of the remedy, is that a writ of *estrepement*, to prevent waste, may be had in every stage of *mixed* actions (that is, where damages, as well as the lands themselves, are recovered), as well as of actions *real*; for peradventure, sayeth the law, the tenant may not be of ability to satisfy the demandant his full damages. And therefore, in an action of waste itself, to recover the place wasted, and also damages (where such a recovery is allowed), a writ of *estrepement* will lie, as well before as after judgment. If a writ of *estrepement*, forbidding waste, be directed and delivered to the tenant himself, as it may be, and he afterwards proceeds to commit waste, an action may be carried on against him on the foundation of such writ; wherein the only plea of the tenant is *non fecit vastum contra prohibitionem*; and if, upon verdict, it be found that he did, the plaintiff may recover damages therefor, or may invoke the court to punish him

for his contempt of its mandate. But if the writ be directed *to the sheriff*, it is his duty to prevent the *estrepement* absolutely, even by raising the *posse comitatus*, if need be. (3 Bl. Com. 225 & seq.; 3 Th. Co. Lit. 241, n. (M.))

In Virginia, provision is made for a proceeding corresponding nearly to a writ of *estrepement*, although it is not called by that name, and seems to be applicable only where the waste has been *actually committed*, not where it is merely apprehended, but is not limited to real and mixed actions. "If the tenant in possession of any land," says the statute, "shall, pending *any suit to recover or charge* said land, with knowledge of such suit, *commit any waste* thereon, the court in which the suit is, or the judge in vacation, may, on petition of the plaintiff, alleging such waste, verified by oath, and after reasonable notice to the tenant, make an order forbidding the tenant to commit further waste on the land during the pendency of the suit, and disobedience to the order by the tenant after he shall have been served with a copy of it, may be punished as a contempt by the court, or by the judge in vacation; and if the plaintiff succeed in recovering or charging the land, he may recover, in an action on the case against him who committed the waste, *three times* the amount of damages assessed therefor; but it shall be provided in the order aforesaid, that it is not to take effect until the plaintiff, or some one for him, shall have given bond with sufficient surety before the said court or the clerk thereof in his office, in such penalty as the court or judge thereof shall prescribe, with condition to pay the tenant, in case the plaintiff does not recover or charge the land, such damages as shall accrue to the tenant in consequence of the order." (V. C. 1873, ch. 133, § 5; V. C. 1887, ch. 126, § 2780; *Aute*, pp. 619-'20.) There seems, however, no reason to doubt that under the reservation of all writs remedial and judicial given by any act of parliament, made in aid of the common law, prior to 4 Jac. I. (V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2 § 3), the writ afforded by statute of Gloucester, 6 Edw. I., c. 13, would be available with us.

2<sup>d</sup>. Remedy *Preventive* for Waste, by Writ of *Injunction*.

Besides the preventive redress by writ of *estrepement*, and the corresponding proceeding in Virginia, the courts of equity, upon bill exhibited therein, complaining of waste, have for more than two centuries been accustomed to grant an *injunction* in order to stay waste, upon the ground that damages constitute an inadequate compensation for such an injury as waste, which affects the substance of the inheritance, or that otherwise there is no sufficient remedy at law. And this



is now become the most usual way of preventing waste, especially as the court not only inhibits the commission of any future injury of the sort, but as incident thereto, obliges the defendant to account for the damages sustained by the plaintiff in consequence of that already done. (3 Bl. Com. 227; 2 Do. 282, n. (22); 2 Kent's Com. 77; *Garrison v. Hall*, 75 Va. 150.)

The other considerations which give occasion to a court of equity's interference to prevent waste are very multiform, as that the plaintiff has only an *equitable title*; that the waste apprehended is the destruction of timber-trees planted or reserved, not for timber, but for *ornament, shade or shelter*, etc.; that the tenant being without impeachment of waste, is about to commit a destruction, *wanton, malicious, or peculiarly ruinous* to the property; that the apprehended waste will be mischievous to owners of the inheritance *not yet in being*, or not ascertained; that the owner of the inheritance *colludes with the tenant* committing the waste, to the detriment of intervening remaindermen; *that some other collusion* exists by which the legal remedies against waste are evaded, or that in any other way a permanent injury to the substance of real property by the tenant, will go unredressed unless equity shall intervene. But it must not be forgotten that, wherever there is an adequate redress without such extraordinary aid of the court of equity, its interposition must be denied. Hence, an injunction is not to be granted in any of those cases where the rights of the party can be properly and fully protected by a writ of *extrepement*, or, with us, by its statutory substitute or otherwise. (Mitf'd Eq. Pl. 123; 2 Bl. Com. 282 n. (22); 2 Stor. Eq. §§ 911 & seq.; 4 Kent's Com. 77; 2 Rob. Pr. (1st ed.) 228; Bac. Abr. Waste, (N.) & (O.); *Harris v. Thomas* 1 H. & M. 18; *Scott v. Wharton*, 2 H. & M. 25; *Clarke & al. v. Curtis*, 11 Leigh, 559, 577, 582; *Norway v. Rowe*, 19 Ves. 155; 1 Bart. Chan. Pr. 331 & seq.)

Neither vague apprehension of an intention to commit waste, nor information given by a third person, who states only his belief, but not the grounds of it, will sustain an application for an injunction. The affidavits need not necessarily set out positive acts, but they must state at least explicit threats. A court of equity never grants an injunction on the notion that it will do the defendant no harm, if he does not intend to commit the act in question; some positive and sufficient reasons must be shown to call for it. (*Hannay v. McEntire*, 11 Ves. 54; *Coffin v. Coffin*, Jac. 72.)

It will be observed that it is vain to expect the aid

of a court of equity, save only in case of equitable waste, if nothing is sought but *amends* for waste *already committed*. Equity (except in case of equitable waste) takes cognizance exclusively to avert *future waste*; but having once got possession of the cause, will complete the redress by compelling the offending tenant to account for the waste done, in order to avoid a needless multiplication of suits. (2 Rob. Pr. (1st ed.) 230; Watson v. Hunter, &c., 5 Johns. C. R. (N. Y.) 169; Hawley v. Clowes, 2 Johns. C. R. 122.)

It is a general rule, that in order to sustain a motion for an injunction in restraint of waste, the party making the application must set forth and verify an express and positive title in himself, (or in those whose interests he has to support); an hypothetical or undisputed title will not suffice. (Davis v. Leo, 6 Ves. Jr. 787.) Hence, when the title is disputed, as between devisee and heir at law, an injunction to stay waste will not be granted, on the application of either party. (2 Bl. Com. 282, n. (22); Jones v. Jones, 2 Meriv. 174; Smith v. Collyer, 8 Ves. 90.)

## 2<sup>k</sup>. *Corrective Remedies for Waste.*

The class of remedies for waste which have for their object to obtain compensation, by means of damages, &c., for the doing of waste, are (1), The writ or action of waste; (2), The action of trespass on the case; and (3), An action of covenant or assumpsit, founded upon the tenant's promise not to commit it;

w. c.

### 1<sup>l</sup>. Writ of Waste.

The history of the writ of waste seems to be as follows: At common law the proceeding in waste was by writ of prohibition from the *court of chancery*, (as *officina justitiæ*) addressed to the *party*, and constituting the foundation of a suit between the person suffering by the waste, and him who committed it. If that writ were obeyed, the ends of justice were attained; if not obeyed, and an *alias* and a *pluries* produced no effect, then came the *original writ of attachment* out of chancery, returnable in a court of common law, which was considered as the *original writ of the court*. It commanded the *sheriff* to summon the defendant to show why he had committed waste in the premises; and being returnable in a court of common law, most usually the court of common pleas, on the defendant's appearing, the plaintiff declared against him; he pleaded,—the question was tried, and if the defendant was found guilty, the plaintiff recovered *single damages* for waste committed. Thus the matter stood at common law. The statutes of Marlebridge (52 Hen. III., ch. 24), and of Gloucester (6 Edw.

I., c. 5), made additional classes of persons (viz. all tenants for life or years) liable for waste, and imposed additional penalties, but gave no new remedy. A new remedy, however, was given by another chapter of the statute of Gloucester (c. 13), namely, by writ of *estrepement, pending suit* (*Ante*, pp. 626-27,) which, however, was a *judicial* writ issuing out of the court of law where the case was pending, and not out of chancery. By Stat. Westm. II., (13 Edw. I., c. 14), the common law writ of prohibition of waste from the chancery, addressed *to the party*, is taken away, and a writ of *summons* substituted in its place, to be followed, if not obeyed, successively by attachment and distress, and this writ of summons is what has since that statute been known as the *writ of waste*. (*Jefferson v. Bishop of Durham*, 1 Bos. & Pul. 120; *Bac. Abr. Waste*, (K).)

The writ of waste, therefore, may properly enough be said to be founded, as to the *recovery*, to the extent of *single damages*, upon the common law; as to the extent of the forfeiture of the *thing* wasted, and treble damages, on the statute of Gloucester (6 Edw. I., c. 5); and as to the *proceedings*, to have been commenced at common law, by a writ of prohibition of waste, from the chancery, addressed to the party, followed by an attachment in the nature of an original writ, returnable in a court of common law; and by the statute of Westm. II. (13 Edw. I., c. 14), which abolished the writ of prohibition, and substituted a summons therefor, the process has ever since been, if the summons were not obeyed, an attachment, and if that were unsuccessful, a distress. (*Bac. Abr. Waste*, (K.); 2 *Bl. Com.* 227-8.)

The action of waste is a *mixed action* in England; partly real, so far as it recovers land, and partly personal, so far as it recovers damages. For it is brought for both these purposes; and if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages by the statute of Gloucester. The writ of waste (that is, the *summons*, or first process), calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named, *ad exhibendum*, to the disinherison of the plaintiff. And if the defendant makes default, or does not appear at the day assigned him, then the sheriff is to take with him a jury of twelve men, and go in person to the place alleged to be wasted, and there inquire of the waste done, and the damages; and make a return or report of the same to the court, upon which report the judgment is founded. For the law will not suffer so heavy a judgment as the forfeiture of the place, and treble damages,

to be passed upon a mere default, without full assurance that the fact is according as it is stated in the writ. But if the defendant appears to the writ, and *afterwards* suffers judgment to go against him by default, or upon a *nil dicit* (when he makes no answer or plea in defence), this amounts to a confession of the waste; since having once appeared, he cannot now pretend ignorance of the charge. Now, therefore, the sheriff shall not go to the place to inquire of the fact, whether any waste has or has not been committed; for this is already ascertained by the silent confession of the defendant; but he shall only, as in default upon other actions, make inquiry of the *quantum* of damages. The defendant on the trial may give in evidence anything that tends to prove there was no waste committed, as that the destruction happened by lightning, tempest, public enemies, or other inevitable casualty. But it is no defence to say that a *stranger* did the waste, for against him the landlord has no remedy; though the defendant is entitled to sue such stranger in an action of trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act. The verdict, if for the plaintiff, ascertains the damages to be paid, and finds also the *place wasted*. (3 Bl. Com. 228; Redford & als. v. Smith, 2 Bingh. (9 E. C. L.) 262.)

When the waste, the damages, and the place wasted are thus ascertained, either by confession or by verdict, judgment is given, pursuant to the statute of Gloucester (6 Edw. I., c. 5), that the plaintiff shall recover the *place wasted*; (for which he shall have immediately a writ of *reisin* or of *possession*, provided the particular estate be still subsisting, for if it be expired, there can, of course, be no forfeiture of the land), and also that the plaintiff shall recover *treble the damages* assessed by the jury, which he obtains in like manner as all other damages in actions, personal and mixed, are obtained, whether the particular estate be expired or be still in being. (3 Bl. Com. 228-'9.)

In Virginia, as we have seen, the place wasted is no longer recoverable, and it is enacted that any person entitled to damages for waste, "*may* recover the same in an action *on the case*." (V. C. 1873, ch. 133, § 4; V. C. 1887, ch. 126, § 2778.) It would seem to have been the intent of the revisors of the Code of 1849, to abolish the writ of waste, as well as its distinguishing incidents of the recovery of the place wasted, and treble damages (2 Rob. Pr. (2d ed.) 634-'5), but such does not seem to be the effect of the statute as enacted. There being no negative words, and the writ of waste having existed at com-



mon law, it seems that it subsists still, as regulated by statute of 13 Edw. I., c. 14 (V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2 § 3), save only that it admits of the recovery at present of nothing but *single damages*.

It should be observed, however, that the limited application of the writ of waste (being maintainable only by the reversioner or remainderman *in fee*, when there is no intermediate freehold remainder), and the rigorous technical nicety required in its proceedings, had occasioned it to be very rarely resorted to, even in England, and *a fortiori* with us, prior to 1849; it having given way to the much more expeditious and easy remedy of an *action on the case in the nature of waste*, or to the proceeding by an injunction. (3 Bl. Com. 227. n. (7); *De Jarnette v. Allen*, 5 Grat. 514.)

## 2<sup>1</sup>. Action of Trespass on the Case.

The action of trespass on the case for waste, as was just observed, has long practically superseded the *writ of waste*, as well in England as in Virginia. The plaintiff derives the same benefit from it as from an action of waste *in the tenuit*; that is, where the tenant's term is expired, and the landlord having regained possession of the land, by virtue of his reversion, can, in the nature of things, have no other redress than to recover damages; and although the plaintiff cannot, in an action on the case, recover the place wasted when the tenant is still in possession, as he may do in an action of waste *in the tenet*, yet this latter action was found, by experience, to be so imperfect and defective a mode of recovering seisin of the place wasted, that the plaintiff derived little or no advantage from it; and, therefore, where the lease is by deed, care is or ought to be taken to give the lessor power of *re-entry* in case the lessee, under-lessee, or assignee of either, commit any waste or destruction, and an action on the case is then better adapted for the recovery of mere damages than an action of waste *in the tenuit*. It has also this further advantage over an action of waste, an advantage already repeatedly referred to, namely, that it may be brought by him in the reversion or remainder *for life or years*, as well as in fee, and whether the reversion be *immediate* or not. The action on the case, however, did not at first prevail without considerable opposition, although at length it is definitely established as the usual and the preferable remedy, as well for *permissive* as for *voluntary* waste, and as well against the assignee of the tenant, as against the tenant himself. (3 Bl. Com. 227, n. (7); 1 Chit. Pl. 160 & seq.; *Jefferson v. Jefferson*, 3 Lev. 130; *Jeffer v Gifford*, 4 Burr. 2141; *Greene v. Cole*, 3 Saund. 252

&c., note (7); Provost, &c., of Queen's College v. Hallett, 14 East. 489; Harnett v. Maitland, 16 M. & W. 257, 262.)

It is often said that the action on the case lies not for *permissive waste*; but we have seen (*Ante*, p. 623) the fallacy of that conclusion, so far as it depends on adjudged cases, and it is on adjudged cases alone that it can be supported, having no foundation in reason, analogy, or policy. (Burnett v. Lynch, 5 B. & Cr. (12 E. C. L. 589); White v. Wagner, 4 Har. & Johns. (Md.), 373, (7 Am. Dec. 674), Fay v. Brewer, 3 Pick. (Mass.) 203, 206.)

### 3<sup>d</sup>. Action of Covenant or of Trespass on the Case in *Assumpsit*.

These remedies are treated together because, although they can never be concurrent, yet they are strictly correlative; the action of covenant lying when the agreement not to commit waste is under seal, and trespass on the case *in assumpsit* when the agreement is not under seal.

For voluntary or commissive waste, trespass *on the case* is the most usual remedy; but if there is also a demand for money, as for rent, or for damages for some breach of contract other than the doing of waste, it may be more eligible to join in one suit the claim for damages for waste and that for the money, or for the breach of other contracts; and then the action must be trespass *on the case in assumpsit*, if the agreement be not under seal, and covenant if it be. (1 Chit. Pl. 116, 135-'6.) There seems to be no doubt that in case of an agreement not to do waste, the landlord has his election in case of waste done, to bring either case for the waste, or the appropriate action for the breach of the agreement. If by the special agreement the landlord acquires a new remedy, he does not therefore lose that which he had before. (1 Chit. Pl. 160-'61; Kinlyside v. Thornton & als. 2 W. Bl. 1111, 1113; Greene v. Cole, 3 Saund. 252 a and b, n. (7); Pomfret v. Ricroft, Id. 323 b, n. (7).) And sometimes it will be advantageous to the lessor to prefer the action on the agreement; for whilst destruction wrought by the act of God, or of a public enemy, or other inevitable accident, is not waste, and therefore no action lies for it as such, yet if the lessee has obliged himself by agreement to rebuild or repair, without making any exception, he is bound to do it, even though the injury be brought about, without his default, by the act of God, or other inevitable casualty. (Walton v. Waterhouse, 3 Saund. 422, n. (2); Chesterfield v. Bolton, Com. Rep. 627; Bullock v. Donmitt, 6 T. R. 650; Brecknock Nav. v. Pritchard, 6 T. R. 750; Ross v. Overton, 3 Call. 319.)

On the other hand it may sometimes be expedient to eschew the action upon the agreement, and bring *case* for the waste. Thus, it is provided by statute in Virginia (V. C. 1873, ch. 113, § 19; V. C. 1887, ch. 108, § 2455), that no *covenant or promise* by a lessee that he will leave the premises in good repair, shall have the effect, if the buildings are destroyed by fire or otherwise, without fault or negligence on his part, of binding him to erect such buildings again, unless there be other words showing it to be the intent of the parties that he should be so bound. In such a case, therefore, whilst the lessee could not be subjected upon the *agreement*, he would still be liable in an action upon the *case*, as for waste. Hence, in *Maggort v. Hansbarger* (8 Leigh, 532), had the action been *case* for the waste, instead of *assumpsit* upon the agreement, the plaintiff, it would seem, must have recovered. And so, *perhaps*, in *Thompson v. Pendell* (12 Leigh, 591), although it was decided that upon the special agreement in that case *no rent* could be recovered, yet the lessor might possibly have recovered the value of the property in an action as for *waste*.

7<sup>h</sup>. Forfeiture of Copyhold Estates, by Breach of the Customs of the Manor.

As we have no copyhold estates in Virginia, it will suffice to refer to 2 Bl. Com. 284.

8<sup>h</sup>. Forfeiture by Bankruptcy.

The general nature of bankrupt laws is pretty well explained by Blackstone (2 Bl. Com. 285 & seq.); and the proceedings under the English bankrupt system, to which our own is much assimilated, (when there was a bankrupt law in force), are set forth by him at large in 2 Bl. Com. 471 & seq. See 3 Min. Insts. ch. XII.

Congress is clothed by the Constitution of the United States with the power to "establish uniform laws on the subject of bankruptcies throughout the United States" (Art. I., § viii., 4); and it has exercised the power thus conferred several times. The last bankrupt act was passed 2d March, 1867, and took effect June 1, 1867. (Acts Cong. 1866-7, p. 517, c. 176: Rev. Stats. U. S. §§ 4972 & seq.) It was repealed by act of 7 June, 1878, the repeal to take effect September 1, 1878, (Suppt. to Rev. Stats. U. S. p. 335.)

It will suffice to say that, when it is applied, it vests all a bankrupt's property, of every kind, with a few exceptions, in the assignee, for the benefit of the creditors. (§ 14, James' B'krupt Act, p. 36 & seq.) The subject of bankruptcy will be treated at some length in Vol. 3, ch. XII.; notwithstanding the repeal of the bankrupt law.

2<sup>g</sup>. The Causes of Forfeiture in Virginia.

The doctrine touching forfeiture in Virginia has been already sufficiently explained in connection with the several causes of forfeiture in England.

## CHAPTER XIX.

## V. OF TITLE BY ALIENATION.

5<sup>t</sup>. Title by Alienation.

Alienation is by far the most usual and most important mode of acquiring title to real property *by purchase*, and must be discussed at considerable length, under the heads following, namely: (1), The nature of alienation; (2), The subject-matter thereof; (3), The persons who may aliene lands, and to whom; (4), The modes of effecting the alienation of lands; and (5), The rules for the construction of common assurances; W. C.

1<sup>g</sup>. The Nature of Alienation.

The most usual and universal method of acquiring a title to real estate, as Blackstone remarks, is that by *alienation*, conveyance, or purchase in its limited and popular sense; under which may be comprised any method whereby estates are voluntarily resigned by one man, and accepted by another, whether that be effected by sale, gift, marriage-settlement, devise, or other transmission of property by the mutual consent of the parties. (2 Bl. Dom. 287.)

The general doctrine of the common law, as well in the United States as in England, is that the law of the place where the property is situated, the *lex loci rei sitæ*, exclusively governs real property in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed, and lost only according to the *lex loci rei sitæ*. (Stor. Conf. Laws, §§ 424, 428, 434, 464, 474; *Post* p. ( ), ; 3 Min. Insts. 129.)

Alienation, as a means of acquiring real estate, is not of equal antiquity in the common law of England with that of taking it by descent; for although it is generally admitted that unlimited power of alienation existed prior to the Conquest, in the time of the Saxons, yet the introduction of the system of feuds, which followed close after the Conquest, wrought a total revolution in this particular. (2 Lom. Dig. 2; *Ante*, pp. 64-65.) For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble tenant, or one liable to suspicion, might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity



he could depend. Neither could the feudatory then subject the lands to his debts; for thus the feudal restraint of alienation would have been easily evaded. And as he could not aliene it in his life-time, so neither could he by will defeat the succession, by devising the feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his next apparent or presumptive heir. And, therefore, it was very usual in ancient feoffments to express that the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant. And on the other hand, as the feudal obligation was looked upon as being reciprocal, the lord could not aliene or transfer his seignior, without the consent of his vassal; for it was esteemed unreasonable to subject a feudatory, without his own consent, to a new superior, with whom he might have a deadly enmity; or even to transfer his fealty, without his being thoroughly *apprized of it*, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighboring clan. This consent of the vassal was expressed by what was called *attorning*, or professing to accept the new lord in the *tourn* or place of the old, which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to *attorn* to the purchaser, and to become his tenant the grant or contract was in most cases void, or at least incomplete; which was also an additional clog upon alienations. (2 Bl. Com. 287-'8.)

But by degrees this feudal severity is worn off; and experience has shown that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are perfectly free and unrestrained. (2 Bl. Com. 288.) Let us, therefore, consider under this head the several relaxations which, in the lapse of seven centuries, have occurred: (1), In respect to the *absolute sale* of lands; (2), In respect to *charging lands* with debts; (3), In respect to the *devising or willing* of lands; and (4), In respect to the *attornment* of tenants, concluding with a view of the doctrine touching alienation of lands in Virginia;

W. C.

1<sup>h</sup>. Relaxation in England of the Common Law Doctrine in Respect to the *Absolute Sale* of Lands; w. c.

1<sup>i</sup>. Laws of Hen. I., c 70.

A law of Henry I., c. 70 (say A. D. 1130), allowed a man to dispose of lands which *he himself had pur-*

*chased*, so as not wholly to disinherit his children; but he was still prohibited to aliene his paternal estate derived by inheritance from his ancestor. (2 Bl. Com. 288-9.) And by a subsequent ordinance of unascertained date, the tenant might sell *all his own acquisitions*, if he had purchased them expressly, to him *and his assigns*; and also one-fourth of the lands he inherited, *without consent of the heir*. (2 Bl. Com. 289; Lamb. De Priscis Anglorum Legibus, 203, c. 70.)

2<sup>d</sup>. Statute *Magna Charta*, 9 Hen. III., c. 32.

By *magna charta* it was provided (A. D. 1224), that no sub-infeudation should be permitted, unless sufficient was left to answer the services due the superior lord, which seems to have been commonly estimated at *one-half*. (2 Bl. Com. 289.)

3<sup>d</sup>. Statute *Quia Emptores*, 18 Edw. I., c. 1.

By the statute of *quia emptores terrarum* (A. D. 1290), free alienation of all fee-simple lands not held of the crown was permitted, *without consent of the lord*; but the practice of *sub-infeudation* was abolished; and it was prescribed that the lands aliened should thenceforth be held, *not of the grantor* (as before they had been), but of the *chief lord of the fee*, by the same services whereby the grantor had held. But this license was not at this time extended to the king's tenants *in capite*. (2 Bl. Com. 289.)

4<sup>d</sup>. Statute 1 Edw. III., c. 12.

By the statute 1 Edw. III., c. 12 (A. D. 1327), the king's tenants *in capite* were permitted to aliene freely, *on payment of a fine to the king*. (2 Bl. Com. 289.)

5<sup>d</sup>. Statutes 7 Hen. VII., c. 3, and 3 Hen. VIII., c. 4.

These statutes, which were *temporary* (A. D. 1492 to 1512), allowed all persons attending the king in his wars to *aliene their lands without license*, and therefore without *fine*, and relieved them from other feudal burdens. (2 Bl. Com. 289.)

6<sup>d</sup>. Statute 12 Car. II., c. 24.

By the statute 12 Car. II., c. 24 (A. D. 1660), all  *fines for alienation*, along with most other feudal burdens, were in all cases totally *abolished*. (2 Bl. Com. 289.)

2<sup>h</sup>. Relaxations in England of the Common Law Doctrine in Respect to *Charging Lands with Debts*; w. c.

1<sup>d</sup>. Statute Westm. II., 13 Edw. I., c. 18.

The statute 13 Edw. I., c. 18 (A. D. 1285), allowed a *moiety* of the *freehold lands* of the debtor to be charged with judgment debts, by execution of *elegit*; and the *whole* by recognizance in the nature of a *statute-merchant*. (2 Bl. Com. 289.)

2<sup>d</sup>. Statute-Staple, 27 Edw. III., c. 9.

This statute (A. D. 1354) enabled a creditor, by means of a recognizance, in the nature of a *statute-staple*, to charge *the whole* of the debtor's *freehold lands* with his debt. (2 Bl. Com. 289.)

3<sup>i</sup>. Statute 23 Hen. VIII., c. 6.

By this statute (A. D. 1532), the debtor's lands were allowed to be charged with other recognizances similar to those of statute-merchant and statute-staple. (2 Bl. Com. 290.)

4<sup>i</sup>. Statute 34 Hen. VIII., c. 4, and Other Statutes of Bankruptcy.

*All one's lands*, and other property, were by these statutes (A. D. 1543) subjected to the bankrupt's debts. (2 Bl. Com. 290, 474, &c.)

3<sup>b</sup>. Relaxations in England of the Common Law Doctrine in Respect to *Devising Lands*; w. c.

1<sup>i</sup>. Statute of Wills, 32 Hen. VIII., c. 1, Explained by 34 Hen. VIII., c. 5.

Lands in *fee-simple* were allowed to be devised by these statutes (A. D. 1541, 1543); that is *two-thirds* of one's *chivalry*, and *all* of his *socage lands*, provided the will were *in writing*. (2 Bl. Com. 290, 375.)

2<sup>i</sup>. Statute of *Frauds and Perjuries*, 29 Car. II., c. 3, § 5.

By this famous statute (A. D. 1677) the ceremonies were prescribed with which wills of lands must be executed; experience having demonstrated that to require no more than that they should be *in writing*, would always yield a plentiful crop of frauds and perjuries. This statute did not enlarge the power of devising; but a previous statute, passed the same year of Charles's return from his exile (12 Car. II., c. 24, A. D. 1660), by converting the *chivalry* into *socage* tenures throughout England, did very much enlarge the subject-matter of devise. (2 Bl. Com. 376.)

3<sup>i</sup>. Statute 7 Wm. IV., & 1 Vict. c. 26, &c.

This statute (A. D. 1837), and some following ones (15 & 16 Vict. c. 24; 28 & 29 Vict. c. 72,) slightly changed the mode of making wills of lands as prescribed by 29 Car. II., c. 3, § 5. (Wms. Real Pr. 187-'8.)

4<sup>b</sup>. Relaxation in England of the Common Law Doctrine in Respect to *Attornment* of Tenants.

Attornment of tenants was made no longer necessary to complete the grant or conveyance, by statute 4 and 5 Anne, c. 16 (A. D. 1706); and by 11 Geo. II., c. 19 (A. D. 1738), the attornment of any tenant affects the possession of any lands only when made with *consent of the landlord*, etc., or by direction of a court of justice. (2 Bl. Com. 290.) See V. C. 1873, ch. 134, § 4; V. C. 1887, ch. 127, § 2784.

5<sup>b</sup>. The Doctrine in Virginia Touching the Alienation of Lands; w. c.

1<sup>i</sup>. Doctrine in Virginia Touching the Conveyance of Lands.

No estate of inheritance, or freehold, or for a term of more than five years in lands, shall be conveyed *unless by deed* or will (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413); but *any interest in or claim* to real estate may be so disposed of; and any estate therein may be made to commence *in futuro*, as well as *in presenti*, by deed, in like manner as by will. (V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2417.) Yet, notwithstanding the provision requiring a deed or will to convey an estate in lands exceeding five years, we have seen that, without any writing, a court of equity will raise *implied, resulting, and constructive trusts*, in pursuance either of the intention of the parties, or of the justice of the case, in order to suppress fraud and violation of good faith. (*Ante*, pp. 254 & seq.; Bank of U. States v. Carrington, 7 Leigh, 566; Laws v. Law, 76 Va. 527; Kane v. O'Coners, 78 Va. 76 '7; Sinclair v. Sinclair, 79 Va. 42; Gregory v. Pesples, 80 Va. 358; Morgan v. Fisher, 82 Va. 417; Beecher v. Wilson, 84 Va. 817-'18.)

It will be observed, that from the principle that no estate exceeding five years can be conveyed except by deed or will, it follows that land once vested in the grantee or devisee by deed or will, for such an estate, cannot be divested merely by cancelling the deed, or by a *verbal* disclaimer of title under the will, but only by deed or will. (Grayson v. Richards, 10 Leigh, 57.)

2<sup>i</sup>. Doctrine in Virginia as to *Charging Lands with Debts*.

Lands may be charged with debts in Virginia in various ways, and, amongst others, by means of *mortgages and deeds of trust* (*Ante*, pp. 332 & seq. 340; V. C. 1873, ch. 113, §§ 5, 6; V. C. 1887, ch. 108, §§ 2441, 2442); by means of *judgments and decrees*, originally through the execution of *elegit*, which, however, is now abolished, making it requisite in every case to resort to a court of equity (*Ante*, pp. 301 & seq.; V. C. 1873, ch. 182, §§ 1, 6, 9; *Id.* ch. 183, § 26; V. C. 1887, ch. 174, §§ 2337, 3567, 3571; *Id.* ch. 175, § 3581); by means of *builders' liens*, reserved by contract in writing, or asserted, by claim, accompanied by a sworn statement of the account, filed in the clerk's office of the county or corporation court, in favor of mechanics employed in the erection or repair of houses (V. C. 1873, ch. 115, §§ 2-5; V. C. 1887, ch. 110, §§ 2475 & seq.); by means of a *lis pendens*, or notice of a pending suit duly registered, (V. C. 1873, ch. 182, § 5; V. C. 1887, ch. 141, § 2971); by means of an *attachment*, (V. C. 1873, ch. 148, § 12; V. C. 1887, ch. 174, § 3566); which, however, when against the estate of a *non-resident*, must be duly registered, (V. C. 1873, ch. 182, § 5; V. C. 1887, ch. 174, § 3566); and by



means of the *bankrupt act*, now repealed, (14 U. States Stats. 517 ; Abb. U. S. Pr. 96 & seq., 357 & seq.)

### 3<sup>d</sup>. Doctrine in Virginia as to *Devising Lands*.

Every person of sound mind, over the age of twenty-one years, and not a married woman, may, by will duly executed, dispose of *any estate, right or interest to which he shall be entitled at his death*, and which, if not so disposed of, would devolve upon his heirs, personal representatives, or next of kin ; notwithstanding he may become so entitled *subsequently to the execution of the will*. And a married woman may also make a will of her *separate estate*, or in the exercise of a *power of appointment*. (V. C. 1873, ch. 118, §§ 2, 3 ; V. C. 1887, ch. 112, §§ 2512, 2513.) And it is enacted (in close imitation of the English statutes, 29 Car. II., c. 3, § 5, and 7 Wm. IV. & 1 Vict. c. 25, § 3), that no will shall be valid unless it be *in writing*, and *signed by the testator*, or by some other person in his presence and by his direction, in such manner as to make it *manifest* that the name is *intended as a signature* ; and moreover, unless it be *wholly written* by the testator, the signature shall be made or the will acknowledged by him in the presence of at least *two competent witnesses*, present *at the same time* ; and such witnesses shall *subscribe the will* in the *presence of the testator*. (V. C. 1873, ch. 118, § 4 ; V. C. 1887, ch. 112, § 2514.)

### 4<sup>d</sup>. Doctrine of Attornment of Tenants in Virginia.

We have enacted substantially the English statutes of 4 & 5 Anne, c. 16, and 11 Geo. II., c. 19, touching attornment of tenants ; namely, that “ a grant or devise of a rent, or of a reversion or remainder, shall be good and effectual without attornment of the tenant ; ” and “ the attornment of a tenant to any stranger shall be void unless it be with the consent of the landlord of such tenant, or pursuant to or in consequence of the judgment, order, or decree of a court. ” (*Ante*, p. 638 ; V. C. 1873, ch. 134, §§ 3, 4 ; V. C. 1887, ch. 127, §§ 2783, 2784 : *Miller v. Williams*, 15 Grat. 221.)

## 2<sup>g</sup>. The Subject-Matter of Alienation ; w. c.

### 1<sup>h</sup>. The Doctrine at Common Law Touching the Subject-Matter of Alienation, as Respects Real Estate.

At common law a grantor can convey no title to lands, unless it be fortified and sanctioned *by the possession*. The *naked right*, whether it be the right of possession or the right of property, is not capable of being conveyed, lest it should enable the great men of large social and political influence to obtain pretended titles, whereby justice might be trodden down, and the weak oppressed. But this principle does not hinder reversions and vested remainders from being granted, nor contingent remainders, where the owner is ascertained, because the possession of the particular ten-

ant is the possession of him in remainder or reversion. (2 Bl. Com. 290, and n. (6).)

2<sup>h</sup>. The Doctrine by the Statute of *Pretensed Titles* (32 Hen. VIII., c. 9), Touching the Subject-Matter of Alienation.

By the statute touching *pretensed titles* no person was allowed to *convey or take*, or to *bargain* to convey or take, any *pretensed* title to lands or tenements, unless the grantor, or those under whom he claimed, shall have been in possession of the same, or of the reversion or remainder thereof, *one whole year* next before, under penalty of forfeiting the *whole value* of the lands, etc. And this was the law of Virginia until 2d July, 1850, when the Revised Code of 1849 took effect (4 Bl. Com. 135-'6; 1 R. C. 1819, ch. 103). Under this state of the law, it was the well established doctrine that a conveyance of land in the *adversary possession* of another person was *void at common law*, independently of the statute of pretensed titles; but that, although the grantor were not in *actual*, yet if he were in *statutory* possession, as he always would be, supposing him to have the best legal title, and the land to be vacant, or not in the *adversary possession* of some one else, the conveyance was good and operative; and (contrary to the usual analogies in transactions to which penalties are affixed), that a conveyance was *never void* merely under the statute of pretensed titles, because the statute *did not in terms so declare!* (Duval & als. v. Bibb, 3 Call, 366-'7; Tabb v. Baird, Id. 480 & seq.; Hall v. Hall, Id. 490; Clay v. White, 1 Munf. 162; Bream v. Cooper, 5 Munf. 10; Hopkins & al. v. Ward & als. 6 Munf. 41; Williams v. Snidow, 4 Leigh, 16, 17 & seq.; Kincheloe v. Tracewell, 11 Grat. 604; Early v. Garland's Lessee, 13 Grat. 8; Middleton v. Arnolds, Id. 490 & seq.; Carrington v. Goddin, Id. 599; Cline v. Catron, 21 Grat. 393.)

For an able vindication of the principle that the penalty in this case did not make the conveyance invalid, which was laid down in Duval & al. v. Bibb, 3 Call, 366-'7; Tabb v. Baird, Id. 480 & seq., and approved by Brooke, P., in 1 Leigh, 254, and by Tucker, P., in 4 Leigh, 17, see Judge Moncure's opinion in delivering the judgment of the court in Middleton v. Arnolds, 13 Grat. 491 & seq.

3<sup>h</sup>. The Present Doctrine in Virginia Touching the Subject-Matter of Alienation, as it Respects Real Estate.

It is declared by statute, as we have seen, that *any interest in, or claim to* real estate, may be disposed of by deed or will; and that any estate may be made to commence *in futuro* by deed, in like manner as by will (V. C. 1873, ch. 112 § 5; V. C. 1887, ch. 107, § 2418); and the power of disposition by will extends to any estate, right, or interest, to which the testator may be entitled at his death, notwith-

standing he may become so entitled subsequent to the execution of the will. (V. C. 1873, ch. 118, § 2; V. C. 1887 ch. 112, § 2512.)

The terms of the clause first cited, allowing *any interest in, or claim to* real estate to be disposed of, are held to apply to transactions *anterior* as well as *subsequent* to the statute, and to authorize in such cases an action in the name of the grantee in a deed, just as, under corresponding terms in the former statute of wills, it was held in *Taylor's Devises v. Rightmire*, 8 Leigh, 468, that a writ of right might be maintained by a devisee, the right of action being esteemed incident to the right of property, and passing with it. (*Carrington v. Goddin*, 13 Grat. 600; *Mustard v. Wohlford*, 15 Grat. 339.)

3<sup>g</sup>. The Persons who may Aliene Lands, and to Whom; w. c.

1<sup>h</sup>. What Persons may Aliene Lands; w. c.

1<sup>i</sup>. The General Doctrine as to who may Aliene Lands.

The general doctrine is that all persons who own lands may aliene them, unless they labor under some peculiar disability. And these disabilities grow either out of, (1), *A want of understanding* sufficient to comprehend the transaction; or (2), *A want of freedom of will*; or (3), *A want of sufficient interest in, or ownership of, the subject-matter.*

2<sup>i</sup>. Exceptions to the General Doctrine as to Who may Aliene Lands.

These exceptions have just been summarily indicated; w. c.

1<sup>k</sup>. Persons Wanting in Understanding Sufficient to Comprehend the Transaction.

This want of understanding may proceed from insanity, infancy, or drunkenness; all of which, for the most part, make the conveyance not void, but voidable, by or on behalf of the party laboring under the disability. (2 Bl. Com. 291 & seq.) But insanity or excessive drunkenness will render it *void*. (1 Chit. Pl. 519; 2 Stark Ev. 379; *Yates v. Boen*, 2 Str. 1104; *Faulder v. Silk*, 3 Campb. 126);

w. c.

1<sup>l</sup>. Persons who are *Non Compos Mentis*.

According to Lord Coke, this phrase, *non compos mentis*, expresses any and every kind of *mental alienation*, and is, he says, the "most sure and legal" for that purpose; including, (1), *Idiots*, who from their nativity are wanting in understanding; (2), *Lunatics*, who sometimes have understanding and sometimes not; (3), *Persons non-sane*, who, by sickness, grief, or other accident, have wholly lost their memory and understanding; and (4), *Persons drunken*, who, by their own vicious act,

have, for a time, deprived themselves of their understanding and memory. (3 Th. Co. Lit. 45-'6.)

In modern times *non-sane* persons include *idiots* and *lunatics*, the latter word being commonly used to signify all who, by any event supervening *after birth*, are deprived of their understanding, whether with or without lucid intervals; whilst *persons drunken* are assigned to a separate class.

A very remarkable doctrine is recognized by Littleton and Lord Coke in the passage above cited (3 Th. Co. Lit. 44-'6), as undoubted law, namely, that if a *non-sane* person executes a conveyance, he shall not plead his want of reason (although his heir may) to invalidate his conveyance, because "no man of full age shall be received in any plea by the law to *disable his own person*;" to which was sometimes added the further reason, that if he were really out of his senses, he *could not know whether he had made the conveyance or not*. (2 Bl. Com. 291-'2; Beverley's Case, 4 Co. 123 b.) For the credit of the law this doctrine has been, in later times, absolutely and wholly repudiated and abandoned; and it is admitted that in all cases the party himself, as well as his heir, may invalidate any conveyance, or other contract, made whilst in a state of mental aberration. (2 Kent's Com. 451; 1 Stor. Eq. § 227; 2 Bl. Com. 292, and n. (9).)

In respect to the *amount* of mental weakness or disturbance which will invalidate a conveyance, or other contract, the rule is the same as in the case of wills. Mere weakness of understanding is no objection to a man's disposing of his own estate. Courts cannot measure people's capacities, nor examine into the wisdom and prudence of their property-dispositions. If a man be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions. The *test of legal capacity* is said to be that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty. But of course the particular act must be attended with the *consent of his will and understanding*. For although the person may labor under no legal incapacity to do a valid act, or make a contract, yet if the circumstances of the whole transaction taken together, mental weakness being one of them, show that consent, the *very essence of the act*, was wanting, *it is not valid*. (Greer v. Greers, 9 Grat. 332-'3; Stevens v. Vandlieve, 4 Wash. Cir. C. R. 262; Stewart v. Lisenard, 26 Wend. 255; Samuel v. Mar-



shall & ux. 3 Leigh, 567; Stearns v. Beckham, 31 Grat. 379. See Beverly v. Walden, 20 Grat. 147.)

Derangement of mind must be proved by him who alleges it; but if general derangement be once established, and an act is alleged to have been done in a lucid interval, the burden of proof is on the party alleging such lucid interval, to show sanity and competence at the time of the act. And the evidence applying to such interval ought to go to the state and habit of the person, and not relate to a casual interview, as to the degree of self-possession in the particular act. (1 Gr. Ev. § 42; Atto. Gen. v. Parnter, 3 Bro. C. C. 441; Fishburne v. Ferguson, 84 Va. 108.)

The student will observe that the statutes of Virginia authorize the circuit and corporation courts in chancery to direct the sale of the estates of infants and insane persons, at the instance of the guardian of the infant or of the committee of the insane person, whenever the court shall deem that the interest of the infant or insane person will be thereby promoted. (V. C. 1887, ch. 117, §§ 2616, & seq.; Faulkner v. Davis, 18 Grat. 651; Quesenberry v. Barbour, 31 Grat. 491; Palmer v. Garland, 81 Va. 444.)

## 2<sup>1</sup>. Infants Under the Age of Twenty-One Years.

We have seen, in connection with the subject of *guardian and ward* (1 Min. Inst. 510 & seq.), that whilst some contracts of infants are valid and a few void, the great bulk of their transactions of business are *voidable* at the election of the infant upon attaining his age; and that to this latter class belong, at least for the most part, *conveyances of lands*. (2 Kent's Com. 235-'6; 2 Lom. Dig. 11 & seq.; 1 Th. Co. Lit. 172; Zouch v. Parsons, 3 Burr. 1805; Jackson v. Carpenter, 11 Johns. 539; Oliver v. Houdlet, 13 Mass. 237; Wamsley v. Lindenberger, 2 Rand. 478; Tucker v. Morland, 10 Pet. 71; 1 Am. L. C. 251; Mustard v. Wohlford's Heirs, 15 Grat. 337.)

The manner of confirmation of such voidable transactions by infants when they attain their age, and the effect thereof, was also explained in the same connection, and is pretty fully exhibited in Mustard v. Wohlford's Heirs, 15 Grat. 337 & seq. (See 1 Min. Insts. 520 & seq.; 1 Am. L. C. 258 & seq.; Tucker v. Morland, 10 Pet. 58; 3 Rob. Pr. (2d ed.) 227-'8.)

## 3<sup>1</sup>. Persons Drunken.

The plea of drunkenness was formerly regarded with as little favor in civil as it still is in criminal cases. For although Lord Coke classes a drunkard as *non compos mentis*, yet he allows him no indulgence on that account. "As for a drunkard," says he, "who is *voluntarius*

*daemon*, he hath (as has been said) *no privilege thereby*, but what hurt or ill he doth, his drunkenness doth aggravate it." (3 Th. Co. Lit. 46; Beverley's Case, 4 Co. 124 b; 1 Plowd. Com. 19.) But for more than a century this rigorous doctrine has been much relaxed, and it is agreed that drunkenness invalidates, or renders voidable all contracts and transactions where, (1), The drunkenness was brought about by the opposite party; (2), A fraudulent advantage was taken of it; (3), It deprived the party of his reason, and of an agreeing mind. Although in this last case, the inebriate may be made liable for *necessaries*, like a lunatic, upon a *promise implied*. (1 Chit. Cont. (11th Am. ed.) 192; Smith's Cont. 202; 1 Pars. Cont. 311, n. (n); 2 Lom. Dig. 290-'91; Gore v. Gibson, 13 M. & W. 625 & seq.)

The mere fact that one is drunk when he enters into a contract is no ground for setting it aside, at least in equity, unless under one or the other of the circumstances above stated (Johnson v. Medlicott, 3 P. Wms. 130; Cory v. Cory, 1 Ves. Sr. 19; Cooke v. Clayworth, 18 Ves. 15 & seq.; Rich v. Sydenham, 1 Cha. Cas. 202); but when a person's habitual addiction to intoxication renders him extremely subject to imposition, such habits, though not carried to an excess constituting absolute incapacity, lay a ground for strict examination whether any instrument executed by him does not in itself, or in the attendant circumstances, contain evidence that advantage was taken of those habits. (Say v. Barwick, 1 Ves. & Beames, 199; Dunnage v. White, 1 Swanst. 150; Mountain v. Bennet, 1 Cox, 355; Samuel v. Marshall, 3 Leigh, 572);

W. C.

1<sup>m</sup>. Where the Drunkenness is Brought about *by the Opposite Party*.

This is so flagrant a badge of fraud that it always renders the conveyance or contract voidable, both at law and in equity. (Johnson v. Medlicott, 3 P. Wms. 130, n. (A.); Gregory v. Frayser, 3 Camph. 454; Brandon v. Old, 3 Carr. & P. (14 E. C. L.) 410; Harvey v. Pecks, 1 Munf. 518.)

2<sup>m</sup>. Where a *Fraudulent Advantage* is Taken of the Drunkenness.

This, too, is so direct a fraud, as always to render the transaction voidable in all courts. (Cory v. Cory, 1 Ves. Sr. 19; Reynolds v. Waller, 1 Wash. 194; Harvey v. Pecks, 1 Munf. 518; Coke v. Clayworth, 18 Ves. 15 & seq.)

3<sup>m</sup>. Where the Drunkenness has been so Total as to *Deprive the Party of Reason*, and of an *Agreeing Mind*.

Here, without reference to the question of fraud, there being an absolute want of understanding, without which there can be no contract, the conveyance or other transaction is not, as in the other cases, voidable only, but *wholly void*. (Pitt. v. Smith, 3 Campb. 33; Fenton v. Holloway, 1 Stark. (2 E. C. L.) 126; Brandon v. Old, 3 Carr. & P. (14 E. C. L.) 440; Cooke v. Clayworth, 18 Ves. 16; Gore v. Gibson, 13 M. & W. 625; Reynolds v. Waller, 1 Wash. 164; Wigglesworth v. Steers, 1 H. & M. 70; Harvey v. Peck, 1 Munf. 518; Arnold v. Hickman, 6 Munf. 15; Samuel v. Marshall, 3 Leigh, 572.)

2<sup>k</sup>. Persons Wanting in *Freedom of Will*.

Persons wanting in freedom of will are (1), Persons under duress; and (2), Married women;

W. C.

1<sup>l</sup>. Persons Under Duress,

In order to give validity to a contract, the law requires the *free assent* of the party to be charged. Indeed, without freedom of will and choice, it is absurd to talk of *consent* or of contract at all. An agreement or conveyance, therefore, extorted by violence or terror, is voidable by him who is subjected to such constraint. But although it is immaterial whether the constraint proceeds from the other contracting party, or from his agent, or some one acting by collusion with him, yet if no connection is shown to exist between the other contracting party and the perpetrator, the validity of the contract is not affected by any violence, nor, in general, by any *fraud* of which the latter, being such stranger, may have been guilty. (1 Chit. Cont. (11th Am. ed.) 269; Bac. Abr. Duress, (B.); Griffith & als. v. Reynolds, 4 Grat. 46; Talley v. Robinson, 22 Grat. 896.)

And so, on the other hand, the general rule is that the duress must be suffered by the party who enters into the contract; and that if a stranger, not under its influence, enter into an agreement, in order to obviate the duress which another undergoes, the agreement is good. But it seems that the duress to a wife or child would avoid a contract, given under its influence, by the husband or parent. (1 Chit. Cont. (11th Am. ed.) 269; Bac. Abr. Duress, (B.).)

Duress may consist either of *actual* violence, or a *threat* thereof. (1 Bl. Com. 136 '7); and may, therefore consist in, (1), Duress of imprisonment, or (2), Duress by threats;

W. C.

1<sup>m</sup>. Duress of Imprisonment.

The actual violence which constitutes such duress

resolves itself always into *illegal imprisonment*, which may be in the common prison, or elsewhere, provided only it is a restraint of the person, and is unlawful, or if lawful, undue and illegal force be used, or the party is made to endure unnecessary and unlawful privation, as want of food, etc., and in order to free himself from such unlawful restraint, or privation, is induced to make the contract, etc. (1 Chit. Cont. (11th Am. ed.) 269 ; 1 Bl. Com. 136-'7 ; 2 Watts (Pa.) 167 ; Cadaval v. Collins, 4 Ad. & El. (31 E. C. L.) 858.)

2<sup>m</sup>. Duress *Per Minas*, or by Threats.

This is where the party enters into a contract induced by a *reasonable fear* occasioned by threats of, (1), Loss of life ; (2), Loss of *member* ; (3), Mayhem ; (4), Imprisonment. (1 Chit. Cont. (11th Am. ed.) 269 ; Bac. Abr. Duress, (A.).) But a menace of a mere *battery*, or of a *trespass* on lands or goods is not duress, and consequently does not affect the validity of a contract induced thereby ; for the law considers that such a threat is not sufficient to overcome a firm and prudent man, seeing that adequate redress may be obtained for such injuries. Whereas, for serious and actual personal violence, no damage can be an adequate compensation ; and, therefore, even a man of ordinary firmness may be unable to withstand the threat, and immediate danger of such personal mischief. (1 Chit. Cont. (11th Am. ed.) 269-270 ; Bac. Abr. Duress ; Atlee v. Backhouse, 3 M. & W. 642, 650 ; Astley v. Reynolds, 2 Stra. 917 ; Skeate v. Beale, 11 Ad. & El. (39 E. C. L.) 983.)

It is laid down in the old books (Bac. Abr. Duress ; 3 Th. Co. Lit. 69), that a threat to burn one's dwelling is not duress, such as to avoid a bond, etc., made under its influence, because adequate amends may be recovered. But it may well be doubted whether, in modern times, that principle would prevail, burning a dwelling being not only an offence in some circumstances capital, but being incapable of adequate reparation in damages, and seriously endangering life. (1 Chit. Cont. (11th Am. ed.) 272.)

So a threat to prosecute for felony, a friend or near relation, does not constitute such duress as to avoid a note given in consequence of the threat and in order to avert the prosecution. (Keckley v. Union Bank, 79 Va. 465-'6.)

2<sup>l</sup>. Married Women ; w. c.

1<sup>m</sup>. The Reasons why a Married Woman *may not* at Common Law *Convey Her Lands* ; w. c.

1<sup>n</sup>. A Married Woman has, *in Law*, no *Separate Existence*.



She is *one with her husband*, and in law her existence is merged in his, so far as concerns relations of business and property. (2 Lom. Dig. 468.)

2<sup>n</sup>. A Married Woman is *Under the Constraint of Her Husband*.

It is true in fact, as it is in law, that a married woman, in matters of business and property, in which both are concerned, seldom persistently maintains an opinion and will adverse to her husband. His influence is ultimately absolutely controlling, to which if she opposes any resistance at all, it is a vain one; and if occasional exceptions are exhibited, they serve only to make the general rule more noticeable. (2 Lom. Dig. 468.)

2<sup>m</sup>. Doctrine as to a Married Woman's Power to *Dispose of Her Separate Estate*.

We must advert to, (1), The separate estate created *by deed or will*; and (2), The separate estate accruing under the Married Woman's Law;

W. C.

1<sup>n</sup>. The Separate Estate created *by Deed or Will*.

The whole doctrine of the *separate estate* of a married woman is the *creature of equity*, and sets at naught all or most of the principles of the common law touching the marital relation, and also touching property generally. Thus, a wife may be enabled to dispose of her separate estate as freely, and with less solemnity, than a *feme sole*, to charge it merely *by implication*, as a *feme sole* cannot do, and may also be restrained from conveying or charging it at all, a restraint adverse to one of the most settled doctrines of the general law of property. (2 Bl. Com. 293, n. (12); 1 Min. Insts. 345 & seq., 351, 355 & seq.)

In respect to the power of *alienation* of a wife's separate estate, a distinction is made between *real* and *personal* property. (1 Bish. Mar. & Div. §§ 860, 869, and n. 1.) As to personal property, the *jus disponendi* is incident to it in the fullest manner. The wife may dispose of it absolutely at her pleasure, *by deed or will*, as if she were a *feme sole*; unless the instrument which creates the estate and vests it in her shall *impose restrictions*, and then these restrictions will *constitute the law of the case*. (1 Th. Co. Lit. 132, n. (N.); 2 Bright's H. & W. 220 & seq.; 2 Stor. Eq. § 1393; Grigby v. Cox, 1 Ves. Sr. 518; Peacock v. Monk, 2 Ves. Sr. 191; Feltham v. Gorges, 1 Ves. Jr. 46, and n. (a); Peglus v. Smith, Id. 193, and notes; Rich v. Corkell, 9 Ves. 369; Wagstaff v. Smith, Id. 520; Sturgis v. Corp. 13 Ves. 190; Essex v. At-

kins, 14 Ves. 547; Major v. Lansley, 2 Russ. & My. 355; Gore v. Knight, 2 Vern. 535; West v West's Ex'ors, 3 Rand. 373, 376, 389, 392; Vizonneau v. Pegram & als. 2 Leigh, 183; Charles v. Charles, 8 Grat. 486; Nixon v. Rose, 12 Grat. 425; Penn & ux. v. Whitehead, 17 Grat. 503; Burnett v. Hawpe, 25 Grat. 481; Finch v. Marks, 76 Va. 209; Bain v. Buff. 76 Va. 374; Geiger v. Blackley, 86 Va. 330.)

In respect to *real property*, her power of disposition is more circumscribed. If she is not *in terms* allowed, by the instrument which clothes her with the separate estate, to aliene it in some *designated way*, she can do so *only* by will duly executed (V. C. 1873, ch. 112, §§ 3, 5; V. C. 1887, ch. 107, § 2418; Id. ch. 112, § 2513), or by deed executed with the formalities prescribed for married women. (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, §§ 2502, 2503.) And it seems that, though permitted to aliene otherwise than in pursuance of the statute, she is not thereby precluded from adopting the statutory mode. (Lee & al. v. Bk. of U. States, 9 Leigh, 209.) The rents and profits of her separate real estate constitute *personalty*, and may be disposed of accordingly, unless invested in lands. (2 Bright's H. & Wife, 224 & seq.; West v. West's Ex'or, 3 Rand. 373 & seq.; Vizonneau v. Pegram & als. 2 Leigh, 183; Williamson v. Beckham, 8 Leigh, 200; Whiting v. Rust, 1 Grat. 483; Hume v. Hord & als. 5 Grat. 374; Peacock v. Monk, 2 Ves. Sr. 191; Southby v. Stonehouse, Id. 610; Hearle v. Greenbank, 1 Ves. Sr. 301; Hodsden v. Lloyd, 2 Bro. C. C. 534; Churchill v. Dibben, 9 Sim. (16 Eng. Ch. R.) 447, note to Curteis v. Kenrick.)

Where the wife has the power of disposition, she may bestow her separate property as well *on her husband* as on a stranger, and that not by giving it to a third person to give to him, but by conveyance directly to himself (unless where she conveys under the statute). But a court of equity will not give sanction or effect to a conveyance to the husband, without first subjecting the wife to a privy examination, and adopting such other precaution as shall seem needful to ascertain her freedom of action. (2 Stor. Eq. §§ 1395-'6; Bright's H. & Wife, 257; Grigby v. Cox, 1 Ves. Sr. 518; Essex v. Atkins, 14 Ves. 542; Tykes v. Smith, 1 Ves. Jr. 189; Muller v. Bayley & al. 21 Grat. 521.)

As to the wife's power to *charge her separate estate* with debts and other liabilities, (supposing such separate estate to be created by deed or will, as at common law, and not to arise under the Married Woman's Law. (V. C. 1887, ch. 103),) the English doctrine is that, al-

though a married woman is incapable, in general, of charging her *person* during the coverture, with any engagement whatsoever, yet as she may *dispose* of her separate estate *in chattels*, as if she were *sole*, she may charge it also at her pleasure, unless restricted by the instrument creating the estate. And not only may she charge it *directly and expressly*, but also by *inference and implication*. Thus, if a married woman promise to pay money, or to do a collateral thing, the promise, so far as her *person* is concerned, is merely *void*; but if she has separate *personal* estate, or indeed, *real estate* either, she is considered as *intending by the promise*, whether verbal or written, to charge the estate with it; for, it is argued, she must have intended *something* by her promise; and as she must be taken to know that she could not charge her person by it, the promise must be construed (*ut res valeat*, etc.) as designed to pledge her separate estate, notwithstanding the difficulty of conceiving upon what principle she can charge her estate thus, *by implication*, when she is admitted not to be sufficiently a free agent to bind her person by *express words*. (Hulme v. Tenant, 1 Bro. C. C. 16; S. C. 1 Wh. & Tud. L. C. 361 to 363; Murray v. Barlee, 3 My. & K. 223; Owens v. Dickinson, 1 Cr. & Phil. 53-4, and n. (13); 2 Bright's H. & Wife, 252 & seq.)

It is to be regretted that this doctrine, seemingly so full of injustice to married women, and so in conflict with the precaution which the law usually takes to guard against unexpected and undesigned charges and liens upon property, and against which eminent English jurists have entered warm protests (Whistler v. Newman, 4 Ves. 144; Jones v. Harris, 9 Ves. 497; Nantes v. Corrock, Id. 189; Heatley v. Thomas, 15 Ves. 604), is now to be reckoned part of the law of Virginia, not only as to separate *personal*, but as to *real* estate also, with no other qualification than that if it shall appear from all the circumstances that no charge was intended, none ensues. (Woodson v. Perkins, 5 Grat. 351-2; Penn & al. v. Whitehead & als. 17 Grat. 503, 512, 516; Leake v. Benson, 29 Grat. 457; Burnett v. Hawpe, 25 Grat. 451; Darnall v. Smith, 26 Grat. 884 & seq.; McDonald v. Hurst, 86 Va. 885.)

2<sup>m</sup>. The Separate Estate accruing *under the Married Woman's Law*.

But supposing the separate estate to arise under the Married Woman's Law (V. C. 1887 ch. 103), the present law of Virginia withdraws all protection from the wife, providing that a married woman shall have power *by her sole act*, in virtue of the provisions of chapter

103, to convey any estate, real or personal, which is made her separate estate by that chapter. And any conveyance signed by her, though not signed by her husband, may be admitted to record as to such separate estate as if she were unmarried. (V. C. 1887, ch. 111, § 2503.)

3<sup>m</sup>. Doctrine as to a Married Woman's Power to Act as a *Feme Sole*.

A married woman having no separate legal existence, cannot, at common law, in general, act as a *feme sole* during the coverture, not even though the husband have deserted her, nor though they live apart by consent, nor though they be divorced *a mensa, etc.*, unless under the Virginia statute (V. C. 1873, ch. 105, § 13; V. C. 1887, ch. 101, § 2264), there be a decree of *perpetual separation* superadded to the decree of divorce from board and bed. (Bac. Abr. Bar. & F. (M.); 1 Th. Co. Lit. 133-4; Marshall v. Rutton, 8 T. R. 545; Nurse v. Craig, 2 Bos. & P. (N. R.) 148; Hyde v. Price, 3 Ves. Jr. 433; Lewis v. Lee, 3 B. & Cr. (19 E. C. L.) 291; Hookham v. Chambers, 3 Br. & B. (7 E. C. L.) 92; Bogget v. Frier, 11 East. 303; Kay v. Duchesse de Pienne, 3 Camp. 123.)

To this general doctrine, however, there are some marked exceptions. Thus, for her own protection and advantage, a married woman is allowed to act as a *feme sole*,—

(1), Where her husband is *civiliter mortuus*.

At common law this happens when he is *attainted* of treason or felony, has *abjured* the realm, or is *banished* or *transported*. (2 Bl. Com. 121; 4 Do. 380; Portland v. Prodgers, 2 Vern. 104; Newsome v. Bowyer, 3 P. Wms. 38; Lean v. Schutz, 2 Wm. Bl. 1198; Carrol v. Blencon, 4 Esp. 27.)

It seems that in Virginia no *civil death* is possible. (Branch v. Bowman, 2 Leigh, 170; Platner v. Sherwood, 6 Johns. Ch. R. (N. Y.) 118.)

(2), Where the husband is an *alien enemy*. (Deerly v. Duchess of Mazarine, 1 Salk. 116. But see De Wahl v. Braune, 1 H. & N. 181.)

(3), Where the husband is an *alien*, and has never been in Virginia.

See Kay v. Duchesse de Pienne, 3 Campb. 123; Marshall v. Rutton, 8 T. R. 545; 1 Bl. Com. 443, n. (42.)

The former doctrine, laid down in Walford v. Duchesse de Pienne, 1 Esp. 554, and Franks v. Same, Id. 588, that the wife may act as a *feme sole* whenever the husband is an *alien*, if he has gone abroad, is over-



ruled. (Cases *Supra*; *Barden v. Keverberg*, 2 M. & W. 61, 64; 1 Chit. Cont. 252, 253 (11 Am. ed.).)

(4), Where, in *Virginia* there is a decree of *perpetual separation* superadded to a decree of divorce *a mensa, etc.*

Such a decree the statute (V. C. 1873, ch. 105, § 13; V. C. 1887, ch. 101, § 2264) declares shall operate upon the property *thereafter acquired*, and upon the personal rights and *legal capacities* of the parties as a decree of divorce from the bond of matrimony, except that neither party shall marry again during the life of the other.

(5), Where, in *Virginia*, a married woman is a *sole trader*.

By the Code of 1887, following substantially the act of April 4, 1877, a married woman is expressly allowed to be a *sole trader*, and property acquired as such she may dispose of, or may contract concerning, without her husband's concurrence, and as if she were a *feme sole*, save that she does not thereby bind *her person*. And in all contracts touching such transactions she may sue and be sued as if she were unmarried; and her husband is no longer liable in respect to them. (V. C. 1887, ch. 103, §§ 2287 to 2290, 2295.)

(6), A conveyance by a married woman of separate estate acquired under the Married Woman's Law.

Nothing in the Married Woman's Law is to be construed to impair or affect the right of a married woman, *by her sole act*, to convey any estate, real or personal, which is made her separate estate by that law. (V. C. 1887, ch. 111, § 2503.)

4<sup>m</sup>. Method Whereby a Married Woman may Aliene Her Lands; w. c.

1<sup>n</sup>. Method Adopted at *Common Law* to Enable Married Women to Aliene Their Lands.

It will be remembered that a married woman is disabled, at common law, to dispose of her lands, or to make any other contract obligatory upon herself, for two reasons: 1st, Because, *in law*, she is one with her husband, and has no separate existence; and 2ndly, Because of the supposed constraining influence of her husband. Any device which makes a conveyance by her possible must therefore surmount or elude these obstacles. By an act of parliament it might have been done with entire facility; but an act of parliament was not easily obtained in the earlier stages of the law; and meanwhile the daily needs of society pressed strongly for the recognition of married women's alienations in some form. The courts and

lawyers being, therefore, put to their invention, it was observed that no principle forbade a married woman *to be sued*, and so her *oneness* with her husband might be obviated by a collusive suit brought by the intended grantee against the *feme covert* and her husband, in which there might be, by compromise, or by default, a judgment rendered for the land. And as to the husband's constraint, it was easy to elude that objection by an examination of the wife, before judgment was allowed to be entered, so as to satisfy the court that she understood the transaction, and freely assented to it. And thus, by the device of *finer and common recoveries*, but especially of fines, the desired end was achieved; nor was any parliamentary method introduced (notwithstanding the American precedents) until by 3 and 4 Wm. IV. c. 74, aided by 8 and 9 Vict. c. 106, and 19 and 20 Vict. c. 108, a married woman was enabled to convey, as with us, with far greater facility and cheapness, by deed, executed with the concurrence of her husband, and accompanied by a privy examination and acknowledgment before certain public functionaries. (2 Bl. Com. 355; Wms. Real Prop. 226.)

2<sup>n</sup>. Method in Virginia whereby Married Women may *Aliene their Property*.

In common with most of the States of this Union, Virginia has long had a statute providing for married women's conveyances. The *oneness* of the wife with the husband is obviated by the *potency of the statute*, which suspends her incompetency in those cases to which the statute applies, whilst the husband's supposed coercion was done away with by the *privy examination* of the wife. (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502);

W. C.

1<sup>o</sup>. Doctrine Applicable to Conveyances of Married Women.

The allowance of such a conveyance is *an exception* to the general principles of the common law, and must, for that reason, be *construed strictly*. A *literal* compliance with the prescribed forms is not, indeed, required, but any substantial departure therefrom, in whatever particular, will wholly invalidate the instrument. (Currie & al. v. Page & al. 2 Leigh, 620; Tod v. Baylor, 4 Leigh, 513; Countz v. Geiger, 1 Call, 190; Harvey & ux. v. Pecks, 1 Munf. 518.)

2<sup>o</sup>. The Principles to be Observed in Respect to the Transactions of Married Women;

W. C.

- 1<sup>st</sup>. Statute Applied formerly only to *Conveyances* of Lands or Chattels.

It was not, therefore, applicable to any *power of attorney*, nor to any *executory contract*. (Shanks v. Lancaster, 5 Grat. 111; V. C. 1873, ch. 117, § 7.) But by the Code of 1887, a married woman, *not a resident of Virginia*, may in conjunction with her husband by *power of attorney* duly executed, acknowledged and certified as prescribed in §2501, make a valid conveyance. V. C. 1887, ch. 111, § 2511.) And by a subsequent statute such a power is allowed in any case provided it be recorded along with the writing. (Acts 1889-'90, p. 193, ch. 238.) And a *contract to convey* is allowed by the same statute.

- 2<sup>nd</sup>. The Husband Must be a *Party*.

Sexton v. Pickering, 3 Rand. 468.

- 3<sup>rd</sup>. Both Husband and Wife *Must Sign It*.

Tod v. Baylor, 4 Leigh, 498; McClanahan v. Siter, 2 Grat. 280.

- 4<sup>th</sup>. It was required to *Appear* that there was a *Privy Examination* of the Wife.

Healy, &c., v. Rowan, &c., 5 Grat. 431.

- 5<sup>th</sup>. It was required to *Appear* that there was an *Explanation* of the Writing to the Wife.

Hairston v. Randolph, 12 Leigh, 445; Harkins v. Forsyth, 11 Leigh, 294; Bolling v. Teel, 76 Va. 407.

But by the Code of 1887, the privy examination, and the explanation are both dispensed with as it seems to the writer very unadvisedly. (V. C. 1887, ch. 111, § 2502.)

- 6<sup>th</sup>. No Prescribed Requisite Must be Omitted in the Certificate.

Hence, to omit that "she does not wish to retract it," was fatal whilst such a declaration was required. (Grove v. Zumbro, 14 Grat. 516.)

- 7<sup>th</sup>. No Other Disability is Obviated Save that of *Coverture*.

The statute declares that when *duly executed and recorded*, the deed shall convey the estate of the wife "as effectually as if she were an unmarried woman," (§ 7.) Hence, as no other disability but *coverture* is removed, *infancy* will invalidate the deed, as in other cases. (Thomas v. Gammel & ux. 6 Leigh, 9.)

The circumstances to be observed under the Code of 1887, and a subsequent act, are the following, viz.:

1. The statute applies to *conveyances of lands or chattels*, to *contracts*, and to powers to convey.

2. The husband as well as the wife *must be a party*.

3. Both husband and wife *must sign it*.

4. It must be acknowledged before the proper functionaries, or certified by the proper officer to have been proved by two witnesses.

5. It must be admitted to record *as to the husband as well as the wife*.

And then it is provided that the deed shall operate to convey from the wife her right of dower, and pass all right, title and interest, which at the date of the writing she may have in the estate conveyed thereby, as if she were then *an unmarried woman*. (V. C. 1887, ch. 111, § 2502; Acts, 1889-'90, p. 193, ch. 238.)

And now, by Acts 1889-'90, a married woman may *contract to convey* any estate, real or personal, in conjunction with her husband, *by writing* duly recorded, or even by virtue of a *power of attorney*, duly recorded; and such writing executed by husband and wife or executed under a power of attorney shall, when recorded, operate to pass from the wife all right, title and interest of every nature which at the date of the writing she may have in such estate, as if she were an unmarried woman. But such writing shall not operate on the wife by means of any covenant or warranty contained therein, which is not made with reference to her separate estate as a source of credit, or which, if it relate to her right of dower therein, or to any interest other than her own, is not made with reference to her separate estate as a source of credit. (Acts, 1889-'90, p. 193, ch. 238.)

3<sup>k</sup>. Persons Wanting in Complete Ownership of the Subject-Matter ; w. c.

1<sup>l</sup>. Persons Attainted of Treason or Felony.

Persons attainted of treason or felony are, at common law, incapable to convey from the time of the offence committed, because from that time the lands are liable to be forfeited to the crown. (2 Bl. Com. 290-'91.)

In Virginia, as no such forfeiture ensues, no such disability exists. (V. C. 1873, ch. 195, § 5; V. C. 1887, ch. 190, § 3883.)

2<sup>l</sup>. Aliens.

At common law aliens may *take* lands by *purchase*, or act of the party, but not by *descent*, which is an act of the law ; nor can they, although they may *take* by purchase, *hold* even in that case. Hence, as lands in the possession of an alien are always liable to be forfeited



to the crown or commonwealth, he can make no good title thereto. (2 Bl. Com. 293.)

In Virginia, "any alien, *not an enemy*, may acquire by purchase or descent, and hold real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens." An alien *enemy* is subject to all the common law disabilities. (V. C. 1873, ch. 4, § 18; V. C. 1887, ch. 6, § 43.)

### 3<sup>l</sup>. Corporations.

In England, corporations acquiring lands without license from the crown, contrary to the statutes of *mortmain*, are, by those statutes, liable to forfeit the same, and therefore can convey no perfect title thereto. (2 Bl. Com. 268; *Ante*, pp. 589 & seq.)

In Virginia the same result is supposed to follow in case of lands acquired by a corporation in excess of the quantity allowed by the charter, or if the charter is silent, in excess of the quantity required by the objects of the corporation (*Ante*, p. 596). *Sed, quære*. (V. C. 1873, ch. 56, § 2; V. C. 1887, ch. 46, § 1070; 1 Lom. Dig. 14; *Ante*, p. 596.)

### 2<sup>h</sup>. Persons to Whom Lands *may be Alienated*; w. c.

#### 1<sup>l</sup>. The General Doctrine as to the Persons to Whom Lands may be Alienated.

In general, lands may be aliened *to any persons whomsoever*, the exceptions being fewer than in the case of persons aliening; because every conveyance is supposed to be for the benefit of the grantee. (2 Bl. Com. 292-'3; 2 Th. Co. Lit. 214; Shepp. Touchst. 235.)

#### 2<sup>l</sup>. Exceptions to the General Doctrine; w. c.

##### 1<sup>k</sup>. Persons Wanting in Understanding, or in Freedom of Will.

Persons wanting in understanding, or in freedom of will, may take as alienees; and as it is usually for the alienee's benefit, the conveyance will be commonly good until the party, being restored to competency, shall plainly declare his intention to waive it. Thus, an infant or non-sane person may be a grantee, with the privilege, upon the removal of his disability, to agree to or avoid it, without any cause shown; a privilege which descends also to his heir, if he dies before the removal of the disability, or before agreeing to the transaction. And so, when a married woman is grantee, the conveyance is *not void*, as it is where she is grantor, but continues good during coverture, unless avoided by the husband's dissent; and, after the coverture ended, may be avoided or confirmed by her or her heirs. (2 Bl. Com. 292-'3; 2 Lom. Dig. 24, 377-'8; 2 Th. Co. Lit. 214-'15; Shepp. Touchst. 235.)

2<sup>k</sup>. Persons Insufficiently Designated.

Persons insufficiently designated, so that it is not reasonably certain who is intended, can take nothing by any sort of conveyance. So if the *beneficial object* for which the conveyance is designed be undefined, the conveyance is void. Hence, a conveyance to an *unincorporated association* (as a religious congregation, etc.), or to the unborn bastard child of *such a man*, or for an object of general philanthropy (as the establishment of a place of education, or the benefit of the trade of a town), is, independently of statute, inoperative and void. But see the case of Prot. Episc. Ed. So. v. Churchman, 80 Va. 755, which as to *charities*, lays down a much more latitudinous doctrine, corresponding to Vidal v. Girard, 2 How. 127. Literary charities, however, for *educational purposes* are, with some qualifications, made valid in Virginia *by statute*, and so, to a very limited extent, are conveyances (but *not deirges*), for the benefit of religious and benevolent associations. (Baptist Association v. Hart, 4 Wheat. 372; Gallego's Ex'ors v. Attorney-Gen'l, 3 Leigh, 450; 1 Rep. Leg. 80, &c.; Lit. Fund v. Dawson, 10 Leigh, 148; Wheeler v. Smith, 9 How. 55; Maund's Adm'r v. McPhail, 10 Leigh, 199; Vidal v. Girard's Ex'ors, 2 How. 127; 3 Lom. Dig. 181, &c., 189, &c.; V. C. 1873, ch. 77, §§ 2 & seq.; Id. ch. 76, §§ 8 & seq., 13 & seq.; V. C. 1887, ch. 65, §§ 1420 & seq.; Id. ch. 64, §§ 1398 & seq.; Kelly v. Love, 20 Grat. 124; Kinnaird v. Miller's Ex'or, 25 Grat. 119 '20 & seq.; Roy v. Rowzie, 25 Grat. 599.) Thus it is enacted, that "Every conveyance, *devise or dedication*, shall be valid, which, since the first day of January, 1777, has been made (that is, down to February 3, 1842); and every conveyance shall be valid which hereafter shall be made of *land* for the *use or benefit* of any religious congregation, as a place for *public worship*, or as a *burial place*, or a *residence for a minister*; or for the *use or benefit of any church or religious society*, for a *residence for a bishop, or other minister or clergyman, who, though not in special charge of a congregation, is yet an officer of such church or religious society, and employed under its authority and about its business; and the land shall be held for such use or benefit, and for such purpose, and not otherwise.*" (V. C. 1873, ch. 76, § 8; V. C. 1887, ch. 64, § 1398.) The quantity of land is limited to not more, at any one time, than "two acres of land in an incorporated town, nor more than seventy-five acres out of such town." (V. C. 1873, ch. 76, § 12; V. C. 1887, ch. 64, § 1403.) And in like manner, when books or furniture are given or acquired for the benefit of a congregation, church or religious society, *to be used on*

*the said land, in the ceremonies of public worship, or at the residence of the minister, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, and upon the same trusts.* (V. C. 1873, ch. 76, § 10; V. C. 1887, ch. 64, § 1401.)

Similar provisions are made in favor of benevolent associations, such as any society of freemasons, oddfellows, sons of temperance, or any other benevolent or literary association. (V. C. 1873, ch. 76, §§ 13-16; V. C. 1887, ch. 64, § 1407.)

Provision is also made for any of the foregoing associations suing or being sued through their trustees, and for the sale or mortgage of their property under the direction of a court of chancery. (V. C. 1873, ch. 76, §§ 11, 13; V. C. 1887, ch. 64, §§ 1402, 1405, 1406, 1407.)

See 1 Min. Insts. pp. 540 & seq.

The certainty or uncertainty of the *trustee* is wholly immaterial, for however vaguely or obscurely he may be designated, or although none be designated, yet equity will supply a trustee in pursuance of its maxim, "never to suffer a trust to fail for want of a trustee." (Charles & al. v. Hunnicutt, 5 Call, 312; 2 Stor. Eq. §§ 976, 1059; 2 Pom. Eq. § 1007, and n. 2; Adams v. Adams, 21 Wal. 102.)

3<sup>k</sup>. Persons who, by Law, Cannot *Hold Lands*.

The common law makes a merit of allowing lepers, bastards, and persons however deformed, yet having human shape, to take and hold lands like other persons, whilst it denies the right either to take or to hold to those whom it designates as *monsters*, not having human shape, a sort of being which, we have seen, to be purely imaginary and impossible. There are, however, several classes of persons who are admitted freely to *take*, but whose capacity to *hold* requires some exposition, namely: (1), Aliens; (2), Corporations; and (3), Persons attainted;

W. C.

1<sup>1</sup>. Aliens.

The common law, under no circumstances, permitted aliens to *hold* lands, save that persons engaged in trade might hire habitations and houses of business; and any alien who presumed to acquire any permanent estate in real property, whether in fee-simple, for life, or for years, was liable to have the same immediately escheated to the crown. (*Ante*, Vol. I., pp. 164 to 166.) This rigor, however, is with us confined to *alien enemies*, it being enacted that "an alien, *not an enemy*, may acquire by purchase or *descent*, and may *hold* real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens." (V. C. 1873, ch. 4, § 18; V. C. 1887, ch. 6, § 43.)

2<sup>l</sup>. Corporations.

The restrictions upon the power of corporations, at common law and by statute, to *hold lands* (there is no restriction upon their *taking them*) has been fully explained in Vol. I., pp. 611 & seq., and *Ante*, p. 589 & seq., and 596-7. It will be remembered that the doctrine in Virginia, as declared by statute, is that "No incorporated company shall hold *any more real estate* than is proper for the purposes for which it is incorporated." (V. C. 1873, ch. 56, § 2; V. C. 1887, ch. 46, § 1070.) And although no express provision is found enacting that any *excess* shall be forfeited to the commonwealth, yet that conclusion seems to be the result of the several enactments upon the subject. (*Ante*, pp. 596-7; Vol. I., 612.)

3<sup>l</sup>. Persons Attainted of Treason or Felony.

A person attainted of treason or felony may, at common law, before or after attainder, be a grantee; but he *cannot hold* the thing granted; for if the king or lord will, he may have it from him by forfeiture or escheat. (2 Th. Co. Lit. 214; Shepp. Touchst. 235; 3 Prest. Abstr. 407; *Ante*, pp. 556, 588 & seq.)

In Virginia it is enacted (V. C. 1873, ch. 195 § 5; V. C. 1887, ch. 190, § 3883) that no "attainder of felony shall work a corruption of blood or forfeiture of estate;" and thus persons attainted may not only take, but may hold and dispose of lands as freely as others. (*Ante*, p. 588.)

4<sup>k</sup>. Persons Occupying Fiduciary Relations.

Trustees, agents, attorneys, and other persons occupying a fiduciary relation, cannot lawfully deal *for their own benefit*, touching the subject-matter committed to them; and any such transactions are regarded as *constructively fraudulent* (however transparently fair they may actually be), and are voidable at the *election of the beneficiary*. (Fox v. Mackreth (2 Bro. C. C. 400; 2 Cox, 320), 1 Wh. & Tnd. L. C. 105, 126 & seq.; 1 Stor. Eq. §311 & seq.; Buckles v. Lafferty, 2 Rob. 294; Bailey's Adm'x v. Robinson, 1 Grat. 9; Howerly v. Helms, 20 Grat. 7; Michoud v. Girod, 4 How. 554; 3 Sugd. Vend. 225.)

4<sup>g</sup>. The Modes of Effecting Alienation of Lands.

The modes of effecting the alienation of lands are known as *common assurances*, whereby every man's estate is assured to him. They are of *four kinds*; namely, (1), By matter *in pais*; (2), By matter *of record*; (3), By special custom of particular places; and (4), By devise. (2 Bl. Com. 294.)

W. C.

1<sup>h</sup>. Alienation by *Matter in Pais*.

The development of the subject of alienation by *matter in pais* will lead us to inquire into, (1), The doctrine as to



the matter *in pais* necessary for the conveyance of lands; (2), The general nature of *deeds*; and (3), The several species of *conveyances*.

W. C.

1<sup>i</sup>. Doctrine as to the *Matter in Pais*, Necessary for the Conveyance of Lands; w. c.

1<sup>k</sup>. Doctrine at Common Law, as to Conveyance of Real Property by *Matter in Pais*, and Contracts to Convey.

No writing was in any case required, at common law, save for the conveyance of *incorporeal rights*, which, being incapable of actual delivery, could pass only *by deed*, and were, therefore, said to *lie in grant*. For the transfer of *terms for years*, nothing was required but a verbal agreement, consummated by the *lessee's taking possession*, whether the lessor were *present or not*, or whether he were *living or not*; for the transfer of *freeholds* there must have been an agreement *in presenti*, and an actual *delivery* of the possession of the freehold *by the vendor to the vendee, i. e., a livery of seisin*. Hence, lands, as to the immediate freehold thereof, were said to *lie in livery*. (2 Bl. Com. 144; *Ante*, pp. 80, 184; 1 Th. Co. Lit. 630, and n. (6); Id. 318, and n. (T.); 2 Do. 404, n. (A.); Id. 224, n. (A).)

Contracts to convey either a freehold or a term for years, may, at common law, be *by parol*, without any writing whatever. (*Maldon's Case*, 1 Cro. (Eliz.) 33; *Burton v. Crowell*, Id. 306; 1 Th. Co. Lit. 628, 630, and n. (6).)

2<sup>k</sup>. Doctrine by Statute as to Conveyances of Real Property by *Matter in Pais*; w. c.

1<sup>i</sup>. Doctrine by Statute in England; w. c.

1<sup>m</sup>. Doctrine by Statute of Frauds and Perjuries, 29 Car. II., c. 3, §§ 1 to 4.

All original estates of freehold, and for a term exceeding *three years*, can by this statute, be *conveyed* only by *deed or writing*; and all *assignments*, whether of lease for years, or for life, and all *surrenders* of the same must also be by deed or note in writing. Freeholds, however, must be accompanied by *livery of seisin*. Those not exceeding three years can be conveyed by *parol agreement and entry*, as at common law. (2 Th. Co. Lit. 404, n. (A.); Id. 566, n. (5).)

*Contracts* for *future conveyances*, or for *future leases*, for *any interest whatever* in lands, are by § 4 required to be *in writing*, and signed by the party to be charged, or his agent.

2<sup>m</sup>. Doctrine by Stat. 8 & 9 Vict. c. 106.

All lands, as to the *immediate freehold* thereof, *lie in grant*, as well as *in livery*.

2<sup>l</sup>. Doctrine by Statute in Virginia; w. c.

1<sup>m</sup>. Doctrine by Statutes of *Conveyances*, and of *Parol Agreements*.

No estate of inheritance, or freehold, or for a term of *more than five years* in lands, shall be *conveyed unless by deed or will*. (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.)

No action shall be brought upon any *contract* for the sale of real estate, or (for) the lease thereof for *more than a year*, unless the contract, or some memorandum or note thereof, be *in writing*, and signed by the party to be charged thereby, or his agent. (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840.)

2<sup>m</sup>. Doctrine by *Statute of Grants*, Corresponding to 8 & 9 Vict. c. 106.

All real estate shall, as regards the conveyance of the *immediate freehold* thereof, be deemed to lie *in grant* as well as *in livery*. (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417.)

Seeing, therefore, that a *deed* is the common instrument whereby alienation *in pais* is accomplished, it will be proper to bestow much pains in determining its nature and requisites, and in ascertaining the circumstances which may affect the validity of such instruments.

## CHAPTER XX.

### OF ALIENATION BY DEED.


2<sup>l</sup>. The General Nature of Deeds.

This topic involves the discussion of, (1), What a deed is; (2), The several sorts of deeds; (3), The requisites of a deed; and (4), The circumstances which avoid a deed;

w. c.

1<sup>k</sup>. What a Deed Is.

A deed is a writing on parchment or paper, *sealed and delivered*. (2 Th. Co. Lit. 224; Id. 232; Shepp. Touchst. 50; 2 Lom. Dig. 5.) What is a *sealing* and what a *delivery*, is explained *post*, pp.      &c. (2 Bl. Com. 305 to 307.) At

present, it suffices to say that a seal at common law, (according to the doctrine which until recently has prevailed), is an *impression on wax*, or some other tenacious material (*sigillum est cera impressa*), and not on the paper or parchment itself, and by statute in Virginia, in the case of a *natural person*, it is a *scroll* (e. g., ) “affixed by way of seal.” (Godard’s Case, 2 Co. 5; Bac. Abr. Oblig’n, (C.); V. C. 1873, ch. 140, § 2; V. C. 1887 ch. 133, § 2841.) Parks v. Hew-

lett, 9 Leigh, 511; Ashwell v. Ayres, 4 Grat. 283; Clegg v. Lemessurier, 15 Grat. 108.) But of late a disposition is manifested to hold that even *by the common law*, a seal may be an impression on any substance capable of receiving and retaining it, and, therefore, as well on the *paper or parchment*, as on *wax or wafer*; which is simply judicial legislation. (1 Sugd. Powers, 282 '3, ch. VI., § iv., 9; 1 Min. Insts. 593; Reg. v. St. Paul, 7 Q. B. (53 E. C. L.) 238 '9; Follett v. Rose, 3 McLean, 332; Curtis v. Leavitt, 15 N. York, 9; Pillow v. Roberts, 13 How. 473 '4.) And in Virginia it is enacted that "the impression of a *corporate or official seal* on paper or parchment alone shall be as valid as if made on wax or other cohesive substance." (V. C. 1887 ch. 133, § 2841.)

Delivery is the transferring of a deed from the grantor to the grantee, in such a manner as to deprive him of the right to recall it. (Bouv. Law. Dict. Delivery; Dev. Eq. Rep. (N. C.) 14.) The instrument is styled sometimes a charter (*carta*) from its material, and *deed* (*factum* or *fait*) from the solemnity and importance attached to it. One is *estopped* by his deed from averring anything in contradiction to it. (2 Bl. Com. 195.)

## 2<sup>k</sup>. The Several Sorts of Deeds.

The several sorts of deeds are, (1), Deeds indented; and (2), Deeds poll; w. c.

### 1<sup>l</sup>. Deeds Indented; w. c.

#### 1<sup>m</sup>. Characteristic of a Deed Indented.

A deed indented is a deed *inter partes*, where the parties *mutually stipulate*, on opposite sides. (2 Lom. Dig. 6.)

#### 2<sup>m</sup>. Whence the Designation of *Deed Indented*.

A deed indented, or an *indenture*, is so called because originally all deeds *inter partes*, where the parties mutually stipulated, were indented or *toothed* like a saw, on the edge; a practice which is accounted for thus: Formerly, deeds being more concise than they have since become, it was usual to write both *parts* (each party having a copy—a *part*, as it was called), on the same piece of parchment, with some word, or letters of the alphabet written between them, through which the parchment was cut, either in a straight or indented line (more frequently the latter), in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists; and with us *chirographa*, or hand-writings; the word *chirographum* or *chirographum* being usually that which is divided in making the indenture; and this custom was still preserved in England, in making out the indentures of a *fine*, down to a very recent period (A. D. 1834), when, by statute 3 & 4 Wm. IV., c. 74, fines were abolished. But for many generations past, in ordinary transactions, indenting only is used, or rather

cutting the parchment or paper in a *waving line* on the top or side, without cutting through any letters at all; and it seems now to serve little other purpose than to give name to the species of the deed. Indeed, the better opinion is that it is the deed's being *inter partes*, that is, containing mutual stipulations between the parties, and not its having its top or side indented, which constitutes an *indenture*. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually styled the *original*, and the rest are *counterparts*; though in modern times it is most frequent for all the parties to execute every part, which renders them all originals. (2 Bl. Com. 295-6; Wms. Real Prop. 74-5; 2 Lom. Dig. 6; Currie v. Donald, 2 Wash. 63.)

## 2<sup>l</sup>. Deeds Poll; w. c.

### 1<sup>m</sup>. Character of a *Deed Poll*.

A deed poll is a deed where the stipulation is altogether *on one side*, without any mutual stipulation on the other. (2 Lom. Dig. 6.)

### 2<sup>m</sup>. Whence the Designation of a *Deed Poll*.

A deed poll owes its designation to the fact that originally it was not indented on the edge, but *smooth*,—as if *factum politum*. (See 2 Bl. Com. 296.)

## 3<sup>k</sup>. The Requisites of a Deed.

The requisites of a deed are as follows, to wit: (1), Competent parties; (2), A lawful subject-matter; (3), A consideration not open to legal objection; (4), Written or printed upon paper or parchment; (5), Matter legally and orderly set out; (6), Reading the deed; (7), Sealing and probably signing; and (8), Delivery;

w. c.

## 1<sup>l</sup>. Competent Parties.

The parties must have sufficient *understanding* to comprehend the transaction, sufficient *freedom of will* to act without constraint, and sufficient *interest* in the subject-matter to serve the purposes of the deed. (2 Bl. Com. 296; 2 Lom. Dig. 11 & seq., 377-8 & seq.; *Ante*, pp. 642 & seq.)

## 2<sup>l</sup>. A Lawful Subject-Matter.

The requirement of a *lawful subject-matter*, in order to make a valid deed, imports that the tenor and objects of the deed must not be in *opposition to the policy of the law*. (*Ante*, p. 640 & seq.)

## 3<sup>l</sup>. A Consideration not Open to Legal Objection.

A conveyance, as *between the parties*, needs not any consideration to support it, unless, indeed, it be a conveyance operating under the statute of uses, in which case, in order to raise such an use as the statute will execute in possession, there must be expressed either a valuable considera-



tion, or a consideration of natural love and affection. A want or failure of consideration, therefore, except in conveyances operating under the statute of uses, is no ground of avoidance of a conveyance, as between the parties, or indeed as to third persons, except in so far as such want or failure of consideration may be satisfactory evidence of *fraud* perpetrated by the grantee on the grantor, or designed to be perpetrated by the grantor against third persons, as *e. g.*, creditors, and purchasers for value and without notice. The only inquiry, therefore, of importance touching the consideration of a conveyance, is whether such consideration be *legal* or *vicious*. (2 Washb. R. P. 652; 2 Lom. Dig. 25, 382, 404, &c.; 1 Tuck. Com. (B. II.) 230 & seq.)

Let us take notice of, (1), Illegal considerations; (2), Considerations involving mistake or misapprehension; and (3), Impossible considerations;

W. C.

### 1<sup>m</sup>. Illegal Considerations.

We will advert to, (1), The several instances of illegal considerations; and (2), The principal *classes* of cases governed by the doctrine touching illegal considerations;

W. C.

#### 1<sup>n</sup>. The Several Instances of Illegal Considerations.

See 1 Lom. Dig. 334; 2 Th. Co. Lit. 24, n. (P.); *Ante*, pp. 281-'2;

W. C.

##### 1<sup>o</sup>. To do Something Illegal.

##### 2<sup>o</sup>. To Omit the Doing of what is a Legal Duty.

##### 3<sup>o</sup>. To Encourage such Crimes or Omissions.

#### 2<sup>n</sup>. The Principal *Classes* of Cases Governed by the Doctrine touching Illegal Considerations.

The principal classes of cases governed by the doctrine touching illegal considerations may be enumerated as follows: (1), Considerations of an *immoral* character, *pro turpi causa*, as they are styled; (2), Those involving a *restraint of trade*; (3), Those affecting freedom of marriage; (4), Those declared illegal by statute; and (5), Those involving frauds.

See 2 Th. Co. Lit. 24, n. (P.); *Ante*, p. 282-'3;

W. C.

##### 1<sup>o</sup>. Considerations *Pro Turpi Causa*.

*e. g.*, Consideration of illicit cohabitation. (2 Th. Co. Lit. 24, n. (P.); 1 Stor. Eq. §§ 296, 298, 299, 300; *Ante*, p. 282-'3; 3 Min. Insts. 98.)

##### 2<sup>o</sup>. Considerations Involving a *Restraint of Trade*.

See 2 Pars. Cont. 253 & seq.; 2 Th. Co. Lit. 24, n. (P.); *Ante*, p. 282-'3; 3 Min. Inst. 99.

##### 3<sup>o</sup>. Considerations Affecting *Freedom of Marriage*.

See 2 Th. Co. Lit. 24, n. (P.); *Id.* 19, n. (K.); 1 Lom.

Dig. 338 & seq.; 1 Pars. Cont. 556; 1 Stor. Eq. §§ 283 & seq.; Scott v. Tyler (2 Bro. C. C. 431), 2 Wh. & Tud. L. C. (Pt. I.), 266 & seq.; Maddox v. Maddox, 11 Grat. 804; *Ante*, pp. 283-'4 & seq.; 3 Min. Insts. 99.

#### 4°. Considerations Declared Illegal by Statute.

Not only is every contract and conveyance void which touches what is expressly prohibited by statute, but also in general where the statute only inflicts a *penalty*: for a penalty usually implies a prohibition, or at all events, indicates a policy of the law which the transaction tends to thwart. No suit lies at law or in equity to enforce or give effect to what is thus at war with public policy. It is conceivable, however, that the penalty is not designed to prevent the transaction in question, but to attain a collateral object; as for example, to induce the payment of taxes assessed upon licenses for the conduct of certain business avocations; and where such is the case, the contract or conveyance remains unimpaired. (3 Min. Insts. 99 & seq.; 2 Lom. Dig. 399; Tabb v. Baird, 3 Call, 275; 1 Pars. Cont. 382, and n. (d); Little v. Poole, 9 B. & Cr. (17 E. C. L.) 192; Cope v. Rowland, 2 M. & W. 157, &c.; Smith v. Mawhood, 14 M. & W. 452; Cundell v. Dawson, 4 C. B. (56 E. C. L.) 397, &c.)

The most frequent and prominent instances of considerations declared illegal by statute are, (1), Gaming considerations; (2), Usurious considerations; and (3), Considerations made illegal by other statutes;

W. C.

#### 1°. Gaming Considerations.

It is provided by statute in Virginia, that every "*contract, conveyance, or assurance,*" of which the consideration, or any part thereof, is money, property, or other thing won, or bet at any game, sport, pastime, or wager, or money lent or advanced at the time of any gaming, betting, or wagering, to be used in being so bet or wagered (when the person lending or advancing it knows that it is to be so used), *shall be void*. (V. C. 1873, ch. 139, § 2; V. C. 1887 ch. 132 § 2836.)

And also, that if any person shall lose to another within *twenty-four hours* seven dollars or more, or property of that value, and shall pay or deliver the same, such loser may recover it back from the winner by suit or warrant, according to the amount or value, brought within *three months* after such payment or delivery; and after three months, if the loser does not proceed to recover it, any one may recover *treble the value*, one-half to the commonwealth. (V. C. 1873, ch. 139, §§ 3, 5; V. C. 1887, ch. 132, §§ 2837 to 2839.)

The various *offences* connected with gaming trans-

actions may be properly adverted to here. They are as follows; and any deed which involves any participation therein, is for the most part, thereby invalidated:

1. Keeping a farobank or gaming-table. (V. C. 1887, ch. 187, § 3815.)

2. Permitting a gaming-table, farobank, or wheel of fortune on the premises which one occupies. (Id. § 3816.)

3. Acting as door-keeper, guard, or watch for a keeper of a gaming-table, farobank, or wheel of fortune, or resisting, preventing or delaying the arrest of such keeper. (Id. § 3817.)

4. Betting or playing at faro, or at any game, except billiards, bowls, chess, backgammon, draughts, or any licensed game, at a *public place*, or betting on the sides of those who play. (Id. § 3818.)

5. Losing or winning more than \$20 within 24 hours, elsewhere than at a public place or house of entertainment. (Id. § 3819.)

6. Keeper of ordinary permitting unlawful gaming at his house. (Id. § 3820.)

7. Keeper of ordinary or house of entertainment letting an out-house or other place appurtenant to his house, for unlawful gaming. (Id. § 3822.)

8. Winning by cheating or other fraud, in any game, wager, or bet. (Id. § 3823.)

9. Betting on any election or appointment to office. (Id. § 3824.)

10. Buying or selling lottery tickets. (Id. § 3825.)

11. Being concerned in setting up, promoting, or managing a lottery or raffle, or permitting the same in his house, or buying, selling, negotiating, or transferring chances, or tickets in the lottery. (Id. § 3826.)

Nothing that savors of gaming is more pernicious to individuals, or to the community at large, than *lotteries* and their counterpart, *raffles*. A lottery is a scheme for the distribution of prizes by chance, and a raffle has substantially the same meaning, (2 Whart. Crim. Law, (8th ed.) §§ 1490, 1491; State v. Short (3 Vroom. N. J. 398); 90 Am. Dec. 669). The ingredient of chance is the evil principle against which laws prohibiting lotteries are aimed, and wherever that feature is discovered, the case is deemed to be within the policy of the law. Hence the annual distribution by lot of paintings amongst the members of the American Art Union, was held to be a lottery. (People's Art Union, 7 N. Y. 240; Benmet v. Art Union, 6 Sandf. (N. Y.) 614; People v. Art Union, 13 Barb. 577.) And so the distribution by

chance, of articles of different values is a lottery. (*State v. Clarke*, (33 N. H. 329.) 66 Am. Dec. 723.) Hence also, it is a lottery if the exhibitor of a show distributes prizes by lot, to those who hold tickets thereto. (*State v. Shorts*, (3 Vroom. N. J. 98), 90 Am. Dec. 668, Com. v. Thacher (97 Mass. 583), 93 Am. Dec. 125).

In like manner, it is held to be a lottery, if a tract of land is divided into lots of *unequal value*, and then are sold at an uniform price, and distributed among the purchasers by lot. (*Den. e. d. Wooden v. Shortwell*, 23 N. Jers. L. 465.)

If the illegal consideration extends to but a part of the transaction, the residue being founded on that which is legal, the part which is vicious may be relieved against in equity, whilst the court sustains what is good, supposing the good and the bad to be distinct, at least if the proceeding be at the instance of him who seeks to impeach the transaction. (*Skipwith v. Strother*, 3 Rand. 214.) Every court, however, whether of law or equity, will refuse its aid to give effect to transactions immoral and demoralizing; and, therefore, to transactions arising out of a partnership for gambling purposes, whether for profits, losses, expenses, contributions or re-imbursement. Hence, a court of equity withholds all interposition in the settlement of such a partnership. (*Watson v. Fletcher*, 7 Grat. 1; 2 Lom. Dig. 399, 400; *Bac. Abr. Asst. (A.)*, (E.); *Stor. Part.*, § 6.)

2<sup>d</sup>. Usurious Considerations.

The statutes regulating interest in Virginia, prior to 1st April 1873, were wont to declare that "all *contracts and assurances*," made directly or indirectly, for the loan or forbearance of money or other thing at a greater rate than is allowed by law shall *be void*. The act of April 1, 1873, moderates the penalty so as to make such contracts and assurances *void as to the illegal excess of interest only*; and that of March 24, 1874, void as to the *whole interest*. (V. C. 1873, ch. 137, § 5; Acts 1874, p. 134, ch. 122, §§ 1, 2; V. C. '87, ch. 130, § 2818.)

This provision, it will be observed, is in *terms* somewhat less comprehensive than the statute of gaming just previously cited, applying only to "*contracts and assurances*," whilst the gaming act applies to "*contracts, conveyances and assurances*," as the former statute of usury also did. Whether there is any significance in the change of phrase may be doubted. The word *assurance* undoubtedly embraces *conveyances*, and indeed is most properly applicable thereto (2 Bl. Com. 294; *Burr. Law Dict. Assurance*; *Bouv. Law Dict. Assurance*); and it is a rule in the construction



of general revisals that the old law is not designed to be altered, unless such intention plainly appear in the new code. (Taylor v. Delancy, 2 Ca. Cas. (N. Y.) 143; Parramore v. Taylor, 11 Grat. 242; St. Boat Wenonah v. Bragdon, 21 Grat. 695.)

Wherever the lender of money at usurious rates is *plaintiff*, whether at law or in equity, if the defendant is able to prove the usury, the assurance, as the law stood prior to April 1, 1873, was *wholly avoided*; but since that time, by act of 1st April, 1873, it is void only as to the illegal excess of interest over six per cent., and by act of March 24, 1874, it is void as to the whole *interest*. (V. C. 1887, ch. 130, § 2818.) The last change in the statute restores a very marked diversity, which, previously to April 1, 1873, had subsisted as to the measure of relief administered where the lender of the money was plaintiff, whether at law or in equity, and where the borrower invoked the aid of the court of chancery. In the latter case, unless the object of the application were merely for the collateral purpose of staying the consummation of the transaction until its legality could be enquired into, the general doctrine was that, in order to obtain the aid of equity, the borrower must himself do what is equitable, and pay what is really due, including both principal and interest; because a court of equity not being positively bound *ex debito justitie*, to interfere in such cases by an active exertion of its powers, but having a discretion on the subject, may and does prescribe terms for its interposition, according to one of its favorite maxims, that "he who asks equity, must do equity." At present, therefore, if the lender of the money is plaintiff, whether at law or in equity, and the usury be proved, he can recover the principal alone without any interest; but if the *borrower* invoke the aid of a court of chancery (except for the collateral purpose above referred to), he must pay the principal with lawful interest. (1 Stor. Eq. § 301; 2 Lom. Dig. 400, 401; *Ante*, pp. 346 & seq.)

3<sup>d</sup>. Considerations Made Illegal by Other Statutes.

Thus, contracts and securities that may originate from, or be made or obtained, in whole or in part, by means of any dealing, trade or business with an *un-chartered bank of circulation*, are void. (V. C. 1873, ch. 60, § 2; V. C. 1887, ch. 50, § 1182; Wilson v. Spencer, 1 Rand. 76; Snyder v. Dailey, 1 Rand. 101; McGuire v. Ashby, 1 Rand. 101; 2 Lom. Dig. 401-2.) So, also, contracts for the sale or deputation of any public office (including the sheriffalty) are void from considerations of public policy, and are in express terms de-

clared to be so. (V. C. 1873, ch. 11, §§ 5, 7; V. C. 1887, ch. 12, §§ 166, 167; 2 Lom. Dig. 402; 1 Stor. Eq. § 295.)

5°. Considerations Involving *Fraud*, or Otherwise Hostile to Public Policy.

The common law allows fraud to be proved in order to vacate a deed, where the fraud relates to the *execution* of the instrument; as, if it be misread to the party, or he be induced to sign one instrument when he intended to sign another; but not where the alleged fraud consists in imposing upon the party in a settlement of accounts, or by a false or fraudulent statement of facts, and the like. (2 Lom. Dig. 382.) And although in Virginia we have a statute (V. C. 1873, ch. 168, § 5; V. C. 1887, ch. 160, §§ 3299, 3300, 3301), allowing a defendant to file a plea alleging any such failure of the consideration, or fraud in the procurement of a contract, or any such breach of warranty of title or soundness of *personal property*, for the price or value of which he entered into the contract, or any such matter existing before its execution, or any such mistake therein, or in the execution thereof, as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; yet there are still many cases in which fraud is wholly irremediable at law, and others where it can be *adequately* relieved against in equity only, which often goes not only beyond, but even contrary to the rules of law; whilst it possesses in all cases of frauds, concurrent jurisdiction with the law-courts, and in many cases an exclusive jurisdiction. (2 Lom. Dig. 382-'3.)

In a very noted case of *Chesterfield v. Janssen* (2 Ves. Sr., 155 & seq.; S. C. 1 Wh. & Tud. L. C. 405 & seq.), Lord Hardwicke remarked that the court of equity had an undoubted jurisdiction to relieve against *every species of fraud*, and lays down a classification thereof, under *five heads*, namely; (1), Actual fraud arising from facts and circumstances of *imposition*; (2), Fraud manifested in inequitable and unconscientious bargains; (3), Fraud presumed from the circumstances and condition of the parties contracting; (4), Frauds consisting of imposition and deceit practiced against other persons *not parties* to the fraudulent contract; and (5), Fraud which infects *catching bargains* with heirs, reversioners, or other *expectants*;

W. C.

1°. Actual Fraud, Arising from *Facts and Circumstances of Imposition*.

This is the plainest case, and needs little exposition.

It comprises those cases which arise out of the *suggestion of falsehood*, or the *suppression of truth*. The *suggestion of falsehood* is a misrepresentation, by acts or artifice, as well as by assertion, whether with intent to deceive or not, if it actually did deceive,—of some thing material,—in regard to which a known trust or confidence was placed in the party misrepresenting, by the other party,—which matter constituted an inducement or motive to the act or omission of the party to whom the misrepresentation was made, and by which he was actually misled to his injury; and the *suppression of truth* is an undue concealment or non-disclosure of facts and circumstances which one party is under a legal or equitable obligation to communicate, and which the other party has a right, not merely in conscience, but *juris et de jure*, to know. Thus, where an heir at law, who knew not that the will which devised the estate away from him was defectively executed, for a trifling sum of money released all his right in the land to the devisee, by a deed which recited that the will was duly executed, it was held that the recital that the will was duly executed was *suggestio falsi*, and that the concealment from the heir that the will was not duly executed was *suppressio veri*, either of which, and much more both, would invalidate the deed of release. (1 Min. Insts. (4th ed.) 248; 2 Lom. Dig. 384-'5; 1 Stor. Eq. §§ 191 & seq., 207 & seq.; Broderick v. Broderick, 1 P. Wms. 239. See Lee v. Monroe, 7 Cr. 368; Smith v. Richards, 13 Pet. 26; Stuart v. Luddington, 1 Rand. 403; Crump v U. S. Mining Co., 7 Grat. 353; Grim v. Byrd, 32 Grat. 300; Linhart v. Foreman, 77 Va. 544-'5; Lowe v. Trundle, 78 Va. 67; Rorer Iron Co. v. Trout, 83 Va. 406-'7; McMullin v. Sanders, 79 Va. 362-'3; 1 Stor. Eq. § 192; 2 Pom. Eq. §§ 886 &c.; Hull v. Fields, 76 Va. 294.)

Even in judicial sales, under a decree of court, if it be made to appear, either before or after the sale has been confirmed, that there has been any injurious mistake, misrepresentation, or fraud, the biddings should be opened, the reported sale rejected, or the order of confirmation rescinded, and the property re-sold. (Merch. Bank v. Campbell, 75 Va. 455, 462-'3.)

It must be observed, however, that fraud is never to be *presumed*. It must be distinctly alleged, although it is not necessary to charge it in direct terms, if the facts stated make out a case of fraud, and it must be clearly proved as alleged. (Hord v. Colbert, 28 Grat. 49; Crebs v. Jones, 79 Va. 384; Rixey v. Moorhead, 79 Va. 590; Gregory v. Peoples, 80 Va. 359-'60; Mat-

thews v. Crockett, 82 Va. 394; Houghton v. Grayhill, 82 Va. 580; Terry v. Fontains, 83 Va. 456; Hickman v. Trout, 83 Va. 490; Kevan v. Trice, 75 Va. 698; Redd v. Dyer, 83 Va. 335-'6; Jones v. Diggs, 84 Va. 685; Southall v. Farish, 85 Va. 403; Ins. Co. v. Cottrell, 85 Va. 857.)

No right can be deduced from a fraudulent act. The law can afford no countenance to fraudulent transactions, so as to protect the perpetrator. (Williamson v. Goodwyn, 9 Grat. 906-'7; Henderson v. Hunton, 26 Grat. 933-'4; Almond v. Wilson, 75 Va. 626; Railroad Co. v. Soutter, 13 Wal. 523.) Hence, if one fraudulently collude with a debtor to buy the debtor's land, ostensibly for himself, but really for the debtor, and makes payments upon the purchase, he cannot claim to charge the land, as against the creditors of the debtor, with an *implied trust* in his favor, in order to secure the payments he has made (Almond v. Wilson, 75 Va. 614.)

2<sup>d</sup>. Fraud Manifested in *Inequitable and Unconscientious Bargains*.

Here the fraud is apparent from the intrinsic nature and subject of the bargain itself, being such as no man in his senses, and not under a delusion would make, on the one hand, and no honest and fair man would accept, on the other. (2 Lom. Dig. 383, 386.)

Mere inadequacy of price, standing by itself, and independent of other circumstances, is not sufficient to set aside a transaction. But inadequacy, accompanied by other circumstances (*e. g.*, weakness of understanding in the grantor or grantee; fraud, imposition, mutual mistake, or standing in a relation of influence), may readily make out a case of fraud (Samuel v. Marshall, 3 Leigh, 567; Greer v. Greers, 9 Grat. 330; Lowe v. Trundle, 78 Va. 69; Crebs v. Jones, 79 Va. 382; Allore v. Jewell, 94 U. S. 506-'7; Smith v. Hinkel, 81 Va. 524; Fishburne v. Ferguson, 84 Va. 87); and it is said that if the inadequacy be so gross and manifest that it cannot be stated to a man of common sense without shocking the conscience and confounding the judgment, it suffices *of itself* (in the absence of adequate explanation), to prove that a fraudulent advantage was taken, as it shows that the person did not understand the bargain he made, or that he was so oppressed that he was glad to make it, knowing its inadequacy. (2 Lom. Dig. 386; McKinney v. Pinkard, 2 Leigh, 149; Cribbins v. Markwood, 13 Grat. 495; Mayo v. Carrington, 19 Grat. 107; Brown v. Rice, 26 Grat. 470, 474; Osgood v. Franklin, 2 Johns. C. R. 1, 23; 1 Wh. & Tud. L. C. 420.)



3<sup>d</sup>. Fraud Presumed *from the Circumstances and Condition of the Parties Contracting.*

This class comprehends cases where advantage has been taken of the mental weakness, or of the necessities or actual condition of one of the contracting parties, putting him under the power of the other; or of undue influence arising out of the natural or social relations in which the parties stand to each other; or of business relations inconsistent for the time being with the transaction in question. (2 Lom Dig. 387 & seq.)

Weakness of mind alone, where there is a legal capacity for business, does not invalidate an instrument; but if connected with any circumstances of surprise, inadequate consideration, undue influence, or the like, it affords strong and, in general, satisfactory proof of fraud. The question always is, whether the party has yielded an intelligent and willing consent to the transaction; and if it appear, considering all the facts—mental weakness being one—that such consent is wanting, the act is void. But the influence resulting from attachment, or the mere desire to gratify another's wishes, if the party's free agency be not impaired, does not affect the validity of the act any more than does the fact that it seems to others unreasonable, imprudent, or unaccountable. (2 Lom. Dig. 388; Harvey v. Pecks, 1 Munf. 518; Samuel v. Marshall, 3 Leigh, 567; Greer v. Greers, 9 Grat. 330; Parramore v. Taylor, 11 Grat. 220; Simerman v. Souger, 29 Grat. 24; 1 Jarm. Wills (5th Am. ed.) 35 & seq.; 1 Redf. Wills, 509 & seq., 514 & seq.)

Intoxication invalidates all contracts and conveyances by the intoxicated party, when either—*first*, the intoxication was procured by the other contracting party; or when, *second*, he took advantage of it; or when, *third*, the individual was so drunk as not to know what he did, having no *agreeing*, because no *apprehending* mind. (2 Lom. Dig. 390-'91; 1 Stor. Eq. §§ 231 & seq.; Harvey v. Pecks, 1 Munf. 518; Whitehorn v. Hines, 1 Munf. 577; Arnold v. Hickman, 6 Munf. 15, 172; Reynolds v. Waller, 1 Wash. 164; Wigglesworth v. Steers, 1 H. & M. 70; *Ante*, pp. 644-'5 & seq.)

Transactions between attorney and client, parent and child, guardian and ward, and other persons connected by peculiarly confidential relations, are looked upon with jealousy; and if improper advantage is taken of the parental or tutorial authority, or of the influence belonging to the relation, the transaction will be invalidated; and as between guardian and ward, it is established that a deed of gift, or a release made by the

ward soon after coming of age, and at the very time of accounting and delivering up the estate, or before delivering up the estate, without any settlement, is absolutely void, upon a principle of public policy, as constructively fraudulent, although, in truth, it be fair, and much more if the circumstances evince actual fraud. (2 Lom. Dig. 391-'2; 1 Stor. Eq. §§ 317 & seq.; 1 Jarm. Wills (5th Am. ed.), 36 & seq., and note 1; Waller v. Armistead, 2 Leigh, 11; Riddell v. Johnson, 26 Grat. 152.)

A similar principle is applicable to grants obtained by a person having a *spiritual ascendancy* over another who is in a state of religious delusion or extravagant excitement. (2 Lom. Dig. 392; Norton v. Kelley, 2 Eden. 286; Hugen v. Baseley, 14 Ves. 273.)

It should be observed, however, that where a legal capacity is shown to exist, that the party had sufficient understanding to comprehend clearly the nature of the business—that he consented freely to the special matter about which he was engaged, and no fraud or undue influence is shown to have been used to bring about the result—the validity of the disposition cannot be impeached, however unreasonable, or imprudent, or unaccountable it may seem to others. (Greer v. Greers, 9 Grat. 333.)

Trustees, agents, attorneys, and other persons occupying a fiduciary relation, are peremptorily inhibited from dealing *for their own benefit*, touching the subject-matter committed to them; and any such transactions are regarded as constructively fraudulent, and voidable at the election of the beneficiary. (2 Lom. Dig. 392-'3; 1 Stor. Eq. §§ 311 to 316 a; *Aute*, pp. 245-'46 & seq.; 1 Min. Insts. 244; Moseley v. Buck, 3 Munf. 232; Buckles v. Lafferty, 2 Rob. 294; Bailey's Adm'r v. Robinson, 1 Grat. 4, 9, 10; Armistead v. Hundley, 7 Grat. 52; Howery v. Helms & als. 20 Grat. 1, 7, &c.)

4<sup>p</sup>. *Frauds Consisting of Imposition and Deceit Practiced Against Other Persons, not Parties to the Fraudulent Contract.*

"Particular persons, in contracts," says Lord Hardwicke, in *Chesterfield v. Janssen*, 2 Ves. Sr., 156 (1 Wh. & Tud. 406 '7) "shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect of other persons, who stand in such relation to either as to be affected by the contract, or the consequences of it." Hence, clandestine agreements to return part of the portion of the wife, or provision stipulated for by the husband, to the parent or guardian;

or conveyances or bonds taken as rewards for securing marriages; or a secret agreement of a debtor compounding with his creditors, that if a certain one of them will sign the deed, he will pay him more than a ratable proportion of his debt; all these will be set aside in equity, as injurious to the third persons who are thereby respectively deceived. (2 Ves. 156; S. C. 1 Wh. & Tud. L. C. 406-'7.)

So a conveyance made by a *feme sole*, in contemplation of marriage, without the intended husband's knowledge, is deemed in fraud of his marital rights, and therefore void (Waller v. Armistead, 2 Leigh, 14); and by parity of reason, if a man seised in fee of *lands*, should, just before his marriage, without the privity of the intended wife, convey the same, it deprives the wife of her dower therein, and is liable to be invalidated at her instance, as in fraud of her rights. (2 Lom. Dig. 397.) This principle, however, is subject to several qualifications. Thus, it is admissible for the wife in contemplation of marriage, to convey her property without the husband's knowledge in order to secure a just debt (Fletcher & Wife v. Ashley & als. 6 Grat. 332); and even to provide for the children of a previous marriage. (2 Lom. Dig. 396-'7.) She may also convey her property to whom she will, if it be done before the marriage is contemplated, notwithstanding it may, in fact, occur soon after. (2 Lom. Dig. 394; Strathmore v. Bowes, 2 Cox, 28; S. C. 1 Ves. Jr., 22; S. C. 1 Wh. & Tud. 395; Gregory & al. v. Winston, 23 Grat. 102.)

But the instances under this head, of the greatest practical importance and interest, are those which relate to *frauds committed upon creditors and subsequent purchasers*, which will require to be unfolded in order.

W. C.

#### 1<sup>a</sup>. English Statutes of Fraudulent Conveyances.

The English statutes of fraudulent conveyances are 13 Eliz. c. 5, and 27 Eliz. c. 4. The first applies to both lands and chattels, and is intended to protect *creditors*, as well subsequent as existing; whilst 27 Eliz. applies to lands alone, and was designed for the benefit of *subsequent purchasers*.

It has been said by very high authority (Lord Mansfield in Cadogan v. Kennett, Cowp. 434; C. J. Marshall in Hamilton v. Russell, 1 Cr. 309, 316; and Judge Roane in Fitzhugh v. Anderson & als. 2 H. & M. 302), that the principles and rules of the common law are so strong against fraud in every shape, that the common law would have attained every end proposed by these statutes. This, however, seems some-

what too strong a statement. The common law would certainly avoid any fraudulent conveyance made to deceive one who has an *existing debt or right*; but if the gift were *precedent to the right or debt*, there is no way in such case at common law to set the conveyance aside. (Bac. Abr. Fraud, (C.); Twyne's Case, 3 Co. 83.)

2<sup>a</sup>. The Virginia Statute of Fraudulent Conveyances.

The character and effect of the Virginia statute of fraudulent conveyances will best be unfolded in connection with, (1), Its tenor; (2), The parties as to whom it avoids fraudulent conveyances; and (3), The circumstances under which it invalidates such conveyances;

W. C.

1<sup>r</sup>. The *Tenor* of the Virginia Statute of Fraudulent Conveyances.

"Every gift, conveyance, assignment, or transfer of, or charge upon any estate, *real or personal*, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with *intent to delay, hinder, or defraud creditors, purchasers or other persons*, of, or from what they are or may be lawfully entitled to, shall, *as to such creditors, purchasers, or other persons*, their representatives, or assigns, be void. This section shall not affect the title of a *purchaser for valuable consideration*, unless it appear that he *had notice* of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." (V. C. 1873, ch. 114, § 1; V. C. 1887, ch. 109, § 2458.)

"Every gift, conveyance, assignment, transfer or charge, which is *not upon consideration deemed valuable in law*, or which is *upon consideration of marriage* shall be void as to creditors, whose debts shall have been contracted at the time it was made, but shall not on *that account merely*, be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased, *after it was made*; and though it be decreed to be void as to a *prior creditor*, because voluntary, it shall not *for that cause* be decreed to be void as to *subsequent creditors or purchasers*." (V. C. 1873, ch. 114, § 2; V. C. 1887, ch. 109, § 2459.)

These provisions, in pursuance of a rule applicable to all statutes made against fraud, are to be liberally expounded for the suppression of the fraud. (2 Lom. Dig. 419; 2 Bl. Com. 88; Twyne's Case, 3 Co. 82 a.)



2<sup>r</sup>. The *Parties* as to Whom the Virginia Statute Avoids the Fraudulent Conveyance.

The statute avoids the conveyance *as to the creditors, purchasers and other persons*, whom the maker of the conveyance designed to hinder, delay or defraud by it, and as to them alone. *As between the parties* and persons claiming under them, the conveyance is unimpeachable. It is a maxim, adopted from the civil law, in both our law and equity courts, that *nemo allegans suam turpitudinem est audiendus*; and in pursuance of it, wherever the plaintiff and defendant have participated in transactions for the purpose of injuring others, or in violation of law or public policy, in order to discourage such transactions, neither will be helped, either at law or in equity, save only so far as public policy may require. Hence, where property is fraudulently transferred, the grantor cannot recover it from the fraudulent grantee, because thus the iniquitous object sought to be accomplished is most effectually frustrated, and the temptation to practice such devices is best removed. On the other hand, where the enforcement of the fraudulent or vicious conveyance will most surely attain those ends, it will be enforced; and, therefore, a fraudulent grantee, although *in pari delicto* with the grantor, is allowed to establish his claim to the property, whilst the grantor is not permitted to defeat it by alleging the fraud. In short, the transaction is enforced or avoided, both at law and in equity, as may best answer the purposes of discouraging such evasions of fair dealing, or of sound policy; and it is for this purpose, and not because the defendant is on his own account entitled to any favor, that the rule is established, that *in pari delicto potior est conditio defendentis*. (2 Lom. Dig. 408-'9, 459; *Starke's Ex. v. Littlepage*, 4 Rand. 369; *Chamberlayne v. Temple*, 2 Rand. 384; *James v. Bird's Adm'r*, 8 Leigh, 510; *Terrell v. Imboden*, 10 Leigh, 321; *Owen v. Sharp & ux.* 12 Leigh, 427. See *Harris v. Harris*, 23 Grat. 738.)

It is worth while to observe that the maxim referred to (*nemo allegans suam turpitudinem est audiendus*), does not exclude a confederate in the fraud from disclosing it, at the instance and for the benefit of third persons, *e. g. creditors*. Thus, one of the grantors in a conveyance impeached by creditors as fraudulent, is a competent witness for the creditors to prove the fraud. (*Brown & al. v. Molineaux & als.* 21 Grat. 548.) But in no case can a participant in

the fraud impeach the transaction on account of it. (Wellf v. Shenandoah Iron, L. M. & M. Co., 83 Va. 775; 1 Smith L. C. P. T. (ed. 1866) note and cases cited.)

3<sup>d</sup>. The *Circumstances* under which the Virginia Statute Invalidates the Fraudulent Conveyance.

Conveyances are invalidated by the effect of the statute, (1), Where there is an *actually fraudulent* intent; and (2), Where a fraudulent intent is *implied*.  
W. C.

1<sup>st</sup>. Where there is an *Actually Fraudulent Intent*.

However valuable may have been the consideration paid, an *actually* fraudulent intent *concurrent in by both parties*, grantee as well as grantor, always vitiates the conveyance, as indeed the statute expressly declares; *affirmatively*, by pronouncing its nullity, and *negatively*, by providing that it shall not be void if founded on a valuable consideration, and the grantee had *no notice* of the fraudulent intent. It should, therefore, be specially observed, that in order that the conveyance may fall within the condemnation of the statute, the *grantee must be privy* to the fraudulent design, and collude with the grantor in accomplishing it. (2 Lom. Dig. 419-20, 449; Briscoe v. Clark, 1 Rand. 213; Garland v. Rives, 4 Rand. 282; Magniac v. Thompson, 7 Pet. 393; Herring v. Wickham, 29 Grat. 631; Hickman v. Trout, 83 Va. 491; Rixey v. Deitrick, 85 Va. 45; Paul v. Baugh, 85 Va. 958; Henderson v. Hunton. 26 Grat. 926; Slater v. Moon, 86 Va. 31.)

The circumstances indicating fraud are, of course, very various, the perpetrators being usually astute to conceal it. In Click v. Green, 77 Va. 827, it was held that a conveyance of *all his property* by a father heavily indebted and apprehensive of additional liability by the decision of a suit against him for damages, to a son, for an improbable cash payment, and deferred payments *without interest*, extending through *fifteen years*, accompanied by an agreement on the son's part, to provide maintenance for his father and mother during their lives, presents a case which, without satisfactory explanation, is indicative of a fraudulent intent to hinder and delay creditors; and especially when the son, who might afford the necessary explanation, is *not examined* as a witness in the case. And, in general, evidence of fraud must be circumstantial, and can seldom be direct, and yet in one way or another the proof must be sufficient to satisfy the conscience of

the court of the commission of the fraud. Nor is it out of place to repeat that the omission of the party implicated in the fraud, to testify and explain the suspicious circumstances attending the transaction, is a circumstance of great weight against him. (Moore v. Ullman, 80 Va. 310; Bowden v. Johnson, 107 U. S. 251.)

But whilst fraud must be alleged and proved, not only may it be proved by circumstances, but when the evidence shows it *prima facie*, the burden shifts to the upholder of the transaction to establish its fairness. (Hickman v. Trout, 83 Va. 490 & seq.) In this case we have a categorical enumeration of the *usual badges of fraud*, which it is not amiss to transcribe, namely, gross inadequacy of price; no security taken for the purchase-money; unusual length of credit; bonds taken payable at long periods; conveyance purporting to be made in satisfaction of alleged antecedent indebtedness of father to son, they continuing to reside together; threats and pendency of suits; concealment of the transaction; keeping the conveyance a considerable time, unacknowledged and unregistered; grantor remaining in possession as before the conveyance; absence of itemized accounts, and of vouchers; contradiction in the statements of the grantor and grantee; want of means by the grantor to create the alleged indebtedness; and failure to examine as witnesses, persons who have had opportunity to know the facts. Any of these facts may make a case of *prima facie* fraud which will call upon the parties for an explanation, and all combined will generally suffice to establish the fraudulent character of the transaction, as to all the parties. (Hickman v. Trout, 83 Va. 491; see Paul v. Baugh, 85 Va. 955; Lawson v. Moorman, 85 Va. 880.)

A conveyance not fraudulent in its inception cannot become so by matters subsequent, for the statute requires that the act *should be done* with the criminal intent. But still, if it be afterwards employed for a fraudulent purpose, a court of equity will interpose to prevent such a use of it. (2 Lom. Dig. 420; Claytor v. Anthony, 6 Rand. 306-7.)

The *badges* whereby a fraudulent intent may be discovered are very numerous. Besides those above enumerated, six are named in Twyne's case (3 Co. 81 a), as follows:

1st, That the gift is *general* of all one's property, without exception of apparel or anything of neces-

sity; for it is commonly said *quod dolus versatur in generalibus*.

2nd, That the donor *continues in possession*, and uses the goods as his own, and by reason thereof he trades and traffics with others, and defrauds or deceives them.

3rd, That it is made in *secret*, for *dona clandestina sunt semper suspiciosa*.

4th, That it is made *pending the writ* or suit whereby the property is to be subjected.

5th, That there is a *trust between the parties*, the donor still possessing all; for fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

6th, That the deed contains that the gift was made *honestly*, truly, and *bona fide*; for *clausulæ inconsuetæ semper inducunt suspicionem*.

It will be readily perceived that the retaining possession may be provided for in the conveyance itself, and be consistent with its terms and objects, in which case the suspicion which it engenders is at least mitigated; and it will be also perceived that, as in the case of lands, possession is not the principal *indicium* of ownership, so it does not excite the same degree of mistrust if the grantor retains them, as it does in the case of chattels. (2 Lom. Dig. 421; Charlton v. Gardner, 11 Leigh, 281; Davis v. Turner, 4 Grat. 422.)

Any provision contained in the conveyance tending to *delay, hinder, or defraud* creditors or purchasers, will invalidate it. An unreasonable postponement of the period of sale in case of a deed of trust, and of payment of the debt secured, was once thought to have such effect, as for ten years, or even for three, but not for two. (2 Lom. Dig. 422; Garland v. Rives, 4 Rand. 282; Lewis v. Caperton's Ex'ors, 8 Grat. 148; Cochran v. Paris, 11 Grat. 348; Dance v. Seaman, Id. 781-'2.) But there seems much reason to consider that no postponement of the sale *could* operate a fraud upon other creditors, since they might proceed at once to subject to their debts by a proceeding in equity, if not at law, whatever interest the grantor had reserved. (Skipwith v. Cunningham, 8 Leigh, 271; Lewis v. Caperton's Ex'ors, 8 Grat. 148; Cochran v. Paris, 11 Grat. 348; Dance v. Seaman & als. Id. 781-'2; Marks & als. v. Hill & als. 15 Grat. 420; Sipe v. Earman, 26 Grat. 566, 569.)

To reserve any benefit to the grantor himself, or



to introduce limitations and contingencies such as will give him control over the property or its proceeds, so as to enable him, in effect, to defeat the conveyance (Lang v. Lee, 3 Rand. 410; Barnes v. Janney, 11 Leigh, 100; Sheppard v. Turpin, 3 Grat. 374; Spence v. Bagwell, 6 Grat. 444; Addington v. Etheridge, 12 Grat. 436; Reuker v. Moss, 84 Va. 634); to reserve the power of revocation of the conveyance; to select, as trustee, one disqualified by illness, mental infirmity, or distance; to stipulate for the maintenance of the grantor or his family, or for his employment at a fixed salary; all these will render the assignment fraudulent. (2 Lom. Dig. 424 '5.)

To prefer one creditor to another (neither having any lien) is not immoral nor illegal, save so far as it is prohibited by the bankrupt act. (2 Lom. Dig. 423 '4; James's Bankrupt L. 152 & seq., 261, § 39; Small v. Dudley, 2 P. Wms. 427; Cock v. Goodfellow, 10 Mod. 489; Estwick v. Coilland, 5 T. R. 424; Nunn v. Wilsmore, 8 T. R. 528; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 306; McNemony v. Murray, 3 Johns. Ch. 444; McNemony v. Roosevelt, 3 Johns. Ch. 453; Williams v. Brown, 4 Johns. Ch. 685; Murray v. Riggs, 15 Johns. (N. Y.) 583-'4; Brashear v. West, 7 Pet. 614; Skipwith v. Cunningham, 8 Leigh, 280; McCullough v. Somerville, 8 Leigh, 427 & seq.; Lewis v. Caperton, 8 Grat. 148; Sipe v. Earman, 26 Grat. 563; Brockenbrough v. Brockenbrough, 31 Grat. 590; Lucas v. Clafflin, 76 Va. 269; Young v. Willis, 82 Va. 296 & seq.) The bankrupt law declares that it shall be an *act of bankruptcy*, exposing the party to the action of that law, at the instance of his creditors, for "one being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency," to make "any payment, gift, grant, sale, conveyance or transfer of money or other property," etc., *with intent to give preference* to one or more of his creditors, or sureties, etc.; and the assignee may recover back the money or property, etc., if the person receiving it had *reasonable cause* to believe that a fraud on the bankrupt act was intended, or that the debtor was insolvent; and such creditor is not allowed to *prove his debt*. But this penalty on the creditor may be remitted, in pursuance of § 23 of the act, if he will surrender to the assignee whatever he may have received, without compelling him to resort to legal proceedings to recover it. (§ 39, James's Bankrupt L. 261; Rev. Stats. U. S. §§ 5021, 5084.) Nor does it, at

common law, vitiate the assignment to incorporate a proviso that the creditors who avail themselves of the deed shall release so much of their debts as are not satisfied by its proceeds; that is, supposing the *whole* of the grantor's property is conveyed. (2 Lom. Dig. 425 to 427; Skipwith v. Cunningham, 8 Leigh, 272; Kevan v. Branch, 1 Grat. 274; Phippin v. Durham, 8 Grat. 457.)

An assignment for the benefit of sundry creditors may be void for fraud as to some and valid as to others. (2 Lom. Dig. 427; Skipwith v. Cunningham, 8 Leigh, 272.)

2<sup>a</sup>. Where a *Fraudulent Intent is Implied*.

Let us note the doctrine as to the implication of a fraudulent intent in respect of, (1), Creditors; and (2), Purchasers;

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1<sup>t</sup>. Doctrine *as to Creditors*.

The denunciation of the statute of 13 Eliz. c. 5, was levelled against all gifts, grants, etc., of lands or chattels devised of fraud with intent to *delay, hinder and defraud creditors and others* of their just and lawful actions, suits, debts, damages, etc., leaving it to be determined in each case, according to the facts, whether the *criminal intent* existed or not. The question then soon presented itself, what inference as to such criminal intent might properly be derived from the fact that a conveyance or other transaction, alleged to be fraudulent, was *gratuitous*, and without consideration, or as it is usual to designate it, *voluntary*. Upon this point considerable diversity of opinion has prevailed from time to time, but the weight of authority in England, however it may be otherwise in later times (Lush v. Wilkinson, 5 Ves. 384, 387, and n. (6); Townsend v. Westacot, 2 Beav. (17 Eng. Chan.) 345; Gale v. Wilkinson, 8 M. & W. 410; Shears v. Rogers, 3 B. & Ad. (23 E. C. L.), 362; Kehr v. Smith, 20 Wal. 35; Lloyd v. Fulton, 1 Otto, 485), was long in favor of the proposition, that a *voluntary conveyance* is always to be deemed fraudulent as to *existing debts*, and if the party is indebted at the time, is *prima facie* fraudulent as to *subsequent creditors* also; subject, however, to have this *prima facie* presumption repelled by proving that the existing debts are *charged on the land*, or the subject of the conveyance, or that there is left in the grantor's hands an *ample remnant* of estate to satisfy them, without any *definite improbability* that

it will be so applied (2 Lom. Dig. 429; Townsend v. Windham, 2 Ves. Sr. 10); and this view was approved and sustained by Chan. Kent in the much considered case of Reade v. Livingston, 3 Johns. C. R. (N. Y.) 500, and seems to have been at one time adopted in Virginia also. (Chamberlayne v. Temple, 2 Rand. 384, 399.)

The Virginia courts, however, were not in the sequel disposed to allow so much force to the presumption of fraud arising from the voluntary character of the conveyance. They placed *existing and subsequent* creditors in the same category, holding that the fact of there being existing debts when the gratuitous gift was made, is *prima facie* evidence of a fraudulent intent as to both classes; but that such *prima facie* presumption may be repelled *as to either*, by the circumstances above stated, namely, that existing debts are provided for out of the property conveyed, or that an ample remnant is left in the grantor's hands to satisfy them, without any *definite improbability* that it will be so applied. (Hutchison v. Kelly, 1 Rob. 123; Bank of Alexandria v. Patton, Id. 499; Hunters v. Waite, 3 Grat. 36 & seq.; Johnston v. Zane's Trustees, &c., 11 Grat. 557; Hopkirk v. Randolph, 2 Brock. 132; Hinde's Lessee v. Longworth, 11 Wheat. 189.) And this phase of the doctrine is believed to be now the prevailing one in this country. (Sexton v. Wheaton, 1 Am. L. C. 68 & seq.; Lush v. Wilkinson, 5 Ves. 387, n. (b); Kehr v. Smith, 20 Wal. 35; Lloyd v. Fulton, 1 Otto, (91 U. S.) 485; Weed v. Davis, 25 Ga. 686.)

But the second section of the statute above cited (V. C. 1873, ch. 114, § 2; V. C. 1887, ch. 109, § 2459), has determined the law with us in favor of Chancellor Kent's decision in Reade v. Livingston (3 Johns. C. R. (N. Y.) 500), namely, that voluntary conveyances are to be reckoned *always fraudulent* as to existing creditors, but that as to subsequent creditors their validity will depend on the circumstances already twice stated. As to *subsequent* creditors, then, the doctrine is this: If the donor in a voluntary conveyance be indebted at the time he *gives away* his property, the gift is *absolutely fraudulent and void* as to existing creditors, and is *prima facie* presumed to be fraudulent as to subsequent creditors; but that presumption may be repelled by showing that the existing debts were charged on the property given,

and only the surplus bestowed on the donee, or by showing that the donor retained in his hands a remnant of estate *amply sufficient* to meet the existing demands against him, without any *definite improbability* that it will be so applied. And, on the other hand, it is established that if the donor be *not indebted* at the date of the voluntary conveyance, that affords a presumption that there is no fraud in the gift, a presumption which may be repelled, however, by showing that the donor immediately contracted a large amount of indebtedness, or by any other proof that he designed to defraud the subsequent creditors. (Bac. Abr. Fraud (C.); 2 Lom. Dig. 431; Johnston v. Lane's Trustees & als. 11 Grat. 561; Townsend v. Windham, 2 Ves. Sr., 11, Russel v. Hammond, 1 Atk. 15; Stileman v. Ashdown, 2 Atk. 481; Fitzer v. Fitzer, 2 Atk. 511; Richardson v. Smallwood, Jac. 552; Sexton v. Wheaton, 8 Wheat. 246.) And it must be observed that creditors are persons who have claims on a party, as well *ex maleficio*, for some tort committed, as *ex contractu*, on account of some contract or promise made. (*Post* pp. 689-'90.)

As to the period within which a conveyance charged to be fraudulent must be assailed by creditors, there was no specific statutory provision until 1st July, 1850. It cannot be said, however, that the case was without limitation; for as the conveyance, if fraudulent, was void, the property of the debtor was liable to be subjected by the creditor as soon as he acquired a right to charge it; and if he sought to do so by action or execution, the limitation prescribed for such cases was applicable; or if he essayed to charge the property by bill in equity, that might have, perhaps, been considered as subject by analogy to a like bar, or, at all events, was liable to the rule, in pursuance of which courts of chancery discountenance *stale demands*. (Huston's Adm'r v. Cantril & als. 11 Leigh, 149, 160, 174-'5; Wilson v. Buchanan, 7 Grat. 343-'4.)

But by statute at present, proceedings to impeach a conveyance as fraudulent because, and merely because, it is *voluntary*, are limited in Virginia to five years from its date. "No gift, conveyance, assignment, transfer, or charge," says the statute, "which is not, *on consideration, deemed valuable in law*, shall be avoided, either in whole or in part, *for that cause only*, unless, within *five*



years *after* the right to avoid the same has accrued, suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied upon by or at the suit of a creditor, as to whom such gift, conveyance, assignment, transfer, or charge is declared to be void by section 2459." (V. C. 1873, ch. 146, § 16; V. C. 1887, ch. 139 § 2929.)

The idea of this limitation may have been suggested by the case of *Huston's Adm'r v. Cantril & al.* 11 Leigh, 136, 149 & seq., in which an attempt was made to annul a voluntary conveyance thirty-seven years after its date. We have seen that the limitation is not applicable to cases of *actual fraud*, but only to such conveyances as are charged with fraud for no other reason than that they are *voluntary*. (*Snoddy v. Haskins & als.* 12 Grat. 368.)

The fact that a conveyance is not founded on valuable consideration, but is *voluntary*, being attended with inferences so prejudicial to the grantee, it is of course sought to be obviated by endeavoring to find in the transaction something which may amount to such valuable consideration wherever there is any pretext to do so. Such valuable consideration may arise in various ways, and when there is no *actual fraud*, and the consideration is materially short of the value of the property, equity will allow the conveyance to stand as security for the amount of the consideration, and subject the surplus to the grantor's creditors. (*Henderson v. Hunton*, 26 Grat. 934.)

A valuable consideration has *hitherto*, both in England and with us, been deemed to be found in these five cases, namely, (1), Marriage; (2), Relinquishment of wife's dower-interest; (3), Relinquishment of any property belonging to the wife, as *e. g.*, her *equitable choses in action*, and other interests belonging to her as her own; (4), Trustee's covenant to indemnify the husband for the wife's maintenance and debts; and (5), Arrears of interest on *voluntary* bonds.

Marriage has always been deemed, until the Code of 1887 (V. C. 1887, ch. 109, § 2459) declared it to be not so, an *eminently valuable* consideration, at least as to the consort, and the children of the marriage; and a settlement *before marriage*, and in contemplation of it, is, therefore, as to such parties, never *voluntary*, but where there is no actual fraud is good against everybody. Nor is it at common law mate-

rial that the husband is ever so much indebted, and the woman knows it, supposing her not to *concur* in the fraudulent intent. His ante-nuptial settlement upon her is not thereby invalidated. (2 Lom. Dig. 434; *Wheeler v. Caryl*, 1 Ambl. 121; *Magniac v. Thompson*, 7 Pet. 348; *Coutts v. Greenhow*, 2 Munf. 363; *Huston's Adm'r v. Cantril & al.*, 11 Leigh, 152, 158, 176-'7; *Herring v. Wickham*, 29 Grat. 628, 636; *Clay v. Waltis*, 79 Va. 96 &c.; *Triplett v. Romine*, 33 Grat. 655-'6 & seq.) And, therefore, if upon lands so settled the husband erect buildings with his money, his creditors cannot charge the wife with the value of the buildings. (*Campion v. Cotton*, 17 Ves. 271.)

This proposition holds good even although the donor were insolvent, and although the marriage was not contemplated at the time of the gift, but occurred long afterwards, provided it occurred before the creditor acquired a right to charge the subject in the hands of the consort. It is regarded as having more or less influenced the marriage, and is considered in the same light as if made at the time of the marriage. (*Huston's Adm'r v. Cantril & al.* 11 Leigh, 152-'3, 176-'7; *Bentley v. Harris' Adm'r*, 2 Grat. 363; *Wells v. Cole*, 6 Grat. 645; *Fones v. Rice & als.* 9 Grat. 568; *Brown v. Carter* 5 Ves. 862; *George v. Milbanke*, 9 Ves. 190.)

Whether the consideration of marriage can extend beyond the husband and wife, and their issue, as, for example, to the brothers of either consort, has provoked considerable diversity of opinion. In England the prevailing sentiment is believed to favor its extension to collaterals. (2 Lom. Dig. 439-40; *Fry Specif. Perf.*, §§ 108 & seq.; *Goring v. Nash*, 3 Atk. 186; *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Vernon v. Vernon*, Id. 594; S. C. 1 Bro. P. C. 267; *Stephens v. Trueman*, 1 Ves. Sr. 73; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 92.) But in the United States, it seems now to be clearly established that collaterals are not entitled to claim the marriage as constituting, in respect to them, a valuable consideration (*Fry Specif. Perf.* § 111, n. (3); *Buford v. McKee*, 1 Dana, (Ky.) 107; *Hayes v. Kershaw*, 1 Sandf. Ch. (N. Y.) 258); and in Virginia this doctrine has been repeatedly announced and insisted on. Thus, whilst the consideration of marriage was allowed to support a marriage-settlement in favor of bastard children

of the father, whom the marriage and his acknowledgment had legitimated (Herring v. Wickham, 29 Grat. 628), it was held that the consideration did not extend to the child of the husband by a previous marriage, so as to give validity to a settlement of the wife's property on such child, as against the wife's ante-nuptial creditors. (Triplett v. Romine, 33 Grat. 658-'9.)

There is, however, a reasonable distinction admitted, even in England, between the case where collaterals provided for by marriage-settlement are seeking to enforce their claims as against the *heirs or devisees* of the settler, and where they are claiming against *creditors* of the settler, or *subsequent purchasers for value* from him. As against the heirs or devisees of the settler, the collaterals are allowed to claim by a much more unanimous assent than as against creditors of the settler, and purchasers from him for value. (Goring v. Nash, 3 Atk. 136, 188; Davenport v. Bishopp, 1 Phillips (19 Eng. Ch.), 698, 704-'5; Johnson v. Legard, 6 M. & S. 60; S. C. 1 Tur. & Rus. (11 Eng. Ch.), 281; Smith v. Cherrill, L. R. 4 Eq. 389; Triplett v. Romine, 33 Grat. 658.) But by the code of 1887 it is declared (it seems to this writer unadvisedly) that marriage shall not be deemed, *as to creditors*, a valuable consideration. (V. C. 1887, ch. 109, § 2459.)

But a settlement made *after* marriage in consideration of *marriage only*, is voluntary, and fraudulent against creditors; so that, in order to sustain it, there must be some valuable consideration besides. This may be supplied on the part of *the wife*, by the relinquishment of her dower, to which, it will be remembered, she is in general entitled paramount to her husband's creditors, or to any disposition which it is in his power to make of it during the coverture. And if she make such relinquishment upon her husband's *promise* to make a settlement upon her, and afterwards he fulfil his promise, the settlement will be valid against all creditors who have not meanwhile obtained specific liens, by judgment or otherwise, upon the property conveyed therein. But where the settlement is not contemporaneous with the relinquishment, *clear proof* must be furnished of such prior contract between the husband and wife, and the *recital* of it in the settlement itself is by no means sufficient for the purpose. On the other hand, a

*mere promise* of the wife to unite with her husband, when requested, in future conveyances of his lands, so as thereby to relinquish her dower therein, is *no consideration*, for the wife's promise is *void*. (2 Lom. Dig. 437; Quarles v. Lacy, 4 Munf. 251; Gordon & ux. v. Tucker's Heirs, 6 Munf. 1; Blanton v. Taylor, Gilm. 210; Harvey v. Alexander, 1 Rand. 237; Taylor v. Moore, 2 Rand. 563; Blow v. Maynard, 2 Leigh, 29; Lee v. Bank of U. States, 9 Leigh, 200; Harrison v. Carroll, 11 Leigh, 484; Lewis & als. v. Caperton's Ex. & als. 8 Grat. 166; Sykes v. Chadwick, 18 Wal. 146, 147.)

It has also been made a question (Lewis & als. v. Caperton's Ex. & als. 8 Grat. 166), whether a relinquishment of a contingent right of dower, where there is no complete alienation of the estate by the husband, but a mere incumbrance is created to secure a debt, constitutes a sufficient consideration for a settlement on the wife, inasmuch as the husband, by discharging the debt, would be re-invested with his whole estate, in which the wife would have her dower as before. And yet the wife's relinquishment is a *present consideration*, and the husband's reinstatement in his original interest is, in fact, no more than the acquisition of a new estate.

The fact that the dower interest relinquished is less considerable than the amount settled does not, *at law*, vitiate the conveyance; the law courts do not regard any disparity of value, except in so far as being merely *nominal*, it may suffice to establish a fraudulent intent, and they treat the conveyance as wholly good or wholly bad. The courts of equity, however, exercise a discrimination, and whilst an excess of value in the settlement of a few dollars would be disregarded, yet if it be considerable, equity may, and often does, treat the overplus of the settlement as merely *voluntary*, and so constructively fraudulent as to creditors of the husband; and, therefore, considers the deed as creating a trust for the wife to the value of the dower released, and for the creditors as to the residue. (2 Lom. Dig. 437-'8; Hopkirk v. Randolph, 2 Brock. 133; Wright v. Stanard, 2 Brock. 312; Sykes v. Chadwick, 18 Wal. 146, 147; Davis v. Davis' Cred'rs, 25 Grat. 590; W. & M. Coll. v. Powell & als. 12 Grat. 386; Burwell's Ex'or v. Lumsden, &c. 24 Grat. 446.) But the wife may, in general, elect to relinquish the settlement alto-



gether, and to be restored to her antecedent claim to dower, if the rights of innocent purchasers will not be thereby compromised. (Davis v. Davis, 25 Grat. 595-'6.)

The value of the contingent dower interest of the wife is not susceptible of accurate computation. It may be determined approximatively, however, by means of tables calculated for the purpose, correcting the results (which represent only the *average* of a great number of cases) by the peculiarities which belong to the constitution and situation of the parties. (See Am. Alm. 1835, p. 88; Wilson v. Davisson, 2 Rob. 284; *Ante* p. 182; Id. 123, and n. (a).) And although the legislature has not undertaken to fix these approximate estimates, by a positive enactment, where the husband is *yet living*, yet it has essayed to do so in the case of dower and other life interests *in possession*. (V. C. 1887, ch. 102 §§ 2281 to 2283; *Ante*, p. 183; Id. 145, *note*.)

Another valuable consideration for a post-nuptial settlement upon the wife may be furnished by the wife's relinquishment to the husband, or his creditors, of her *equitable choses in action*. As the husband who has not made already a reasonable settlement upon the wife cannot recover such *choses in action* without being subjected to the terms in equity, of making an adequate or reasonable settlement, as far as the fund will supply it (which is called the *wife's equity*,—*Ante*, Vol. I., 332 & seq.; Browning v. Headley, 2 Rob. 340; Poindexter & ux. v. Jeffries, &c., 15 Grat. 368; Penn's Adm'r v. Spencer & als., 17 Grat. 92), such equitable *choses in action* of the wife will constitute a valuable consideration to the extent of such a reasonable settlement. (2 Lom. Dig. 438-'9; Gallego v. Gallego, 2 Brock. 285; Wickes v. Clarke, 8 Pai. 161; Garrett v. Grout, 4 Mete. 486; Smith v. Bradford, 76 Va. 764.)

Yet another instance of valuable consideration for a post-nuptial settlement on a wife may arise from a covenant by trustees, in a deed of separation between the parties, to indemnify the husband against the wife's maintenance, and against any debts which she may afterwards contract. (2 Lom. Dig. 438; Stephens v. Olive, 2 Bro. C. C. 90; Id. 93, *note*, (+); Compton v. Collinson, Id. 386; Hobbs v. Hull, 1 Cox, 455; Worrall v. Jacob, 3 Meriv. 270.) It has been gravely doubted, however, whether this doctrine is applicable save

where, in consequence of the husband's breach of his matrimonial duty, the wife is entitled to a separation by judicial sentence, accompanied by a provision for separate maintenance, or at least is entitled to leave the husband, and to charge him with necessaries. (1 Bish. Marr'd Women, §§ 759, 760; Van Duzer, 6 Pai. (N. Y.) 366.) But it is not easy to discern in the husband's misconduct any additional reason why the wife should be entitled to a support as against his creditors; and the better opinion seems to be that the trustee's covenant to indemnify the husband against the wife's maintenance and debts constitutes a valuable consideration for a settlement on her by him, at all events *pro tanto*. (English Cases, *supra*; Hargroves v. Moray, 2 Hill Eq. (S. Car.) 222; Sykes v. Chadwick, 18 Wal. 141; Wm. & Mar. Col. v. Powell, 12 Grat. 372; Davis v. Davis, 25 Grat. 540.)

A noteworthy instance of valuable consideration is presented in several cases where *arrears* accrued on a *voluntary bond* (say, of *interest*) were held to form a valuable consideration for any other bond or conveyance, and also for a payment of the arrears, which will be sustained against creditors. (Stiles v. Atto. Gen. 2 Atk. 152; Gilham v. Locke, 9 Ves. 612; Berry *Ex parte*, 19 Ves. 218; Hopkirk v. Randolph, 2 Brock. 132; Partridge v. Goss, 2 Ambl. 596; Fones v. Rice, 9 Grat. 568; Welles v. Cole, 6 Grat. 645.)

To maintain the defence of a purchase for value without notice, the alienee must *aver and prove* the following essentials, viz. : (1), That he is a purchaser for *valuable consideration*; (2), That the consideration has been *actually paid* or supplied; (3), That he *has received*, or is *best entitled* to receive, the conveyance of the *legal title* to the property; and (4), That these essentials all concurred before he had notice of the adverse claim. And the burden of proving the first three of these essentials rests on the *purchaser*, whilst to affect the latter with notice of the adverse claim, devolves on the *claimant*. (Lamar v. Hale, 79 Va. 147.)

Although the general rule is that, as between the parties, no parol evidence is admissible to contradict or vary, or add to the terms of any writing, so that a conveyance cannot be averred *by parol* to be to another *use or intent* than that expressed in the conveyance itself; yet there are some cases in which averments, founded on parol evidence of

collateral facts, tending to support or explain in deed, have been admitted; as in case of bargain and sale to prove an additional pecuniary or valuable consideration, and, in general, to prove another consideration consistent with that expressed in the deed, but *not one inconsistent* therewith. And so, where no consideration is expressed, a party claiming under the deed may prove one that is valuable. (2 Lom. Dig. 259-'60; Gatewood v. Burrus, 3 Call, 194; Rucker v. Lowther, 8 Leigh, 259; Harvey v. Alexander, 1 Rand. 219; Eppes v. Randolph, 2 Call, 125; 1 Greenl. Ev. § 26, n. 1.)

It can be hardly needful to say that fraud and illegality of consideration, when they are in issue, open the door wide to parol evidence. (1 Greenl. Evid. (13th ed.) § 284; *Post*, 1070; 2 Lom. Dig. 260; Starke's Ex'or v. Littlepage, 4 Rand. 368.)

The transactions which are invalidated by the statute (V. C. 1873, ch. 114, § 1; V. C. 1887, ch. 109, § 2458), when tainted by fraud are "every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder, or defraud creditors, purchasers, or other persons"; but in the liberal construction given to the statute, other means, though not falling strictly within any of these terms, have been held to be within the scope of the enactment. (2 Lom Dig. 441-'2; Coleman v. Cooke, 6 Rand. 618, 638, & seq.; Burbridge v. Higgins, 6 Grat. 119; Hopkirk v. Randolph, 2 Brock. 132; Summers v. Darne, 31 Grat. 804; Click v. Green, 77 Va. 838.)

It is now time to consider who are *creditors* within the statute. The terms at present used (V. C. 1873, ch. 114, § 1; V. C. 1887, ch. 109, § 2458), are less particular in enumeration than those employed by 13 Eliz. c. 5, or by our own former statutes, yet they are supposed to be not less comprehensive. The statute avoids gifts, etc., made "with intent to delay, hinder, or defraud *creditors, purchasers, or other persons*, of, or from what they are or may be lawfully entitled to." Thus the statute protects persons suing *ex maleficio*, as for adultery or seduction, or any tort, and *a fortiori*, those claiming *ex contractu*, as for a debt, or for breach of an official bond, and that whether as the original creditor or his assignee.

(2 Lom. Dig. 445, &c.; Twyne's Case, 3 Co. 82; Hutchison & als. v. Kelly, 1 Rob. 136; Green v. Wright, 6 Grat. 154; Jackson v. Meyers, 18 Johns. 425; Clough v. Thompson, 7 Grat. 26.)

But no one claiming as a volunteer under the grantor (*e. g.*, as his personal representative, or as assignee under a voluntary assignment for the benefit of creditors), has any other rights than the grantor himself had; and no such volunteer, therefore, can affect to set aside a previous fraudulent conveyance of such grantor (2 Lom. Dig. 446; Brownell v. Curtis, 10 Paige, (N. Y.) 218-'19; Thomas v. Soper, 5 Munf, 28); at least a personal representative cannot do so *in that capacity*; but if he is also a *creditor* of the grantor, he may, *in equity*, as creditor, set the fraudulent conveyance aside. (Shields v. Anderson, 3 Leigh, 729.)

As against a personal representative of a decedent, however, who fraudulently sells the assets of the estate to one in collusion with him, a *distributor* of the estate may have the protection of the statute. (Robertson v. Ewell, 3 Munf. 7.)

Formerly it was held that the creditors protected were creditors of the *grantor* who made the conveyance, and none other; and therefore, that in case of a conveyance executed by a married woman before marriage, settling her property on herself, *her* creditors *alone*, and not those of her husband, could impeach the conveyance. (Pierce v. Turner, 5 Cranch, 154; Prior v. Kinney, 6 Munf. 510; Land v. Jeffries, 5 Rand. 211. But see Anderson v. Anderson, 2 Call, 198; Thomas v. Gaines, 1 Grat. 347.) At present, however, our statute provides (V. C. 1873, ch. 114, § 11; V. C. 1887, ch. 109, § 2472), that the words "*creditors*" and "*purchasers*" shall not be restricted to the protection of *creditors of and purchasers from the grantor*, but shall extend to and embrace all creditors and purchasers who, but for the deed or writing, would have had a right to subject the property to their debts or purchases.

As the law was prior to 1st July, 1850, it was well established, as a general rule, that no *creditor at large*, who has not acquired, in some way, by judgment, execution, or otherwise, a right to charge his debtor's property specifically, could come into equity to impeach such debtor's fraudulent conveyance. For, unless the creditor has established a certain claim on the property of the debtor, he



has no concern with his frauds; and to allow him to proceed to annul the conveyance, it was thought, might lead to an unnecessary, and perhaps oppressive interruption of the debtor's rights. To this doctrine several qualifications were admitted. Thus, if the debtor, by removal out of the State, or by evading the process of the law, put it out of the creditor's power to obtain judgment, he might, notwithstanding, prosecute his suit in equity to set the fraudulent conveyance aside. So, also, he might where the debtor had died before the judgment was obtained. (2 Lom. Dig. 447-'8; Chamberlayne v. Temple, 2 Rand. 374; Tate v. Ligget, 2 Leigh, 99; Kelso v. Blackburn, 3 Leigh, 299; Rhodes v. Cousins, 6 Rand. 190; Taylor v. Spindle, 2 Grat. 44; Burbridge v. Higgins, 6 Grat. 119.)

But by the Codes of 1850 and 1887 (V. C. 1873, ch. 175, § 2; V. C. 1887, ch. 109, § 2460), it is enacted that a creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment, or transfer of, or charge upon, the estate of his debtor, which he might institute after obtaining such judgment or decree; and he may, in such suit, have all the relief in respect to said estate to which he would be entitled after obtaining a judgment or decree for the claim. (See Tichenor v. Allen & als. 13 Grat. 37.)

Creditors *at large*, who in pursuance of this statute seek to impeach a fraudulent conveyance by a bill in chancery, acquire a specific lien on the debtor's estate, *from the date of the filing of the bill*, or if they become parties to a suit for that purpose, *by petition*, from the time of the *filing of the petition*. (Wallace v. Treacle, 27 Grat. 487.)

And it is to be observed, that when a creditor at large obtains a mortgage or deed of trust on his debtor's property, he cannot be regarded, under the statute, as a creditor, or in the double character of a creditor and a purchaser, but *only as a purchaser*. (Tate v. Ligget, &c., 2 Leigh, 84; Wickham & al. v. Lewis Martin & Co., 13 Grat. 437.)

A purchaser at a sale, for the creditor's benefit, is protected as an incident to the privilege of the creditor himself. And so, although] the title of a voluntary or actually fraudulent grantee is liable to be avoided, yet if he sells for value to a purchaser, without notice of the fraud, the latter's title prevails, as, indeed, appears from the *proviso* to

the first section of the statute (V. C. 1873, ch. 114, § 1; V. C. 1887, ch. 109, § 2458), that the section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

Where a decree is rendered on behalf of a creditor against several voluntary donees of the debtor, a court of equity will decree contribution among them, so that each shall only pay his just proportion of the debt. But all the donees will be liable for the failure of any one to pay his proportion, as far as he has received the assets of the donor, until the debt is completely liquidated. (*Chamberlayne v. Temple*, 2 Rand. 384; *Ante*, p. 306; *Lewis v. Overby*, 31 Grat. 620; *Horton v. Bond*, 28 Grat. 925, 829-30; *Harman v. Oberdorfer*, 33 Grat. 507.)

The voluntary grantee without actual fraud, although in possession, is not accountable for rents and profits prior to the decree, nor for the property itself, or its value if it has been sold or rented, or been accidentally destroyed prior to the filing of the bill; but where there has been *actual fraud*, the grantee is accountable for rents and profits from the time he came into possession, and perhaps for the property itself. (2 Lom. Dig. 451; *Blow v. Maynard*, 2 Leigh, 30; *Clarke v. Curtis*, 1 Grat. 289; *Hobson v. Yancey*, 2 Grat. 73; *Leake v. Ferguson*, 2 Do. 419; *Blackhouse's Adm'r v. Jett's Adm'r & als.* 1 Brock. 501, 510, 515; *Sexton v. Wheaton*, 1 Am. L. C. 85.)

2<sup>d</sup>. *Doctrine as to Purchasers,*

The common law afforded little or no protection to subsequent purchasers, save in those cases where the prior purchaser, by fraudulent assurances, or by as fraudulent silence, or by permitting the seller to retain the possession, or other *indicia* of ownership, actually participated in the deceit. In other cases no remedy existed for the subsequent purchaser, because he had *no interest* at the time of the commission of the alleged fraud. (*Upton v. Basset*, 1 Cro. (Eliz.) 445; 2 Lom. Dig. 452.) The statute 27 Eliz. c. 4, was, therefore, even more necessary than 13 Eliz. c. 5. It will be remembered, however (see *Ante*, p. 673-'4), that whilst 13 Eliz., touching *creditors*, relates to *both classes* of property, 27 Eliz., which concerns *purchasers*, relates to *realty alone*; and it will be recollected, also

(*Ante*, p. 674), that in Virginia the statute of fraudulent conveyances (V. C. 1873, c. 114, ch. 1; V. C. 1887, ch. 109, § 2459), embraces both *lands and chattels*, and applies the same provision to creditors and to purchasers, except only that a *voluntary* conveyance, as to *existing creditors*, is always void. (V. C. 1873, ch. 114, § 2; V. C. 1887, ch. 109, § 2459; *Ante*, p. 674.)

It matters not from whom the defrauded purchaser derives his title, whether from the original maker of the fraudulent assurance, or from some person claiming under him; in either case the original transaction, thus tainted with the intent to deceive, as proved by the subsequent events, or otherwise, is invalidated. Thus, if a father make a fraudulent lease, and die, and then his son and heir, whether knowing or not knowing of such lease, convey the land for valuable consideration, the purchaser may avoid the lease. (2 Lom. Dig. 453; Burrel's Case, 6 Co. 92 a and b.)

It is not needful, according to the construction of the English statute, that the subsequent purchaser should be *without notice* of the fraudulent conveyance; for, it is said, it would be *only notice of a void thing*, and that, moreover, the statute, by its terms, requires such a construction. But the purchaser must always be a *purchaser for value*. (2 Lom. Dig. 453; Gooch's Case, 5 Co. 60 b; Doe v. Manning, 9 East. 59; Evelyn v. Templar, 2 Bro. C. C. 148.) And whatever extraordinary construction may prevail in respect to the English statute, ours in Virginia expressly declares that its provisions "shall not affect the title of a purchaser for *valuable consideration*, unless it appear that he had *notice of the fraudulent intent* of his immediate grantor, or of the fraud rendering void the title of such grantor." (V. C. 1873, ch. 114, § 1; V. C. 1887, ch. 109, § 2458.) A voluntary conveyance, however *bona fide* made, cannot be defeated by a subsequent *voluntary* deed, nor by a will; for, as we have just seen, the purchaser whom the statute designs to protect is the purchaser *for value*. (2 Lom. Dig. 459; Clavering v. Clavering, 2 Vern. 473; Villers v. Beaumont, 1 Vern. 100; Bolton v. Bolton, 3 Swanst. 414, note.)

The badges and proofs of an *actual fraudulent* intent in the case, and in favor of a *purchaser*, do not essentially differ from those in the case of *creditors*; but the diversity is considerable where

the fraudulent intent is merely to be *implied*, as from the fact that the conveyance complained of is *voluntary*. Where the conveyance is thus *voluntary*, the modern English doctrine is that, as to subsequent purchasers for value, the subsequent sale for value *conclusively* proves the previous voluntary gift to have been made with a *fraudulent intent*; a conclusion not to be repelled by any circumstances whatever. (2 Lom. Dig. 453-'4; 1 Stor. Eq. § 426.)

The former English doctrine, however, which prevailed at the commencement of the American revolution, and which we are considered as having adopted along with the statute itself, was that a subsequent sale for value, after a *prior voluntary* conveyance, was only *presumptive evidence* of a fraudulent intent in making the prior conveyance, and threw on him who claimed under such prior conveyance the burden of proving that it was made *bona fide*. (2 Lom. Dig. 454 '5; 1 Stor. Eq. §§ 430 to 432.) Accordingly, in *Robinson v. Cathcart*, 5 Pet. 264, 280, the supreme court of the United States held that where a husband had made a voluntary settlement of certain property upon his wife, and afterwards conveyed the same for value to another person, the subsequent purchaser's title should prevail by virtue of this *presumption* of an intended fraud, unless the wife could repel such presumption, which she was so far from being able to do that the circumstances all tended to confirm the presumption. And a similar doctrine prevailed in Virginia prior to July 1, 1850 (Bk. of Alex. v. Patton, 1 Rob. 500), and, it seems, also in New York and Massachusetts. (1 Stor. Eq. §§ 427, 428; 2 Lom. Dig. 455.) But by the revision, taking effect 1st July, 1850, the fact that the prior conveyance is voluntary affords, as to subsequent purchasers, not even *prima facie* evidence of a fraudulent intent, as is expressly declared by the terms of the statute itself (*Ante*, p. 674; V. C. 1873, ch. 114, § 2.) A voluntary conveyance "shall not on that account *only* be void as to *subsequent purchasers*." (V. C. 1887, ch. 109, § 2459); although, doubtless, such voluntariness would be an auxiliary circumstance strongly aiding to establish an intent to defraud.

It seems to be immaterial, in respect of imputed frauds upon *purchasers*, whether at the time of executing the conveyance alleged to be fraudulent,



the grantor *were indebted or not*. That fact has an important bearing upon the question whether he designed to defraud *creditors*; but his intent to deceive and defraud creditors, though it were ever so clearly manifested, does not invalidate the conveyance in respect to *purchasers*. A fraudulent purpose against creditors, it is said, can have no connection with, or tendency to promote, a fraudulent purpose against subsequent purchasers. (Bk. of Alex. v. Patton, 539-'40; 2 Lom. Dig. 456-'7.)

It is considered that a conveyance to secure debts generally, to which no creditor nor trustee is a party, or which no creditor or trustee has sanctioned by previous assent or subsequent ratification, is merely a *voluntary* dedication by the debtor of the property in question to the debts indicated, and therefore may be *revoked* at pleasure. Hence, as to a subsequent purchaser for value, whose title accrues before any assent is given to the first deed, it is fraudulent and void, and seems incapable of enforcement at the suit of creditors named in it, even against the *grantors*. (2 Lom. Dig. 457; Spencer v. Ford, 1 Rob. 659; Walwyn v. Coutts, 3 Meriv. 707; S. C. 3 Sim. (6 E. C. R.) 14; Garrard v. Ld. Lauderdale, 3 Sim. (6 E. C. R.) 1; Bill v. Cureton, 2 My. & K. (8 E. C. R.) 511.) A subsequent assent, however, even by act *in pais*, by either the trustee or *cestui que trust*, if given before the rights of other parties attach, has relation to the execution of the instrument, and gives effect to it *ab initio*. (Skipwith's Ex'or. v. Cunningham, &c. 8 Leigh, 272, 286; Marbury v. Brooks, 7 Wheat. 566; Brooks v. Marbury 11 Wheat. 78.)

But see Ellyson v. Ellyson, 6 Ves. 656; Pulvertoft v. Pulvertoft, 18 Ves. 84; 2 Kent's Com. 533.

A mortgagee is a purchaser for value, and so is a creditor secured by deed of trust, or rather the trustee therein, and so also, is a creditor to whom a conveyance is made in payment or satisfaction of a *pre-existing* debt; and either, therefore, may avoid a prior fraudulent conveyance, whether its fraudulent character be derived by inference, from its being voluntary, or from proof of actual fraud. (Chapman v. Emery, Cowp. 279; 2 Lom. Dig. 457-'8; Wickham & al. v. Lewis Martin & Co., 13 Grat. 427, 437; Evans v. Greenhow, 15 Grat. 153; Cammack v. Soran, 30 Grat. 297.)

The subsequent purchaser must be, as we have

seen, a purchaser *for value*; and if it appears that the price paid by him is notably inadequate; or where, to inadequacy of price, other circumstances are coupled, indicating a fraudulent collusion between him and the vendor in order to avoid the prior conveyance, such subsequent purchaser is not entitled to the protection of the statute. (2 Lom. Dig. 458; *Twyne's Case*, 3 Co. 83; *Doe v. Routledge*, Cowp. 705.)

One who buys at a judicial sale made for the benefit of a creditor, is not a *purchaser* under the statute, but simply succeeds to the rights of the creditor. (2 Lom. Dig. 458; *Jackson v. Hans*, 15 Johns. (N. Y.) 261; *Jones v. Crawford*, 1 McMull. (Tenn.) 373; *Ridgway v. Underwood*, 4 Wash. C. C. 129.) But see *Contra*, 2 L. C. in Eq. (4 Am. ed.) 93-'4 and cases cited.

The consideration of marriage always is *valuable*, at least as to the consort and the children of the marriage; and so, when marriage supervenes, even though after the execution of the subsequent conveyance, it is sufficient at common law to establish it as a conveyance *for value*, and to render a prior *voluntary gift* fraudulent and void as to it. (2 Lom. Dig. 461, 458; *Ante*, p. 684-'87.) And as it is provided by the statute (V. C. 1873, ch. 114, § 1; V. C. 1887, ch. 109, § 2458), that its provisions shall not affect the title of a purchaser for valuable consideration, unless it appear that he *had notice* of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor, a consideration of marriage, accompanying the settlement, or following after it, will give the settlement priority over any subsequent conveyance, unless the party had notice of the fraudulent intent of the grantor, &c. (2 Lom. Dig. 461; *Magniac v. Thompson*, 7 Pet. 393; *Huston v. Cantrel*, 11 Leigh, 176; *Bentley, &c. v. Harris' Adm'r*, 2 Grat. 363; *Welles v. Cole*, 6 Grat. 645; *Herring v. Wickham*, 29 Grat. 633; *Triplett v. Romine*, 33 Grat. 659; *Clay v. Walter*, 79 Va. 96; *Hopkirk v. Randolph*, 2 Brock. 133, 147-'8; *Sexton v. Wheaton*, 1 Am. L. C. 82.)

It will be remembered, however, that by the Code of 1887, conveyances "upon consideration of marriage," are put upon the same footing as voluntary conveyances. The enactment declares that "Every gift, conveyance, assignment, transfer, or charge, which is not upon consideration, deemed

*valuable in law*, or which is upon *consideration of marriage*, shall be void as to creditors, whose debts shall have been contracted at the time it was made." (V. C. 1887, ch. 109, § 2459.)

The liability for the value of the property, if destroyed, &c., before the recovery, and for rents and profits thereof, is the same as in case of a creditor. (*Ante* p. 693; *Sexton v. Wheaton*, 1 Am. L. C. 82.)

5<sup>p</sup>. Fraud which Infects *Catching Bargains* with Heirs, Reversioners, or other Expectants.

Bargains made with or conveyances taken from heirs, reversioners, or other *expectants*, in the life-time of their ancestors or relations, from whom is the *expectation* of the estate, tend to deceive and disappoint the relations from whom the expected property is to be derived.

These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. The proof of fraud is generally supplied by inference from the circumstances or condition of the parties contracting; weakness on one side, and usury, or extortion taking advantage of weakness, on the other. The nature of the bargain, *e. g.*, its unconscionableness, although there be no circumvention, often detects the fraud. And in most cases have concurred deceit and illusion practiced on other persons not privy to the agreement; as on the father or other relation from whom comes the expectation of the estate; the expectant has been induced to conceal his circumstances from those whose advice and encouragement might have tended to his relief, and also to his reformation; and the ancestor being deceived to leave his estate, not as he designed, to his heir or family, but to the artful intriguers who have already divided the spoil. (2 Lom. Dig. 398; 1 Stor. Eq. § 334.)

In all cases of this sort, it is incumbent upon the party dealing with the expectant to establish, not only that he took no advantage, and was guilty of no direct fraud, but that he paid a full and adequate consideration, and that the contract is above all exception. (2 Lom. Dig. 398; 1 Stor. Eq. § 336; *Chesterfield v. Jansen*, 1 Wh. & Tud. L. C. 410.)

This doctrine is applied in England, not only to expectant heirs, but also (with doubtful expediency) to reversioners and remaindermen, dealing with property already vested in them, but not in possession, and, therefore, apt to be under-estimated by the necessities, the improvident and the young. (2 Lom. Dig.

398-'9; 1 Stor. Eq. § 337, &c.; *Chesterfield v. Janssen*, 1 Wh. & Tud. L. C. 410-'11, and cases cited.) But this English rule of policy, which deprives the owner of a reversion or vested remainder of the free alienation of his property, and obliging him to forego any benefit which he might derive by negotiating a *private sale* thereof, constrains him to sell at *public auction* (so as to afford satisfactory proof of an adequate price), or to hold on to an unproductive reversion or remainder, perhaps till the decline of life, is not adapted to the usages or sentiments of society in this country. The adult proprietor of a *vested* interest in property, whether in reversion or remainder, is not thus to be reduced to a condition of pupillage, from regard to any such supposed rule of policy, or for the purpose of extending to him an ambiguous protection. All attempts thus to fetter the action of the owner by restricting his power of alienation, really operate injuriously to him. The doctrine of imputing fraud as a *matter of law* is not favored with us. (*Hutchison v. Kelly*, 1 Rob. 123; *Bank of Alexandria v. Patton*, 1 Rob. 499; *Davis v. Turner*, 4 Grat. 422; *Cribbins v. Markwood*, 13 Grat. 507.) And the inquiry, in such cases as we are considering, should be whether in the particular case *actual fraud* existed. Inadequacy of price, youth, inexperience, indebtedness, distress, are circumstances to be looked to and weighed in determining whether, in the particular instance, the bargain is so unconscionable as to demonstrate some gross imposition, circumvention, or undue influence; and so to justify relief on the ground of fraud. In the absence of such proof of actual fraud, it is not incumbent on the purchaser of such an interest in the way of a reversion or remainder, more than in the case of property in possession, in order to make good the bargain, to show that a full and adequate consideration was paid. (*Cribbins v. Markwood*, 13 Grat. 507-'8; *Nichols v. Gould*, 2 Ves. Sr. 422; *Griffith v. Spratley*, 1 Cox's Cases, 383.)

2<sup>m</sup>. Considerations *Involving Mistake or Misapprehension.*

In cases of *plain mistake or misapprehension*, though not the effect of fraud or contrivance, equity will rescind the conveyance, if the error goes essentially to the substance of the contract, so that the purchaser does not get what he bargained for; or the vendor sells that which he did not design to sell; or if the circumstances do not demand the total rescission of the contract, the court will give relief by adjusting a compensation between the parties. (2 Lom. Dig. 409 '10; *Alexander v. Newton*, 2 Grat. 266; *Irick v. Fulton*, 3 Grat. 184; *Shepherd v. Hen-*



derson, 3 Grat. 350; Lea v. Eidson, 9 Grat. 277; French v. Townes, 10 Grat. 513; Gaw v. Hoffman, 12 Grat. 628.) And the student should note that in cases of trust, of mistake, of fraud, or contract, equity may entertain jurisdiction wherever the *person* is found within the state, although the *lands* lie beyond its limits, (Davis v. Morris, 76 Va. 51; *Ante*, p. 254.)

The distinction chiefly to be here noted is between mistakes *in law* and mistakes *in fact*;

W. C.

### 1<sup>n</sup>. Considerations Involving *Mistakes in Law*.

The general doctrine is that ignorance or mistake of the law does not affect contracts or conveyances. If they are entered into *in good faith*, and are free from misapprehension as to *facts*, although under a mistake of the law, they are for the most part valid. (Zollman v. Moore, 21 Grat. 313; Ross v. McLaughlin, 7 Grat. 86; Jennings v. Palmer, 8 Grat. 70; Brown v. Armistead, 6 Rand. 594; Hunt v. Rousmanier, 1 Pet. 15; Bank of U. S. v. Daniel, 12 Pet. 55.)

In respect, however, to the vendor's or vendee's ignorance in law of *the title* he proposes to convey or to acquire, a number of cases, both in England and in Virginia, establish that, notwithstanding the general doctrine, and although there may not appear to be any fraud, a court of equity will not refuse to give relief under circumstances, by either rescinding the contract in whole or in part, or by otherwise decreeing compensation to one or other of the parties. (2 Lom. Dig. 410; 1 Stor. Eq. §§ 120 & seq.; Id. § 126, and n. 1; Bingham v. Bingham, 1 Ves. Sr. 126; Lansdowne v. Lansdowne, 2 Jac. & Walk. 205; Hunt v. Rousmanier, 8 Wheat. 214; Hunt v. Rousmanier's Adm'r, 1 Pet. 15, 16; Pullen v. Mullen, 12 Leigh, 434; Irick v. Fulton, 3 Grat. 193; Brown v. Rice, 26 Grat. 470 & seq.)

### 2<sup>n</sup>. Considerations Involving *Mistakes of Fact*.

Where an act is done or a conveyance executed under a mistake or ignorance of *matter of fact*, material to the transaction, and an efficient inducement thereto, the general rule is, that a court of equity will relieve by setting the conveyance or act aside. Thus, if A buys land of B, to which B is supposed to have a good title, and it turns out that, in consequence of facts unknown alike to both parties, he has no title at all, equity will cancel the transaction, and cause the purchase-money to be restored to A, putting both parties *in statu quo*. (2 Lom. Dig. 411-12; 1 Stor. Eq. §§ 140 & seq.; Ross v. McLaughlin, 7 Grat. 8; French v. Townes, 10 Grat. 513; Gaw v. Hoffman, 12 Grat. 628; *Post*, pp. 881, &c.) The mistake, how-

ever, must be made out by the clearest and most satisfactory testimony, the burden of proof being on the complainant. (Woollam v. Hearn (7 Ves. 211), 2 Wh. & Tud. L. C. (Pt. I.). pp. 540, 547 & seq., 558 & seq.; Carter v. McArtor, 28 Grat. 360, 361; Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 595, 630; Henkle v. Assurance Co. 1 Ves. Sr. 317; Shelburn v. Inchiquin, 1 Bro. Ch. 338, 350; Hudson Iron Co. v. Stockbridge Iron Co. 107 Mass. 290; Major v. Ficklin, 85 Va. 737.)

However, in case of *compromise of doubtful rights*, ignorance of fact is in general no ground for annulling the adjustment made (supposing that there is no fraud nor misrepresentation), however unequal it may prove to be, and although concessions may be made which neither law nor fact required. The peace of society is thus best secured, for no compromise could ever be made if compromises might be overthrown upon any subsequent ascertainment of right contrary thereto. (2 Lom. Dig. 412; 1 Stor. Eq. §§ 129 & seq.; Jones v. Carter, 4 H. & M. 184; Moore v. Fitzwater, 2 Rand. 432; Zane v. Zane, 6 Munf. 406.)

Where there is a material mistake in the substance of the thing contracted for, so that the purchaser does not get substantially what he bargained for, and the seller parts with what he had no idea of selling, the contract or conveyance ought to be vacated. To hold otherwise would be to make a contract for parties, rather than to enforce one. (2 Lom. Dig. 412-13; Graham v. Hendren, 5 Munf. 185; Chamberlaine v. Marsh's Adm'r, 6 Munf. 283, 287; Tucker v. Cocke, 2 Rand. 66; Thompson v. Jackson, 3 Rand. 504; Lamb v. Smith, 6 Rand. 552; Glassell v. Thomas, 3 Leigh, 125, 129; Trick v. Fulton, 3 Grat. 184; Bailey v. James, 11 Grat. 468; Hoover v. Calhoun, 16 Grat. 109; Mauzy v. Sellers, 26 Grat. 645 & seq.)

In respect to *judicial sales*, the maxim of *caveat emptor* applies with considerable strictness. The court undertakes to sell only the title, such as it is, of the parties to the suit, and the purchaser must ascertain for himself, whether the title is liable to impeachment; and if he has just grounds of objection for want or defect of title, he must present them to the court before the confirmation of the sale. Ordinarily, objections after confirmation, come too late. (Thralkeld v. Campbell, 2 Grat. 198; Young v. McClung, 9 Grat. 358; Daniel v. Leitch, 13 Grat. 212-13; Watson v. Hoy, 28 Grat. 698; Long v. Weller, 29 Grat. 351.)

And even when the objection is presented in time, it must be a *mutual mistake after discovered*, of material facts, or a mistake as to such facts, by *one party* induced by the *fraud or culpable negligence of the other*, and not

arising from his own negligence. (1 Stor. Eq. §§ 151, 146; Watson v. Hoy, 28 Grat. 710-'11; Long v. Weller, 29 Grat. 353; Hirkson v. Rucker, 77 Va. 138; Redd v. Dyer, 83 Va. 335.)

A not infrequent, and a very important enquiry connected with this subject, relates to those cases where contracts for, or conveyances of, lands have fallen into innocent mistakes of description, either in respect of the situation and boundaries, or more frequently of the *quantity*. The general doctrine is that already stated, that if the parties are in error as to the *substantial inducement* to the transaction, it must be relieved against, either by rescinding the contract, or by decreeing compensation. Thus, where a vendor's conveyance in good faith described the land, which was in several tracts, as situated on *Paint Creek*, whose lands were noted for fertility, whereas in fact but one tract, rather more than *one-fourth* of the whole, was on that stream, and the residue was of much less value than it would have been had it been so situated, the conveyance was rescinded, and the purchase-money decreed to be refunded, upon the ground that there was an innocent mistake as to the situation of the land, and the substantial inducement to the contract. (2 Lom. Dig. 412 '13; Chamberlaine v. March, 6 Munf. 282; Glassell v. Thomas, 3 Leigh, 137.)

This same principle governs where there is an innocent mistake as to the *quantity*. Of course the parties *may* contemplate a contract of *hazard*, taking the land according to its known metes and bounds, or even subject to a contingency as to its metes and bounds, at a price in gross; but such an agreement must be *clearly shown*, and that not merely by the use of the phrase "more or less," but by a clear indication of such an intent. Except where such a *contract of hazard is proved*, wherever the real quantity turns out to be *materially* more or less than what was anticipated by the parties, whether the sale be *by the acre*, or otherwise, equity entertains jurisdiction and gives relief, on the ground of *mistake*. (Triplett v. Allen, 26 Grat. 723 '4.) If the design of either party in the transaction (although it is more likely to occur with the purchaser) be frustrated in consequence of the mistake in the quantity, the contract or conveyance is to be rescinded, and the purchase-money, if any has been paid, is to be refunded; but if the plans of the parties may be carried into effect, notwithstanding the difference in quantity, compensation is to be decreed on the one side or the other, according as the quantity ascertained is less or more than the quantity expected. (2 Lom. Dig. 414 & seq.; Quesnel v. Woodlief, 6 Call, 218; Beirne &

al. v. Erskine, 5 Leigh, 62, 64; Hull v. Cunningham, 1 Munf. 330; Blessing v. Beatty, 1 Rob. 287; Crawford v. McDaniel, 1 Rob. 418; Neale v. Logan, 1 Grat. 14; Purcell v. McLeary, 10 Grat. 246; Hoback v. Kilgore, 26 Grat. 444.)

Where the contract is not one of hazard, so that the court of equity will relieve against a *deficiency* in the quantity, the *general rule* of compensation is according to the average value of the whole tract, except where peculiar circumstances require a departure therefrom. Thus, if the structures upon the land were only the ordinary farm-building and improvements, the general rule would prevail, but if the structures and appendages constituted the chief value of the premises, they must be taken into account, and deducted from the total value of the premises, before proceeding to ascertain the average value per acre. (Blessing v. Beatty, 1 Rob. 298; Hoback v. Kilgore 26 Grat. 444; Watson v. Hoy, 28 Grat. 698; Yost v. Mallicote, 77 Va. 615.)

And if, by the expenditure of a certain amount of money and trouble, the vendee obtains a satisfactory title to the lacking quantity, the compensation decreed is to be, not the *pro rata* value thereof, but the amount expended in procuring the title, with a reasonable remuneration for his trouble. (Hull v. Cunningham, 1 Munf. 330.)

Where the vendee has got the tract of land he bargained for, although not by the boundaries designated, which have been innocently mis-stated by a mistake common to both parties, the *conveyance* will be reformed in equity according to the truth; but as no mistake has occurred in the substantial inducement to the contract, no relief can be given as for a diminished or an increased quantity. (2 Lom. Dig. 416; Keyton v. Brawford, 5 Leigh, 39; Stafford v. White, 6 Grat. 93.)

It may be expedient to mention, that when it is obvious on the *face of a writing* that a word or phrase has been omitted by mistake or inadvertence, and the words which the parties must have intended to use to express their meaning, be obviously and naturally suggested upon the mere inspection of the writing, such words, or words of like import may be supplied. (2 Lom. Dig. 255-'6; 2 Pars. Cont. 73, 75; Benj. Sales (1st Am. ed.), § 53; Smith v. Lloyd, 16 Grat. 311; Peyton v. Harman, 22 Grat. 645-'6.)

### 3<sup>m</sup>. Impossible Considerations.

A consideration whose performance is *utterly and naturally impossible* can confer no benefit, and is therefore equivalent to *no consideration at all*; nor will the law notice an act which is obviously impracticable and ridiculous; as that A shall go from Richmond to Vienna in an



hour. (1 Chit. Cont. (11th Am. ed.) 64.) But it will be remembered that a deed of conveyance operating at common law, as *by feoffment*, requires no consideration to give effect to it as between the parties, nor does a deed operating as a *grant*, under the statute of grants (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417); and, therefore, although the consideration be impossible, yet in those cases the conveyance is, as between the parties, not the less operative; although, to be sure, the impossibility, like the inadequacy or absence of consideration, may sometimes afford evidence of fraud, even as between the parties, and much more as to creditors and purchasers, whose rights may be thereby affected. (2 Washb. R. Prop. 652; Taylor v. King, 6 Munf. 358; 2 Lom. Dig. 25.) But conveyances operating under the *statute of uses* require always either a *valuable* consideration, or a consideration of *natural love and affection*, the former for a conveyance by bargain and sale, and the latter for one by covenant to stand seised. For a conveyance by bargain and sale, therefore, an impossible consideration, as it cannot be valuable, will not suffice. (2 Lom. Dig. 25-6; 2 Washb. 653.)

#### 4<sup>l</sup>. Deeds Must be Written or Printed upon *Paper or Parchment*.

A deed may be written or printed in any character or language, and, it is believed, in ink, or with pencil; but it *must be upon paper or parchment*; for if written on stone, board, linen, leather, steel, or brass, or the like, it is *no deed*, although it is doubtless a *good agreement in writing*. Wood, stone, or steel, may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must have also the regular *stamp*s required by the stamp-law (if any such enactments are in existence), or else it cannot, *perhaps*, be given in evidence, and under circumstances, *may be void*. (2 Bl. Com. 297; Schneider v. Morris, M. & S. 285 & Seq.; Chit. Cont. 72; Geary v. Physic, 5 B. & Cr. (11 E. C. L.) 234; Jeffrey v. Walton, 1 Stark. Rep. (2 E. C. L.) 267; Rymes v. Clarkson, 1 Phil. (E. Ec. R.) 22; Dickinson v. Dickinson, 2 Phil. (E. Ec. R.) 173; Green v. Skipworth, 1 Phil. (E. Ec. R.) 53; Hale v. Wilkinson, 21 Grat. 78; Talley v. Robinson, 22 Grat. 896; Campbell v. Wilcox, 10 Wal. 421; Carpenter v. Snellings, 97 Mass. 452.)

#### 5<sup>l</sup>. Matter Legally and Orderly Set Out.

Let us note, (1), The meaning of the requirement that a deed must have its matter legally and orderly set out; and (2), The orderly parts of a deed of conveyance;

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1<sup>m</sup>. The Meaning of the Requirement.

The meaning of the requirement touching orderly parts of a deed is, that there must be words sufficient to specify the agreement and to bind the parties; which sufficiency must be left to the courts to determine. For it is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare, clearly and legally, the party's meaning. But as those formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason, or urgent necessity. Frequently the reason for using particular expressions will appear after many years' study, when before, upon a cursory consideration, the words seemed unnecessary, if not improper. (2 Bl. Com. 298, & n's (7) and (8); 4 Kent's Com. (12th ed.) 460, 461.)

2<sup>m</sup>. The Orderly Parts of a Deed of *Conveyance of Lands*.

The formal and orderly parts of a conveyance of lands are commonly enumerated as follows: (1), The premises; (2), The habendum; (3), The tenendum; (4), The reddendum; (5), The conditions; (6), The warranty; (7), The covenants; and (8), The conclusion. (2 Bl. Com. 298 & seq.) w. c.

1<sup>n</sup>. The Premises.

The premises contain the names of the parties; the recital of whatever circumstances may be needful to explain the reasons of the transaction; the consideration which induced the deed; and whatever is necessary to make it clearly intelligible what is the subject of the grant, and who are the grantor and grantee. (2 Bl. Com. 298; 2 Th. Co. Lit. 240; Shepp. Touchst. 52, 74-75.)

2<sup>n</sup>. The *Habendum*.

The office of the habendum is to determine what *estate or interest* is granted by the deed, although this may be, and generally is, stated in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict, or be repugnant to the estate granted in the premises. In case of such irreconcilable repugnancy, the *premises generally prevail*, for the *habendum* cannot divest an estate already vested by the premises. (2 Bl. Com. 298; 2 Lom. Dig. 288; 2 Th. Co. Lit. 241; Shepp. Touchst. 52, 75 & seq.) An exception, however, to this general doctrine is suggested by the case of *Humphrey v. Foster*, 13 Grat. 653, arising out of the statute of Virginia (V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420), dispensing with words of limitation, and declaring that every conveyance shall *pass a fee-simple*,

unless "a contrary intention shall *appear by the conveyance*," etc. In the conveyance referred to, the deed conveyed the land to the grantee *for ever, habendum* for life; and it was held that, as the premises only conveyed a fee by virtue of the statute, and by the statute *the whole deed* is to be looked to, in order to ascertain what was intended to be passed, the *habendum* was not void, but only a life-estate passed by the deed.

### 3<sup>n</sup>. The *Tenendum*.

In modern times, even in England, the *tenendum* is of little practical use, and in deeds conveying a fee-simple is retained only by custom. It was formerly employed to set forth the *feudal service* to be rendered for the land by the grantee; and also to show *of whom* the land was to be held; but as the statute of *quia emptores terrarum* (18 Edw. I., c. 1) has caused all fee-simple lands to be held of the *chief lords of the fee*, and as all tenures, with a few unimportant exceptions, were by 12 Car. II., c. 24, reduced to *free and common socage*, the occasion for the clause of *tenendum*, in conveyances in fee-simple, has in a great degree passed away, and it is usually pretermitted. In Virginia, where all feudal tenures are abolished (10 Hen. St. 65), the *tenendum* is improper, or at least superfluous, in conveyances of the fee-simple. (2 Bl. Com. 298-'9; 2 Th. Co. Lit. 241-'2, & n. (R.); Shepp. Touchst. 52, 79; *Ante*. p. 74.)

### 4<sup>n</sup>. The *Reddendum*.

The office of the *reddendum* is to set forth the *return* (reditus), which in feudal times, for the most part, accompanied all conveyances, even those in fee-simple, being generally *military services*. The *reddendum* may still be properly used in conveyances in fee, when (as sometimes happens) an annual or periodical rent is reserved as a compensation or return for the property; and in conveyances for life, for years, or at will, a clause of *reddendum* is well nigh invariable. A *reddendum*, it will be observed, must be to the *grantors*, or some, or one of them, and not to any *stranger* to the deed. (2 Bl. Com. 299; 2 Th. Co. Lit. 142. & n. (S.); Shepp. Touchst. 52, 80, 81; *Ante*, p. 49.)

### 5<sup>n</sup>. Conditions.

We have seen what a *condition* is (*Ante*, p. 261), namely, a qualification attached to an estate, upon the happening or not happening of which the estate is to arise, or to be defeated; as, "provided that, if the mortgagor shall pay the mortgagee \$500 upon such a day, the whole estate granted shall determine," etc. (2 Bl. Com. 299; Shepp. Touchst. 52, 81.)

In practice, most conveyances in fee-simple are *uncon-*

*ditional*; and of course, if no conditions are to be stipulated, there will be no clause of conditions.

## 6<sup>n</sup>. Warranty.

Lord Coke assures us that, "The learning of warranty is one of the most curious and cunning learnings of the law, and of great use and consequence" (2 Th. Co. Lit. 268); and although in these latter days it is shorn of much of its "great use and consequence," yet enough of both remains to justify and require the student to give attentive heed to the outline of the doctrine touching the subject, as it is about to be expounded. We shall advert to (1), The nature of warranty; (2), How it is created; (3), Its different kinds; (4), Its effect; and (5), The remedies whereby it is made available;

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### 1<sup>o</sup>. The Nature of Warranty.

"A warranty," says Lord Coke, "is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same; and either upon *coucher* or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those that shall be evicted by a former title; or else may be used by way of *rebutter*;" that is, to repel or rebut the claim of the grantor himself, or of his heirs, to the lands. It extends to no lease for years or to any other chattel, and if proper words of warranty are applied to such interests they are to be construed as creating only a *personal covenant*. (2 Th. Co. Lit. 245, 249, and n. (D.); 250, n. (F.); 2 Bl. Com. 300; *Williamson v. Codrington*, 1 Ves. Sr., 516.)

### 2<sup>o</sup>. How a Warranty is Created.

Warranty is either, (1), Implied; or (2), Express;

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#### 1<sup>p</sup>. Warranty Implied.

A warranty is implied wherever, upon the conveyance of a *freehold*, there is a *reversion in the grantor* and the land is held of him. At common law, this is the case even in conveyances in fee-simple, and, therefore, a warranty at common law is implied in all cases of *freehold* conveyances, at least where the word *dedi* is used. But when the statute *Quia emptores* (18 Edw. I., c. 1) had declared that, upon conveyances in fee-simple, the *tenure* should be, not of the grantor, but of the *chief lords* of the fee, implied warranty became limited to tenants in tail, for life and for years, although in estates for years, it is only a *personal covenant*; but in the case of *freeholds* (*i. e.* of estates tail and for life), a warranty is implied only where the word *dedi* is used; and with us, as well as in England, upon a conveyance in fee-simple, the



grantor is no further liable for the title than he *covenants to be*, except in case of *fraud or material mistake*, and except also in case of partition or exchange of lands, where either party is evicted of his share, in which case the other and his heirs, are bound to warranty, for which no better reason is given than that they *enjoy the equivalent in land*. (2 Bl. Com. 300; Black v. Gilmore, 9 Leigh, 448, 449; Williams v. Burrell, 1 Com. B. (50 E. C. L.) 429 & seq.; 2 Th. Co. Lit, 252-'3, and n. (K.); Rawle, Cov'ts of Title, 353 & seq.)

## 2<sup>d</sup>. Warranty Express.

Express technical warranty can be created by *no word whatsoever*, except *warrantizo*, or in English *warrant*. If any other word or phrase be substituted, or be joined with the word *warrant* (save only the auxiliary *will* or *shall*), it is not the ancient "*covenant real*," but becomes a modern *personal covenant of title*. And so also, an ancient warranty can be annexed to no estate *less than freehold*; and hence, if the proper words of warranty be applied to a lease for years, or to any chattel, it is a *personal covenant*; so that, if a conveyance of land in fee-simple comprised chattels also, the same words (*I will warrant*) are construed as creating an ancient warranty as to the land, and a personal covenant as to the chattels. Hence, if the grantor says "I will warrant" the land, etc., it is the *ancient warranty*; but "I will warrant and defend," or "I covenant, or agree to warrant," or "I will warrant a term for years," etc., are modern and *personal covenants of title*. And it should be observed, that an *express* warranty always supersedes one implied. (2 Bl. Com. 301; 2 Th. Co. Lit. 250 & seq., and n's (D.) & (F.); Id. 256; 2 Com. Dig. 318, 321; Tabb v. Binford, 4 Leigh, 132; Nokes' Case, 4 Co. 80 b; Williams v. Codrington, 1 Ves. Sr., 511.)

## 3<sup>d</sup>. The Different Kinds of Warranty.

Warranty is either, (1), Lineal; (2), Collateral; or (3), Warranty commencing by disseisin;

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### 1<sup>d</sup>. Lineal Warranty.

Lineal warranty means warranty that descends *in the same line* with the land warranted; that is, in the same line that the land would have descended in, had it not been sold. The warranty thus descending in the same line with the land is *lineal*, whether it is derived by lineal or collateral *descent*. Thus, if the proprietor of land sells it with warranty, and then die leaving *his nephew* his next of kin and heir, the warranty is *lineal*, while the *descent* of it from the uncle to the nephew is

*collateral*. (2 Bl. Com. 301; 2 Th. Co. Lit. 274, 278 & seq. and n. (M. 1).)

## 2<sup>p</sup>. Collateral Warranty.

Collateral warranty means warranty that descends, *not in the same line* with the land warranted, but from a *different ancestor*. Thus, if a tenant by the curtesy or in dower, aliene his or her estate in fee with warranty, and then die leaving a son, the common heir of both parents, the warranty is *collateral*, because it comes from one parent, when his right to the land descends from the other. (2 Bl. Com. 301 '2; 2 Th. Co. Lit. 274 & seq.)

## 3<sup>p</sup>. Warranty Commencing by Disseisin.

Warranty commencing by *disseisin* is where the very conveyance to which the warranty is annexed immediately follows a disseisin, or itself operates as such (as where a father, tenant *for years*, with remainder to his son in fee, alienes in fee-simple, with warranty). This warranty being founded on the tort or wrong of the warrantor himself, is too palpably injurious to be supported, and is not binding upon any heir of such tortious warrantor; for it cannot be presumed that an ancestor unjust enough to commit such a wrong, will be so just as to leave a recompense to his heir. Warranty by disseisin, it will be observed, is, in all cases, *collateral*. (2 Bl. Com. 302; 2 Th. Co. Lit. 297, and n. (2), 302.)

## 4<sup>p</sup>. The Effect of Warranty; w. c.

1<sup>p</sup>. When the Obligation to Make Good the Warranty is Available; w. c.

1<sup>a</sup>. As to *Making Compensation* when the Land is Lost by Title Paramount.

The warrantor himself is of course *always bound* to make compensation when the land is lost by title paramount; but when he is dead, the liability of his heir to do so depends, at common law, first on the fact that *he is named* in the warranty: "*Hæredes mei*," says Lord Coke, "are words of necessity, for otherwise the heirs are not bound." (2 Th. Co Lit. 250, and n. (G.)) and secondly, on his having *assets descended* to him from the warranting ancestor. (2 Bl. Com. 302, 242 to 244, and n's; 2 Th. Co. Lit. 186, n. (A.)) And this doctrine applies without discrimination to both lineal and collateral warranty.

2<sup>a</sup>. As to *Rebutting the Claims of the Warrantor*, or his Heir, to the Lands.

The claims of the warrantor cannot, in general, be asserted in opposition to his own warranty, and the claim of his heir is, at common law, repelled or *re-*

*butted* by the warranty of the ancestor, whether the warranty be collateral or lineal, and whether the heir actually derived any heritage from the warranting ancestor or not.

It is to be observed, that a covenant real of warranty, when annexed to an assurance *by feoffment, fine, or common recovery*, had not only the ordinary and personal effect of rebutting or repelling the grantor or his heirs from claiming the land, as by force of the estoppel of the deed, but also the much higher operation actually to *transfer and pass* to the grantee any estate in the land which the grantor may *afterwards have acquired*. (Rawle, Cov'ts of Title, 319 & seq.; 2 Th. Co. Lit. 353, and n. (B. i.); Id. 456, 457; Shepp. Touchst. 204, 210; Burtners v. Keran, 24 Grat. 66.) But an after-acquired title, where the assurance is by grant or by release, or under the statute of uses, is not *actually passed* by direct operation of law, however the grantor and his heirs under such assurances may be *estopped* to claim it. (Rawle, Cov'ts of Title, 320, 321; Bigelow on Estoppel, 337, 360–363; Doe v. Oliver, 5 M. & R. 202; S. C. 2 Smith, L. C. 511, 514 & seq.; Doswell v. Buchanan, 3 Leigh, 365, 407; Burtners v. Keran, 24 Grat. 66, 67; Gregory v. Peoples, 80 Va. 357; Reynolds v. Cook, 83 Va. 821, &c.) Where land is conveyed without warranty, the grantor is, in general, not estopped from setting up a title which he has afterwards acquired. On the other hand, a covenant of title does work an estoppel in such case, partly in order to avoid *circuity of action*, seeing that, if the grantor were allowed to recover upon the after-acquired title, he would be immediately liable to the grantee, upon his covenant of title, to the extent of the value of the land: but for another reason also, namely, that honesty and fair-dealing forbid that one shall assert a right in opposition to his own averments and representations. Hence a grantor is estopped to claim a title which he has afterwards acquired, not only where there is a warranty, but also where the deed of conveyance recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate, which the deed purports to convey, and upon the faith of which the bargain was made. (Rensselaer v. Kearney, 11 How. 297; Burtners v. Keran, 24 Grat. 42; Raines v. Walker, 77 Va. 92; Gregory v. Peoples, 80 Va. 357; Reynolds v. Cook, 83 Va. 821 &c.) But although if the warrantor afterwards acquire title, on his own account, and with his own means, the title enures directly or indirectly to the benefit of the warrantee; yet if he buys *with*

*another's money*, it emures to the benefit of the latter. (Gregory v. Peoples, 80 Va. 357-'8; Bank of U. S. v. Carrington, 7 Leigh, 566; Kane v. O'Connors, 78 Va. 80; Raines v. Walker, 77 Va. 95.)

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1<sup>r</sup>. The Effect of Lineal Warranty in Rebutting the Claim of the Heir.

Lineal warranty rebuts or bars the claim of the warrantor's heir, notwithstanding he derives no inheritance from the warrantor, which is only reasonable and just; for if he could succeed in his claim, he would then gain assets by descent (if he had them not before), and must fulfil the warranty of his ancestor. (2 Bl. Com. 302.)

2<sup>r</sup>. The Effect of Collateral Warranty in Rebutting the Claim of the Heir.

Collateral warranty is, by the common law, also held to rebut or bar the heir's claim, and that notwithstanding he in fact derives no inheritance from the warranting ancestor; it being *presumed* that no ancestor would deprive his heir of his inheritance from another source, without providing on his own part an equivalent therefor. And such presumption was at an early period not an unfounded one, considering the predominant temper which then existed to aggrandize families, and to sacrifice present interest and convenience in order to promote the grandeur and influence of the generations to come. And it was further confirmed by the fact that, upon the alienation supposed, the ancestor forfeited the particular estate if the heir chose to enter *before the warranty descended on him*, so that his not having entered gave countenance to the presumption. (1 Tuck. Com. (B. II.), 238; 2 Th. Co. Lit. 294-'5; Urquhart v. Clarke, 2 Rand. 549, 559.) As that temper, however, did not survive the feudal period of the law, it is certainly remarkable that the legislature should have been so slow to change the doctrine, and especially remarkable that, having experienced the injustice occasioned by it in the case of tenants *by the curtesy*, and corrected it so early as 6 Edw. I. (A. D. 1278), no corresponding amendment relating to tenants *in dower* should have been instituted until 11 Hen. VII. (A. D. 1496); nor as to *tenants for life in general* until 4 and 5 Anne (A. D. 1706); nor as to *tenants in tail* until 3 and 4 Wm. IV. (A. D. 1834.)

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1<sup>s</sup>. The Amendments to the Common Law Touching Collateral Warranty, Wrought by Statutes in England; w. c.



- 1<sup>t</sup>. The Statute of Gloucester, 6 Edw. I., c. 3 (A. D. 1278).

This statute enacted that where tenants *by the curtesy* should aliene the lands with warranty, such warranty should be no bar to the son (the heir of both his parents) claiming his maternal inheritance, *unless assets descended from the father*. (2 Bl. Com. 302; Bac. Abr. Warranty, (I).)

- 2<sup>t</sup>. The Statute 11 Hen. VII., c. 20 (A. D. 1496).

By the statute of 11 Hen. VII., c. 20, if a *tenant in dower* aliene in fee, with warranty, and die, such warranty does not bar her heir, who is also the husband's heir, and claims the land as such, *unless assets descended from the mother*. (2 Bl. Com. 303; 2 Th. Co. Lit. 272; Bac. Abr. Warranty, (I).)

- 3<sup>t</sup>. The Statute 4 and 5 Anne, c. 16 (A. D. 1706).

By statute 4 and 5 Anne, c. 16, all warranties *by any tenant for life* are declared to be void against those in remainder or reversion; and all *collateral* warranties by any ancestor who has *no estate of inheritance* in possession, to be void against his heir. But that statute still left a collateral warranty by *tenant in tail* in full force as at common law. (2 Bl. Com. 303; Bac. Abr. Warranty, (I).)

- 4<sup>t</sup>. The Statute 3 and 4 Wm. IV., cc. 27 and 74 (A. D. 1834).

These statutes abolish all warranties (that is, the ancient *covenant real*, so called), together with all real actions. (Rawle, Cov'ts of Title, 24; Wms. Real Prop. 408-9.)

- 2<sup>a</sup>. The Amendments to the Common Law Touching Collateral Warranty, Wrought by Statute in Virginia.

Our statute achieves, by a single enactment of a few lines, the results of the English statutes from A. D. 1278 to A. D. 1834, without imitating, however, the sweeping annihilation of warranties contained in 3 and 4 Wm. IV., cc. 27 and 74. It enacts that "when the deed of the alienor mentions that he and his heirs will warrant what it purports to pass or assure, *if anything descends* from him, his heirs *shall be barred* for the value of what is so descended or liable for such value." (V. C. 1873, ch. 112, § 7; V. C. 1887, ch. 107, § 2419.) And this provision is understood to apply only to cases of *real assets descending* from the warranting ancestor, and not to personal assets, nor to assets, whether real or per-

sonal, accruing from him by devise or bequest. (Norman v. Cunningham, 5 Grat. 83, 77.)

2<sup>p</sup>. The Extent of the Obligation Arising Out of Warranty.

The obligation arising out of the warranty on the part of the warrantor and his heirs (supposing the latter to have assets by descent, and to the extent of such assets) is to render for any part of the land warranted, lost by title paramount, its equivalent in value *in other lands*, having reference to the value at the time of the making of the warranty. (2 Th. Co. Lit. 304, 308, 246, n. (A.); 2 Bl. Com; 302.)

5<sup>o</sup>. The Remedies whereby *Warranty is Made Available*; w. c.

1<sup>p</sup>. Rebutter.

The word *rebutter* is French, and is in Latin *repellere*, to repel or bar; that is, in the understanding of the common law, to repel or bar the action of the warrantor or his heir, by the warranty. And this is the first means (whether it can properly be called a *remedy* or not) whereby a warranty is made available. (2 Bl. Com. 302; 2 Th. Co. Lit. 246, & n. (A.), 303, & n. (G. 2).)

2<sup>p</sup>. Voucher to Warranty.

Where the purchaser has a *real action* instituted against him by some adverse claimant, he has at common law a right to *vouch* (*vocare*) his warrantor to make good his warranty, and to take the defence of the title upon himself; but this he can only do within the limits of the engagement of the warrantor, who is bound in general no further than as his contract charges him. The *voucher to warranty* constitutes the second means whereby a warranty is made available. (2 Th. Co. Lit. 304 & n. (G. 2).)

Voucher to warranty was once in terms abolished by statute in Virginia (1 R. C. 1819, p. 496 ch. 128, § 34); but the statute having been repealed (V. C. 1873, ch. 209, § 1; V. C. 1887, ch. 206, § 4202); the common law is thereby revived. (Ins. Co. v. Bailey's Adm'r, 16 Grat. 363; Booth's Case, Id. 519.) But as it was chiefly incident to writs of right, which are abolished (V. C. 1873, ch. 131, § 38; V. C. 1887, ch. 124, § 2759), its application is much circumscribed.

3<sup>p</sup>. Writ of *Warrantia Chartæ*.

Where the warrantee or his heirs are impleaded in an *assize*, or in a writ of entry in the *nature of an assize*, in which actions they cannot vouch, they shall have a writ *de warrantia chartæ* against the warrantor, or his heirs. And so likewise the warrantee, or his heirs, may at any time before they be impleaded for the land, bring a writ of *warrantia chartæ* upon the warranty in the deed

against the warrantor or his heirs, and thereby all the land the warrantor then has, or all that his heir has derived by descent from him, at the time of the writ brought, shall be charged with the warranty, into whose hands soever it afterwards goes; and if the land warranted be afterwards recovered from the warrantee, he shall recover in recompense, by means of voucher, as much in value of the warrantor and his heirs as he loses. And Lord Coke observes, that it is advisable to bring this writ of *warrantia chartæ* betimes, because it binds all the lands of the warrantor from the time of the writ brought, but it does not bind any land which he had previously aliened. Thus it appears that the writ of *warrantia chartæ* is an independent remedy in those cases where *voucher* does not lie; and in other cases an auxiliary remedy merely, to charge the land with the obligation, and to be followed by *voucher to warranty* afterwards, when the warrantee is impleaded. (2 Th. Co. Lit. 303-'4, n. (G. 2).)

Hence it would seem that, if *voucher* has been abolished in Virginia, the writ of *warrantia chartæ* has been in all cases substituted as an independent remedy, upon the ancient warranty. (See 3 Lom. Dig. 325.)

#### 7<sup>n</sup>. Covenants.

Covenants, as here used, are stipulations by either party, contained in a deed of conveyance, for the truth of certain facts, or to perform or give something to another. Thus, the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment, or the like; the grantee may covenant to pay the purchase-money, or to pay rent, or to keep the premises in repair. Covenants in modern times supply the place of ancient warranty, and something more. Thus, they may oblige the grantor to be answerable for the goodness of the title he sells, but they may also *relate to any other matter*; and when they concern the title to the land sold, they have this great advantage over the ancient warranty, that they enable the grantee to charge with damages in money both the *personal and real estate* of the grantor, if there is a breach of the agreement; whereas the warranty can be redressed by the recovery of *lands only*. (2 Bl. Com. 304.) It is therefore a fitting division of the subject of covenants, as contained in deeds of conveyance, to note, first, the two classes of such covenants, according as they do or do not *run with the land*; secondly, the *persons* respectively who are bound by, or may take advantage of such covenants; and thirdly, the extent and mode of recovery thereon; W. C.

#### 1<sup>o</sup>. The Classes of Covenants Contained in Deeds of Conveyance; W. C.

1<sup>p</sup>. Covenants which do not *Run with the Land*.

Covenants which *do not run with the land* are such covenants as do not affect the *nature, quality or value of the thing conveyed*, independently of collateral circumstances, however they may affect the parties collaterally, in respect of other lands owned by them. The designation by which they are described, namely, that they *do not run with the land*, marks their most distinctive characteristic; that is, that they do not pass with the land to the assignee thereof, either to benefit or to charge him, notwithstanding *assigns* be specially mentioned. Thus, where in a lease of land, with liberty to conduct a water-course through it, and to erect a silk-mill, the lessee covenanted for himself, his executors, etc., and *assigns*, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate, and afterwards *assigned the lease*, it was held that the covenant was not one that ran with the land, affecting neither its nature, quality, nor value, and that the *assignee* was not bound thereby. (Mayor of Congleton v. Pattison & al. 10 East, 130.) So a covenant to pay so much annually for the use of the poor, *does not run with the land*, (Mayho v. Buckhurst, 3 Cro. (Jac.) 438); nor a covenant to build a house on land other than that demised, or to pay a *collateral sum* of money (other than rent) to the lessor, or any money to a stranger, nor a covenant to return cattle, or cattle of like value, leased with the premises. (Spencer's Case, 5 Co. 16 b; S. C. 1 Smith's L. C. 92, 96, & seq.; Bac. Covenant, (E.), 3; Rawle, Cov'ts of Title, 281 & seq.)

It is not enough, however, that the covenant concerns or affects the land; but in order to make it run with the land, there must be a *privity of estate* between the contracting parties. Hence, if mortgagor and mortgagee unite in a lease for years, and the lessee covenant with the *mortgagor* and his *assigns* to pay rent, and do repairs, and the *mortgagee* afterwards assign his interest, the assignee can maintain no action against the lessee, because, although the covenants relate to the land, yet there is no privity of estate between the assignee and *mortgagor* with whom the lessee covenanted. (Webb v. Russel, 3 T. R. 402-'3; Stokes v. Russel, Id. 678; S. C. in Excheq'r Chamb. 1 H. Bl. 563.) And so, where a conveyance was made to such uses as W should appoint, and in default of appointment, to W in fee; and a rent in fee was reserved, with a covenant by W and *his assigns* to pay it; and W made an *appointment* to J, who covenanted



to pay the same rent, and died leaving T his heir, executor and devisee, it was held that T was not liable to pay the rent as assignee of W, T claiming not *in privity with W*, but under the appointment, and consequently from the first grantor. (Roach & al v. Wadham, 6 East. 269; Bac. Abr. Covenant, (E.) 3.)

For the most part, a covenant which relates to the land *runs with it*, and an assignee is liable to observe it, although assigns be not named; but as to this doctrine there seems at common law to be this exception, that if the covenant, although it concern the land, yet relates directly to a thing not then *in esse*, the covenant is not binding on an assignee unless expressly named. Thus, if in a lease the lessee covenants to *build a wall on the land*, and afterwards assigns, the assignee is under no obligation to erect the wall, unless the covenant were for the lessee *and his assigns*. (Spencer's Case, 5 Co. 15 b; Bac. Abr. Covenant, (E.) 3; 1 Smith's L. C. 92, 96 & seq.)

In Virginia, by statute, the words, "the said — covenants," has the same effect as if *assigns* were expressly named. (V. C. 1873, ch. 113, § 9; V. C. 1887, ch. 108, § 2445.)

A covenant of warranty runs with the land, and may be enforced by the grantee and his representatives and assigns, for the protection of the owner in whose time *the breach occurs*, but to constitute a breach of such a covenant, there must be an *eviction* of the party, or the plaintiff must be prevented from taking possession of the premises by an adverse possession of another under a better title. (Marbury v. Thornton, 82 Va. 704; Dickinson v. Hoomes, 8 Grat. 396; Sheffey v. Gardiner, 79 Va. 313; Grist v. Hodges 3 Dev. (N. C.) 200; Banks v. Whitehead, 7 Ala. (N. S.), 83.)

## 2<sup>d</sup>. Covenants which *Run with the Land*.

Covenants which *run with the land* are those which *affect the nature, quality, or value of the thing conveyed*, where there is *privity of estate* between the contracting parties, as a covenant to pay rent, to repair, to be answerable for the title, etc. Covenants of this description pass with the land, and are binding on, and in favor of, the assignee, although *assigns* be not expressly named; but it should be observed that the liability of the *assignee* is confined to the period of his occupancy, or at least of his interest in the land, whilst that of the *lessee himself* continues indefinitely, being expressly undertaken. (Bac. Abr. Covenant, (E.), 3, 4; 2 Th. Co. Lit. 325, n. (G. 3); Spencer's Case, 5 Co. 15 b, &c.; 1 Smith L. C. 92, 96 & seq.; Mayor of Congle-

ton v. Pattison & al. 10 East. 130; Mayho v. Buckhurst, 3 Cro. (Jac.), 438. Rawle, Cov'ts of Title, 281 & seq.)

It must be noted, that no covenant which is *broken* is capable of being afterwards assigned *at law*. When, therefore, a covenant is violated, the suit must be brought by the party *at that time interested*, and not by one to whom the land may afterwards have come by assignment. (Dickinson v. Hoomes, 8 Grat. 396; Marbury v. Thornton, 82 Va. 705; Wash. City Sav. Bank v. Thornton, 83 Va. 164.)

As the most important by far of covenants which run with the land are those which relate *to the title*, the subject will be developed especially with reference to them;

w. c.

- 1<sup>a</sup>. Covenants which *Run with the Land*, but do not Relate to the Title.

Of this nothing needs here to be said.

- 2<sup>a</sup>. Covenants which Run with the Land, and *do Relate to the Title*; w. c.

- 1<sup>r</sup>. Covenants of Title *Implied*.

Covenants of title are sometimes implied in *leases* (2 Lom. Dig. 320-21, 329), but not in conveyances of the grantor's *whole interest*, leaving in him *no reservation*. In the latter case the vendee, in the absence of fraud or mutual mistake, has no redress if evicted, if he has taken no covenant of title. (2 Lom. Dig. 366-7; Rawle, Cov'ts of Title, 353 & seq.; Williams v. Burrell, 1 Com. B. (50 E. C. L.) 429 & seq; Sutton v. Sutton, 7 Grat. 234.)

- 2<sup>r</sup>. The Usual Covenant of Title Express.

These covenants are expressed in terms of wearisome verbosity, which has been happily obviated in Virginia by statute, taken from 8 & 9 Vict. c. 119, 124. (V. C. 1873, ch. 113, §§ 9, &c; V. C. 1887, ch. 108, §§ 2445, &c.)

w. c.

- 1<sup>a</sup>. The Usual Covenants of Title in England; w. c.

- 1<sup>t</sup>. That the Grantor is *Seised in Fee-Simple* of the Land.

See 2 Lom. Dig. 243; 2 Th. Co. Lit. 325, n. (G. 3); Rawle, Cov'ts of Title, 35 & seq.

- 2<sup>t</sup>. That the Grantor has *Good Right and Full Power to Convey* the Land in Fee-Simple.

See 2 Lom. Dig. 343; 2 Th. Co. Lit. 325 n. (G. 3); Rawle, Cov'ts of Title, 101 & seq.

- 3<sup>t</sup>. That the Grantee, his Heirs and Assigns shall *Have, Hold and Enjoy the Premises* granted without Eviction or Disturbance.

- See 2 Lom. Dig. 343 ; 2 Th. Co. Lit. 325 n. (G. 3) ; Rawle, Cov'ts of Title, 145 & seq.
- 4<sup>t</sup>. That the Lands are *Free from all Incumbrances*.  
See 2 Lom. Dig. 343 ; 2 Th. Co. Lit. 325 n. (G. 3) ; Rawle, Cov'ts of Title, 105 & seq.
- 5<sup>t</sup>. That the Grantor and his Heirs will Make all such *Further Assurances* of the Lands as shall be Reasonably Required by the Grantee, his Heirs or Assigns.  
See 2 Lom. Dig. 343 ; 2 Th. Co. Lit. 325, n. (G. 3) ; Rawle, Cov'ts of Title, 164 & seq.
- 2<sup>s</sup>. The Covenants of Title Employed in Virginia ; w. c.
- 1<sup>t</sup>. The Usual Covenant of Title in Virginia ; w. c.
- 1<sup>u</sup>. The Terms of the Usual Covenant.

The terms of the covenant of title usual in Virginia, and generally in the South and West, are to the effect that the grantor, for himself and his heirs, covenants with the grantee, his heirs and assigns, that he and his heirs shall and will warrant and forever defend the title to the said land, to the said grantee and his heirs and assigns forever, free from the claims of all persons whatsoever. (2 Lom. Dig. 355 ; Rawle's Cov'ts of Title, 184 & seq. ; 197 & seq.)

- 2<sup>u</sup>. The Objections to the Usual Covenant of Title ; w. c.
- 1<sup>w</sup>. The Uncertainty of the Precise Meaning of the Covenant.

It is not perfectly settled whether it applies where the grantee has never been able to get possession of the land, or only to subsequent eviction ; although the better opinion seems to be, and indeed it has now been so decided in Virginia, that where, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant in question is broken, without any other act on the part of either the grantee or the claimant ; such failure to get possession being regarded as tantamount to an eviction. (2 Lom. Dig. 356 ; Day v. Chisholm, 10 Wheat. 449 ; Woodford v. Pendleton, 1 H. & M. 303 ; Rawle's Cov'ts of Title, 220 & seq., & 224 ; Sheffey v. Gardiner, 79 Va. 315 & seq. ; Banks v. Whitehead, 7 Ala. (N. S.) 83 ; Moore v. Vail, 17 Ill. 190 ; Grist v. Hodges, 3 Dev. (N. C.) 200.)

- 2<sup>w</sup>. The Certainty that the Covenant is not Applicable *sare in Case of an Actual Eviction*.

The covenant is supposed to be, in fact and

in essence, substantially the same as a covenant for *quiet enjoyment*, and it is believed that no action lies upon it until *actual eviction*, or at least disturbance of the possession. (2 Lom. Dig. 355-'6; Emerson v. Prop's of Land in Minot, 1 Mass. 463; Findlay v. Toncray, 2 Rob. 374, 379; Rawle, Cov'ts of Title, 210-'11 & seq.; Sheffield v. Gardiner, 79 Va. 315 &c. and cases.) And it will be observed that such a covenant as this can never be treated as a covenant *against incumbrances*, for that would be a departure from its terms, and would make it unavailable by an assignee of the grantee, for as to any prior incumbrance, it would be broken at the instant of the execution of the grantor's deed, and having thus become a mere right of action, would not pass by the grantee's assignment. (Grist v. Hodges, 3 Dev. (N. C.), 200; Marbury v. Thornton, 82 Va. 705; Wash. City Sav. Bank v. Thornton, 83 Va. 164.)

2<sup>t</sup>. The Changes Wrought by Statute in Virginia, in Relation to Covenants of Title; w. c.

1<sup>n</sup>. Abbreviations of the Usual (and Objectionable) Covenant of Title.

The judicious policy of the Legislature at the revival of 1849 (adopted in the main, from 8 & 9 Vict. cc. 119, 124), was to encourage the substitution of the more certain and comprehensive English covenants of title for the vague, and at all events narrower, covenant then and still usual in Virginia (*supra*, 2<sup>s</sup>), and it was, therefore, not to have been expected that any provisions would have been introduced tending to facilitate and invite the continuance of a covenant liable to such strong objections. The general assembly, however, thought otherwise, and provided two enactments (not found in the English statutes), the one giving full effect to a shortly expressed covenant of that character; and the other allowing words of warranty annexed to the *granting part* of a deed to have the effect of such a covenant. Thus,

1st, A covenant by the grantor in a deed "that he will warrant *generally* (or '*specially*,' as the case may be), the property hereby conveyed," shall have the same effect as if the grantor had covenanted that he, *his heirs and personal representatives*, will forever warrant and defend the said property unto the grantee, *his heirs, personal representatives and assigns*, against the claims and



demands of all persons whomsoever (or “against the claims and demands of the grantor, and all persons claiming, or to claim, by, through, or under him,” as the case may be.) (V. C. 1873, ch. 113, §§ 10, 11; V. C. 1887, ch. 108, § 2446; Dickinson v. Hoopes’s Adm’r & als. 8 Gratt. 384 & seq.)

2d, The words “with general warranty” (or “*special*,” as the case may be), in the *granting part* of any deed, shall be deemed to be a covenant by the grantor “that he will warrant generally (or “*specialty*,” as the case may be), the property hereby conveyed.” (V. C. 1873, ch. 113, § 12; V. C. 1887, ch. 108, § 2448.)

2<sup>n</sup>. Adoption in Virginia of the English Covenants of Title in Conveyances in Fee-Simple.

The use of these covenants is facilitated by declaring certain very brief forms of expression to be equivalent to the very long and tedious phraseology which in England (prior to 8 & 9 Vict., cc. 119, 124), it was usual to employ. The idea, and substantially the provisions themselves, were derived from the English statute, 8 & 9 Vict. cc. 119, 124. (V. C. 1873, ch. 113, §§ 13 to 16; V. C. 1887, ch. 108, §§ 2449 to 2452.)

W. C.

1<sup>w</sup>. That the Grantor has the *Right to Convey the Land*.

A covenant by the grantor, in a deed for land, “that he has the right to convey the said land to the grantee,” shall have the same effect as if the grantor had covenanted that he has good right, full power, and absolute authority to convey said land, with all the buildings thereon, and the privileges and appurtenances thereto belonging, unto the grantee, in the manner in which the same is conveyed or intended to be conveyed by the deed, and according to its true intent. (V. C. 1873, ch. 113, § 13; V. C. 1887, ch. 108, § 2449.)

2<sup>w</sup>. That the Grantee shall have *Quiet Possession*.

A covenant by any such grantor, “that the grantee shall have quiet possession of the said land,” shall have as much effect as if he covenanted that the grantee, his heirs and assigns, might, at any and all times thereafter, peaceably and quietly enter upon, and have, hold, and enjoy the land conveyed by the deed, or intended so to be, with all the buildings thereon, and the privileges and appurtenances thereto belonging,

and receive and take the rents and profits thereof, to and for his and their use and benefit, without any eviction, interruption, suit, claim, or demand whatever. (V. C. 1873, ch. 113, § 14; V. C. 1887, ch. 108, § 2450.)

3<sup>w</sup>. That the Premises are *Free from Incumbrances*.

If to such covenant (that is, the covenant of quiet possession,) there be added, "free from all incumbrances," these words shall have as much effect as the words, "and that freely and absolutely acquitted, exonerated, and forever discharged, or otherwise by the said grantor or his heirs, saved harmless, and indemnified of, from and against any and every charge and incumbrance whatever." (V. C. 1873, ch. 113, § 14; V. C. 1887, ch. 108, § 2450.) And a covenant by any such grantor, "that he has done no act to incumber the said lands," shall have the same effect as if he covenanted that *he had not done or executed, or knowingly suffered*, any act, deed, or thing whereby the lands and premises conveyed, or any part thereof, are, or will be charged, affected or incumbered. (V. C. 1873, ch. 113, § 16; V. C. 1887, ch. 108, § 2452.)

This covenant against incumbrances does not protect the purchaser against a *public highway*, existing at the time of the purchase; but it does protect against a *private way* or other easement of which he has *no notice*. (Jordan v. Eve, 31 Grat. 1; Scott v. Bentel, 23 Grat. 1; Deacons v. Doyle, 75 Va. 261.)

4<sup>w</sup>. That the Grantor will Execute Further Assurances.

A covenant by any such grantor, "that he will execute such further assurances of the said lands as may be requisite," shall have the same effect as if he covenanted that he, the grantor, his heirs or personal representatives, will at any time, upon any reasonable request, at the charge of the grantee, his heirs or assigns, do, execute, or cause to be done or executed, all such further acts, deeds, and things, for the better, more perfectly and absolutely conveying and assuring the said lands and premises hereby conveyed, or intended so to be, unto the grantee, his heirs and assigns, in manner aforesaid, as by the grantee, his heirs or assigns, his or their counsel in the law, shall be reasonably desired, advised, or re-

quired. (V. C. 1873, ch. 113, § 15; V. C. 1887, ch. 108, § 2451.)

3<sup>rd</sup>. Adoption in Virginia of English Covenants Contained in *Leases*.

The same judicious policy is exhibited in respect to covenants proper to be inserted in leases, as that already set forth in respect to covenants of title in conveyances in fee-simple, namely, to facilitate and encourage their employment by declaring certain very brief *formulae* equivalent in meaning to the long and cumbrous phraseology which, independent of the statute, it was customary to employ. The provisions are derived from the same English statute of 8 and 9 Vict. cc. 119, 124. (V. C. 1873, ch. 113, § 17 to 21; V. C. 1887, ch. 108 §§ 2453 to 2457.)

W. C.

1<sup>st</sup>. That the Lessee will *Pay the Rent*.

In a deed of lease a covenant by the lessee "to pay the rent" shall have the effect of a covenant that the rent reserved by the deed shall be paid to the lessor, or those entitled under him, in the manner therein mentioned. (V. C. 1873, ch. 113, § 17; V. C. 1887, ch. 108, § 2453.)

2<sup>nd</sup>. That the Lessee will *Pay the Taxes*.

A covenant by the lessee "to pay the taxes" shall have the effect of a covenant that all taxes, levies and assessments upon the demised premises, or upon the lessor on account thereof, shall be paid by the lessee, or those claiming under him. (V. C. 1873, ch. 113, § 17; V. C. 1887, ch. 108, § 2453.)

3<sup>rd</sup>. That the Lessee will *not Assign without Leave*.

In a deed of lease a covenant by the lessee that "he will not assign without leave" shall have the same effect as a covenant that the lessee will not, during the term, assign, transfer, or set over the premises, or any part thereof, to any person, without the consent, in writing, of the lessor, his representatives, or assigns. (V. C. 1873, ch. 113, § 18; V. C. 1887, ch. 108, § 2454.)

4<sup>th</sup>. That the Lessee will *Leave the Premises in Good Repair*.

A covenant by the lessee that "he will leave the premises in good repair" shall have the same effect as a covenant that the demised premises will, at the expiration, or other sooner determination of the term, be peaceably surren-

dered and yielded up unto the lessor, his representatives, or assigns, in good order and substantial repair and condition, reasonable wear and tear excepted. (V. C. 1873, ch. 113, § 18 ; V. C. 1887, ch. 108, § 2454.)

But no covenant or promise by a lessee, that he will *leave the premises in good repair*, shall have the effect, if the buildings are destroyed *by fire or otherwise*, without fault or negligence on his part, of binding him to *erect such buildings again*, unless there be other words showing it to be the intent of the parties that he should be so bound. (V. C. 1873, ch. 113, § 19 ; V. C. 1887, ch. 108, § 2455.)

This last provision has reference to an interpretation, sufficiently rigorous, which it was previously customary to put upon covenants to *repair*, namely, to oblige the parties to *rebuild*, although the premises were *wholly destroyed* without lessee's default, by an act of God. (See *Ross v. Overton*, 3 Call, 309 ; *Maggort v. Hansbarger*, 8 Leigh, 532 ; *Thompson v. Pendell*, 12 Leigh, 591.)

And it is also enacted by the Code of 1887, that no covenant or promise by the lessee to *pay rent* shall have the effect if the buildings thereon be destroyed by fire or otherwise, *without fault or negligence* on his part, or if he be deprived of the possession of the premises by the public enemy, of binding him to *make such payment*, unless there be other words showing it to be the intent of the parties that he should be so bound. But in case of such destruction, there shall be a reasonable reduction of the rent, until there be again upon the premises, buildings of as much value to the tenant *for his purposes*, as what was destroyed ; and in case of such privation of possession, a like reduction, until possession of the premises be restored to him. (V. C. 1887, ch. 108, § 2455.)

5<sup>w</sup>. That the Lessee shall *Quietly Enjoy* the Premises.

A covenant by a lessor "for the lessee's quiet enjoyment of his term" shall have the same effect as a covenant that the lessee, his personal representative, and lawful assigns, paying the rent reserved, and performing his or their covenants shall peaceably possess and enjoy the demised premises for the term granted,



without any interruption or disturbance from any person whatever. (V. C. 1873, ch. 113, § 20; V. C. 1887, ch. 108 § 2456.)

How far such a covenant is *implied*, in consequence of the reversion in the grantor, see *McClenahan v. Gwynn*, 3 Munf. 556, 558, and *note*; *Black v. Gilmore*, 9 Leigh, 446.

6<sup>w</sup>. That Lessor *may Re-enter* for Lessee's Default.

If, in a deed of lease, it be provided that "the lessor may re-enter for default of — days in the payment of rent, or for the breach of covenants," it shall have the effect of an agreement that if the rent reserved, or any part thereof, be unpaid for such number of days after the day on which it ought to have been paid, or if any of the other covenants on the part of the lessee, his personal representatives, or assigns, be broken, then in either of such cases the lessor, or those entitled in his place at any time afterwards, into and upon the demised premises, or any part thereof, in the name of the whole, may re-enter, and the same again have, re-possess, and enjoy, as of his or their former estate. (V. C. 1873, ch. 113, § 21; V. C. 1887, ch. 108, § 2457.) But before exercising this right of re-entry, the lessor must make an actual demand upon the tenant for the payment of the rent, unless by special agreement, the requirement be dispensed with. (*Johnston v. Hardgrove*, 81 Va. 118.)

The student is desired to observe specially, that there should be always inserted in leases, in addition to these covenants, the two following, namely:

7th. That the rent shall be duly and justly apportioned, if the premises shall by any means, without the tenant's default, become incapable of beneficial occupation by him; and

8th. That the tenant shall not be liable for any waste not occasioned by his own default. See Form, 4 Min. Insts. 1329.

But the Code of 1887, supplies by its provisions, as we have just seen, the want of the 7th of these stipulations. (V. C. 1887, ch. 108, § 2455.)

2°. The Persons Concerned in Covenants of Title; w. c.

1<sup>p</sup>. The Parties Bound by Covenants; w. c.

1<sup>a</sup>. Doctrine at Common Law.

The personal representatives are always included in the obligation and benefit of covenants, whether

named or not. *Assigns* are not included, unless as to covenants which *run with the land*. Heirs are not bound by covenants unless specially named.

2<sup>a</sup>. Doctrine by Statute in Virginia.

When a deed uses the words, “the said — covenants,” such covenant shall have the same effect as if it was “expressed to be by the covenantor, for himself, *his heirs*, personal representatives, and *assigns*, and shall be deemed to be with the covenantee, his heirs, personal representatives, and assigns.” (V. C. 1873, ch. 113, § 9; V. C. 1887, ch. 108, § 2445.)

See *Dickinson v. Hoomes*, 8 Grat. 355-’6.

2<sup>b</sup>. The Parties to *whose Acts* the Covenants Relate;

W. C.

1<sup>a</sup>. General Warranty.

General warranty is a warranty against the acts and claims of *all persons whomsoever*. See V. C. 1873, ch. 113, §§ 10, 12; V. C. 1887, ch. 108, §§ 2446, 2447.)

2<sup>a</sup>. Special Warranty.

Special warranty is a warranty against the acts and claims of *particular designated persons alone*, usually the grantor and his heirs. See V. C. 1873, ch. 113, §§ 11, 12; V. C. 1887, ch. 108, §§ 2447, 2448.)

3<sup>b</sup>. What Covenants the Grantee may Demand as *Usual Covenants*; W. C.

1<sup>a</sup>. Doctrine in England.

According to general usage, a vendor in England is expected to enter only into special covenants (*special warranty*, as we should call it), that is, against the acts and claims of the *vendor himself and his heirs*, and also against the acts and claims of any *volunteers* (devisees, heirs, &c.), who may intervene between him and the last person from whom the land proceeded with covenants, so as to connect the vendee with the chain of previous covenants. (2 Th. Co. Lit. 325, n. (G. 3); 2 Sugd. Vend. 450-’51.)

2<sup>a</sup>. Doctrine in Virginia.

With us the vendor usually enters into general covenants (*general warranty*, it is called), that is, to warrant and defend the title against the claims of all persons whatsoever;—unless where he sells under *some power*, as under a deed of trust, or under a will, or under a decree in chancery, &c. In these cases, he generally covenants only *for himself and his heirs*. (*Rucker v. Lowther*, 6 Leigh, 269; 2 Th. Co. Lit. 325, n. (G. 3).)

3<sup>b</sup>. The *Extent and Mode of Recovery* upon the Covenants of Title; W. C.

1<sup>b</sup>. The *Mode of Recovery*.

The action at *law* is usually an action of *covenant*, that being the appropriate means of recovering damages by way of amends for the breach of a promise *under seal*. Where there is a fraud, however, the vendee may elect to bring an action of *trespass on the case* therefor. And sometimes a bill in equity lies in consequence of the particular circumstances of the case obstructing or impairing the proceedings at law, the object of the *bill* being, for the most part, to *rescind the contract*. (2 Th. Co. Lit. 325, n. (G. 3).)

The recovery in the action at law is of course *in money*, and not, as in the ancient warranty, *in lands*. (2 Th. Co. Lit. 325, n. (G. 3).)

## 2<sup>d</sup>. The Extent or *Measure of Recovery*.

The measure of recovery is the value of the land *at the time of the warranty*, and not at the time of eviction; and the best standard of such value is, *in general*, the price agreed upon at the time of the sale. The purchaser is also entitled to recover such amount of rents and profits as he is liable for to the adverse and paramount claimant. And when it does not appear what is the value of the rents and profits for which the purchaser is so responsible, interest upon the purchase-money, or upon the value of the land, from the time that such responsibility for rents and profits accrued, is to be given in lieu of rents and profits. But the vendor is not answerable for the value of improvements put upon the premises by the vendee. (Stout v. Jackson, 2 Rand. 132, 154; Threlkeld v. Fitzhugh, 2 Leigh, 451; Thompson v. Guthrie, 9 Leigh, 101.) This was the measure of recovery upon the ancient *warranty*, and is recognized in England as the proper measure on the *covenants of title*. (1 Reeves' Hist. Eng. Law, 433; Flureau v. Thornhill, 2 Wm. Bl. 1078.)

In Virginia very elaborate provisions are made by statute for the adjustment of the value of permanent improvements as between the recoveror of lands and the recoveree, where the recoveree believed his title to be good; so that the vendee's interests are not so seriously affected as they were formerly by the denial to him of the value of his improvements as against the vendor. (V. C. 1873, ch. 132; V. C. 1887, ch. 125; Huru v. Keller, 79 Va. 415; Effinger v. Hall, 81 Va. 102-3.)

## 8<sup>th</sup>. Conclusion of the Deed.

This part of a deed comprehends the *date*, which is not essential: so that, though there be no date, or a false or impossible date, the instrument is yet valid. The *true*

*date* is the time when the deed is proved to have been *delivered* (being, indeed, only the rendering of the Latin phrase, *datum et deliberatum*), but *prima facie* it is the time named as the date. The time of registry, or rather of authentication of registry, sometimes determines, or at least assists in determining, the true date. (2 Bl. Com. 304; Bac. Abr. Lease, (I.) 1.)

### 6<sup>l</sup>. Reading the Deed.

The essential thing is to acquaint the party executing the deed with its contents, and it is immaterial whether that be done by his reading the instrument for himself, or by its being read to him. In the latter case it must, of course, be *truly read*; and if mis-read as to any part, it is, as to so much at least, and doubtless as to all dependent thereon, merely void. But if correctly read, the fact that it was *mis-understood* does not affect the validity of the instrument. (2 Bl. Com. 304; 2 Lom. Dig. 28; Harrison v. Middleton, 11 Grat. 527.)

### 7<sup>l</sup>. Sealing and *Probably* Signing the Deed.

It is requisite, *severally*, that the party whose deed it is should *seal it*, and, in some cases at least, should *sign it* also.

Let us take notice of, (1), The origin of sealing; (2), The nature of a seal; and (3), The authority needed to empower one to execute a deed;

W. C.

#### 1<sup>m</sup>. The Origin of Sealing.

The use of seals as a mark of authenticity to letters and other writings is extremely ancient. We read of it among the Jews and Persians in the earliest records of history (1 Kings, ch. xxi; Daniel, ch. vi; Esther, ch. viii). And in the book of Jeremiah there is a remarkable instance, not only of an attestation by seal, but also of the other formalities usually attending a Jewish purchase (Jer. ch. xxxii). In the *civil law*, also, seals were the evidence of truth. But in the times of the Saxons they were not much used in England. The Saxon method was, for such as could write, to subscribe their names, and whether they could write or not, to affix the sign of the cross; a custom which illiterate persons observe to this day, by signing a cross for their mark when unable to write their names; and this inability to write, and therefore making a cross in its stead, is honestly avowed by one of the Saxon kings at the end of his charters,—*propria manu, pro ignorantia litterarum, signum sanctae crucis expressi et subscripsi*. In like manner, and for the same insurmountable reason, the Normans, a brave but unlettered nation, upon their first settlement in France, used the practice of *sealing only*, without writing their names, which custom continued when learning made its way among them, though the reason had ceased; and was



by them, upon the Conquest, introduced into England instead of the English method of parties writing their names, and signing with the sign of the cross. And in the reign of Edward I., every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct, particular seals. (2 Bl. Com. 305-'6; 2 Th. Co. Lit. 233.)

Sealing alone was sufficient in England to authenticate a deed, until the statute 29 Car. II., c. 3, expressly directed *signing* in grants of land and some other kinds of deeds. But in Virginia we have not adopted, in our statute of conveyances, a similar phraseology, and it seems, therefore, very questionable whether, as a *general* proposition, a deed with us is required *to be signed*, as well as sealed. (2 Lon. Dig. 28.) Our statute of *conveyances* (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413), declares that no estate of inheritance, or of freehold, or for a term of more than five years, shall be conveyed unless *by deed* or will, leaving what constitutes *a deed* to be determined by the general principles of the law. But in case of a *married woman's* conveyance (except of her separate estate accruing to her by the Married Woman's Law), it is expressly required that it shall be *signed* by both husband and wife. (V. C. 1873, ch. 117, § 4; V. C. 1887, ch. 111, § 2502, Id. ch. 103 § 2286.) However, as it is customary *to sign* as well as to *seal* deeds of all kinds, it would be very imprudent to depart from the usage.

## 2<sup>m</sup>. The Nature of a Seal; w. c.

### 1<sup>n</sup> Doctrine at Common Law as to the Nature of a Seal.

At common law a seal is universally defined, until recently, to be an impression on wax, or some other tenacious material. But of late imposing authorities make it at least possible that hereafter, by an act of *court-made law*, it will be held (contrary to the notorious fact), that, by the common law, a seal is an impression on any substance capable of receiving and retaining an impression, and, therefore, as well on the *paper or parchment* itself, as on *wax or wafer*. (1 Min. Insts. 593; *Ante*, p. 661; 1 Sugd. Pow. 282-'3, c. VI., § iv., 9; Ang. & A. Corp. § 218, and n. (a); Reg. v. St. Paul's, 7 Q. B. (53 E. C. L.) 238-'9; Follitt v. Rose, 3 McLean, 332; Curtis v. Leavitt, 15 N. Y. 9; Bates v. Bost. & N. Y. Cent. R. R. Co. 10 Allen, 251; Haven v. Grand Junct. R. R. Co. 13 Allen (Mass.), 337; Pillow v. Roberts, 13 How. 473-'4.)

It is not requisite that the impression should be acknowledged as a seal in the body of the instrument. Whether a writing is sealed or not, is proved by the fact when it is produced: whether the impression appearing on the wax is the seal of the party is to be proved like

any other fact. Several parties may seal with one seal, and acknowledge *one impression as the seal of all*. (Com. Dig. Faits, (A. 2); Goddard's Case, 2 Co. 5 a; 1 Dyer. 19 a; Ld. Lovelace's Case, W. Jones, 268; Ball v. Dunster-ville, 4 T. R. 313; Cooch v. Goodman, 2 Ad. & El. (29 E. C. L.) 598; Ball v. Taylor, 1 Carr. & P. (12 E. C. L.) 417; Warren v. Lynch, 5 Johns. 244; Ludlow v. Simonds, 2 Cai. Cas. Er. 1; Mackay v. Bloodgood, 9 Johns. R. 285; Bac. Abr. Oblig. (C.); 2 Lom. Dig. 28 & seq.)

2<sup>n</sup>. Doctrine by Statute in Virginia Touching the Nature of a Seal.

A scroll *affixed by way of a seal*, by a natural person, is of the same force as if the writing were actually sealed. (V. C. 1873, ch. 140, § 2; Id. ch. 15, § 9, (cl. 12); V. C. 1887, ch. 133, § 2841; Id. ch. 2, § 5, (cl. 12).)

In instruments not required *by some statute* to be under seal, the scroll must be recognized *as a seal* in the *body of the instrument*, as in case of a common bond for money (Clegg v. Lemessurier, 15 Grat. 108; Grover v. Chamberlain, 83 Va. 286); whilst in the instruments required *by statute* to be under seal (*e. g.*, conveyances of freeholds, etc.), it may *perhaps* suffice to have a solemn recognition of the scroll as a seal at the time the instrument is acknowledged or proved for registry; but extrinsic evidence is not otherwise admissible to prove that a scroll at the foot of a writing was intended as a seal. (Parks v. Hewlett, 9 Leigh, 511; Ashwell v. Ayers, 4 Grat. 283; Clegg v. Lemessurier, 15 Grat. 108; 2 Lom. Dig. 30.)

One scroll duly acknowledged by any number of parties, would appear upon principle to be the *seal of all*, as where the instrument concludes, "witness our *hands and seals*." If the corresponding proposition be true at common law, touching a common law seal, an *impression on wax*, etc., which may, and sometimes does, have a distinctive character, it seems to be *a fortiori*, proper as to *scrolls* as seals, which can have no character at all. Accordingly, the weight of American authority is in favor of the doctrine as above stated, (Bohamon v. Lewis, 3 Monr. (Ky.) 377; Bowman v. Robb, 6 Barr. (Pa.) 302; Yarborough v. Monday, 2 Dev. (N. C.) 493; S. C. 3 Dev. 420; Pequawkett Br. v. Mathes, 7 N. H. 230; S. C. 26 Am. Dec. 737; Hatch v. Crawford, 2 Port. (Ala.) 54; Davis v. Burton, 3 Seam. (Ills.) 41; S. C. 36 Am. Dec. 512; McLean v. Wilson, 3 Seam. 51; Witter v. McNeill, Id. 436; Markay v. Bloodgood, 9 Johns. (N. Y.) 286-7); although it should be observed that a contrary doctrine was *assumed* in Virginia, in Rankin v. Roler, &c., 8 Grat. 63, 67.

What constitutes a *scroll* is not clearly ascertained. A circle or rectangle of ink { } with or without the word *seal* written in it, is certainly sufficient, and so are *printed stamps*, e. g., { L. S. }. (Buckner v. Mackay, 2 Leigh 489.) And so also is the word *seal* affixed to the signature. (Lewis v. Overby, 28 Grat. 628.)

### 3<sup>m</sup>. Authority to Execute a Deed.

It is a general rule that one acting under a power of attorney cannot execute for his principal a sealed instrument, unless the power of attorney be *sealed*. The authority must be equal in dignity and solemnity with the thing to be done. (Harrison v. Jackson, 7 T. R. 209; Elliot v. Davis, 2 Bos. & Pul. 338; Berkeley v. Hardy, 5 B. & Cr. (14 E. C. L.) 355; Com. Dig. Attor. (C. 1) and (C. 5); Shepp. Touchst. 57; 2 Rob. Pr. (2d ed.) 14 & seq.; U. S. v. Nelson, 2 Brock. 64; Preston v. Hull, 23 Grat. 616-17. But see Butler v. U. States, 21 Wal. 273.) And although it is an established rule that one partner cannot bind the other partners *by deed* (Harrison v. Jackson, 7 T. R. 207), yet if the deed be made in the partner's *presence* and by his *authority* it is good. (Ball v. Dunsterville, 4 T. R. 313; Burn v. Burn, 3 Ves. Jr. 578.) And if it be an act which does not *require* a sealed instrument (such as the assignment of the personal chattels of the partnership), it seems to be valid where it is done with the partner's consent, although *not in his presence*, not as the party's *deed*, but as an instrument of assent. (Brutton v. Burton, 1 Chit. (18 E. C. L.) 707; McCullough v. Sommerville, 8 Leigh, 419-30; Forkner v. Stuart, 6 Grat. 206; Anderson & al. v. Tompkins, 1 Brock, 462; Hunter v. Parker, 7 M. & Wels. 344-5.)

The deed ought to be executed in the name of the principal as the grantor, and not in the name of the attorney; and at *common law* a deed in the *attorney's name* is void as an instrument of conveyance. (Martin v. Flowers, 8 Leigh, 158; Clarke's Lessee v. Courtney, 5 Pet. 318, 349; Stinchcomb v. Marsh, 15 Grat. 210-11; Combe's Case, 9 Co. 76 b, & 77 a, & n. (D.); White v. Cuyler, 6 T. R. 177.) It has been held, however, that although the words of conveyance were those of the attorney, yet if purporting to be in his capacity as attorney, and the instrument be signed with the *name of the principal*, by the attorney, it operates to convey the estate (Shanks & als. v. Lancaster, 5 Grat. 119); and if the words of conveyance be the words of the principal, the manner of signing it is of no importance; it may be either "*P by A*," or "*A for P*." (Jones v. Carter, 4 H. & M. 184; Shanks v. Lancaster, 5 Grat. 119; Bryan v. Stump, 8 Grat. 241; 2 Com. Dig. 31; Stinchcomb v.

Marsh, 15 Grat. 209 & seq.) But in Virginia we have a statute (the sound policy of which may well be doubted) which gives effect to many deeds executed by attorneys, that at common law could not stand. It enacts that if, in a deed made by an attorney in fact, “the *words of conveyance*, or the *signature*, be in the *name of the attorney*, it shall be as much the principal’s deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be *manifest on the face* of the deed that it should be construed to be that of the principal to give effect to *its intent*.” (V. C. 1873, ch. 112, § 3; V. C. 1887, ch. 107, § 2416; *Stinchcomb v. Marsh*, 15 Grat. 210.)

### 8<sup>1</sup>. Delivery of the Deed.

An eighth requisite to a good deed is that it be *delivered* by the party himself, or his certain attorney. A deed takes effect only from this delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party deliver it himself, he thereby adopts the sealing, and by parity of reason the signing also, and makes them both his own. (2 Bl. Com. 307.)

The deed of a corporation needs no delivery, the affixing of the common seal giving perfection to it without any further ceremony; at least if it be done with that intent; for if the order to affix the seal be accompanied by a direction to the officer to retain the conveyance in his hands until certain conditions be complied with, the sealing does not amount to delivery. (2 Lom. Dig. 33; Ang. & A. Corp. § 227.)

Let us advert to, (1), The mode of making delivery of a deed; (2), The proof of delivery; (3), The effect thereof; and (4), The character of delivery;

W. C.

### 1<sup>m</sup>. The Mode of Making Delivery.

The usual mode of making delivery of a deed is to take it up and say, “I deliver this as my act and deed.” But it may be without words, or by mere words, without any act of delivery; as if the writing, sealed, be handed to the grantee, or whilst it lies upon the table, the feoffor says to the feoffee, “Take the writing; it is sufficient for you;” or, “Take it as my deed,” or the like. Nor, indeed, is a formal delivery essential, if there be acts evidencing an intention to deliver. It is not even essential that the grantee should be present at the time, or the delivery be *personally* made to and accepted by him. And although there must be an acceptance of the deed (which is usually implied in the delivery), and presumed from the beneficial character of the transaction, supposing it be for the grantee’s benefit, there is no necessity that the acceptance should take



place *immediately* upon the delivery. (2 Lom. Dig. 33; Shepp. Touchst. 57 & seq.; 4 Kent's Com. 454 & seq.; 2 Th. Co. Lit. 234-5; Skipwith's Ex'ors v. Cunningham, 8 Leigh, 271, 281; Beale v. Sievely & als. 8 Leigh, 658; Hutchinson & ux. v. Rust & als. 2 Grat. 394; 2 Bl. Com. 306, and n. (17); Church v. Gilman, 15 Wend. (N. Y.) 656; S. C. 30 Am. Dec. 82, 89, and *note*; Jones v. Jones, (6 Conn. 11), 16 Am. Dec. 39, *note*.)

One of the most striking cases illustrative of the proposition that there may be a valid delivery, notwithstanding the grantee is not present, and although the grantor never parts with the deed, is that of Doe v. Knight, 5 B. & Cr. (11 E. C. L.) 671, where the grantor signed a deed (which was already sealed) in the presence of his niece, the grantee not being present, and said, "I deliver this as my act and deed;" whereupon she attested it, and then he took it away with him. Yet it was resolved to be a good delivery. See Hutchinson v. Rust, 2 Grat. 394, 2 Lom. Dig. 33-4.

But whilst a deed may be delivered, not only to the grantee himself, or to any stranger for his use, or declared to be delivered although the grantee be absent, yet if delivered to a stranger, without any declaration or other matter to show that it is for the use of the grantee, it is not a sufficient delivery. (2 Lom. Dig. 34; Shepp. Touchst. 57.) And whilst it is not indispensable that the grantee's acceptance should ensue *immediately*, and his subsequent assent relates back to the delivery, yet if there be no subsequent acceptance, or none before some other party acquires, for valuable consideration, by conveyance of the grantor, or otherwise, a right to the property, or to charge it, the deed is ineffectual. (2 Lom. Dig. 35; Com'th v. Selden, 5 Munf. 160; Skipwith's Ex'ors v. Cunningham, 8 Leigh, 271; Spencer v. Ford, 1 Rob. 648; Walwyn v. Coutts, 3 Meriv. 707; S. C. 3 Sim. (5 Eng. Ch.) 14; Garrard v. Ld. Lauderdale, 3 Sim. (5 Eng. Ch.) 1; Acton v. Woodgate, 2 My. & K. (8 Eng. Ch.) 97.

## 2<sup>m</sup>. The Proof of Delivery.

The delivery of the deed, like any other fact, may as well be inferred from circumstances, as proved by positive testimony. Thus, although the subscribing witnesses remember nothing of the delivery, nor even of the transaction itself, yet if they recognize their signatures to the attestation, and especially if they declare that they know what is necessary for the valid execution of such an instrument, and would not have attested it had they not supposed everything was regularly done as required by law, it justifies the conclusion, in the absence of any contrary testimony, that the delivery took place. (2 Lom. Dig.

34-'5; Currie v. Donald, 2 Wash. 58; Clarke v. Dunnivant, 10 Leigh, 13.)

The presumption of delivery may also arise from the registry of the deed; which, where it takes place upon the acknowledgment of the grantor before the *court of registry*, is held to be conclusive proof of delivery, if the grantee afterwards assent to it (2 Lom. Dig. 34; Com'th v. Selden, 5 Munf. 160); and when upon the grantor's acknowledgment before *justices*, etc., in the country, to be *prima facie* evidence thereof, at least where the grantor retains the deed, the question depending, as in other cases of delivery, upon the grantor's intention, which may be shown by evidence of his previously declared purpose, though nothing be said at the time to indicate his design. (2 Lom. Dig. 34; Hutchinson v. Rust, 2 Grat. 394.) This distinction between acknowledgment in court, and acknowledgment before justices, etc., appears to depend on the fact that the former is a complete record immediately, and imports *absolutely* all that is needful to make the deed complete so far as the grantor's act goes; whilst the latter does not become a record until the deed is registered, and is no more than any other acknowledgment *in pais*, and so is susceptible of being controverted. Accordingly, if the deed be regularly recorded in pursuance of the grantor's acknowledgment before authorities in the country, it is believed to be, in Virginia, as conclusive proof of delivery, and as finally consummating the effect of the instrument when the grantee assents to it, as if it had been acknowledged in court. (See Skipwith's Ex'ors v. Cunningham, 8 Leigh, 271; Spencer v. Ford, 1 Rob. 648; Hutchinson & ux. v. Rust & als. 2 Grat. 394.) It seems, however, that in Massachusetts and New York, registration of a conveyance of itself proves nothing as to delivery. (2 Lom. Dig. 33; Maynard v. Maynard, 10 Mass. 456; Harrison v. Phillips' Acad'y, 13 Mass. 456; Jackson v. Phipps, 12 Johns 418. But see Scrugham v. Wood, 15 Wend. (N. Y.) 545; S. C. 30 Am. Dec. 75.)

### 3<sup>m</sup>. The Effect of Delivery.

It is a reasonable general maxim upon this subject, that where a deed has once been delivered with any effect, any subsequent delivery is void. And so also, when land has once been duly and legally conveyed, a second conveyance thereof from the same party to the same grantee, is inoperative to convey the land. (Evans v. Spurgin, 6 Grat. 108.) Hence, whilst a deed *voidable* (and not void), for infancy or duress, cannot afterwards be *re-delivered* validly, the re-delivery after the coverture ended of a *feme covert's* deed (which is absolutely void), is effectual; because in the last case, the first delivery was null. (2 Lom.

Dig. 35; Shepp. Touchst. 60.) And yet this principle is not to be extended to a case where, at the time of the second delivery, there are rights in the grantor which did not exist at the time of the first delivery. Thus, if the grantor has only a life-estate when he delivers the deed the first time, and afterwards, by descent or purchase, acquires a fee-simple, a second delivery (supposing the terms of the deed comprehensive enough to embrace the fee) would operate, it is said, to pass the inheritance. (*Roanes v. Archer*, 4 Leigh, 561.) And so, it seems, in all cases where the second delivery can operate upon any interest not divested by the first, the second is not void, but effectual. Of this, several curious illustrations occur under our former statute providing that an absolute conveyance (not a deed of trust or mortgage), registered within eight months *from its date*, should have relation back to its date, and take effect as to creditors, etc., as if it had been then recorded. Under this enactment, it was repeatedly held that, after the lapse of the eight months, the deed might be re-delivered before new witnesses, or re-acknowledged, and if recorded within eight months thereafter, it would have relation to such re-delivery, as if the deed had then for the first time been executed. This conclusion was justified by the consideration that the estate, until registry, remained in the grantor, *as to creditors and purchasers*, so that as to them there was something after the lapse of the eight months for the second delivery to operate upon. (2 Lom. Dig. 36; *Eppes v. Randolph*, 2 Call, 103, 151; *Roanes v. Archer*, 4 Leigh, 550, 565.)

The same principle could hardly apply under our existing statute, which allows the registry to take effect *by relation* only where the writing is admitted to record within twenty days from the day of its being *acknowledged before and certified by a justice, notary public*, etc., instead of *from its date*. (V. C. 1873, ch. 114, § 7; V. C. 1887, ch. 109, § 2467.)

#### 4<sup>m</sup>. The Character of Delivery.

The delivery of a conveyance may be either absolute or conditional. Of absolute delivery nothing particular needs to be said, for every delivery is presumed to be absolute, unless it appears to be conditional. (*Currie v. Donald*, 2 Wash. 58.) It is of the essence of conditional delivery that it should be made, not to the grantee himself (for then it must perforce be absolute for the most part, and any condition annexed will be void; *Miller v. Fletcher*, 27 Grat. 405 & seq.; *Hicks v. Goode*, 12 Leigh. 491), but made *to a stranger*, to be delivered by him, as the deed of the grantor, when certain conditions are complied with. It is then styled an *escrow*, in respect to

which Judge Lomax and Mr. Preston enumerate the following principles:

(1), The writing does not operate as a deed till the second delivery;

(2), The deed is of none effect until the conditions be performed, although the grantee obtain possession of it, or even though the person deputed to make the second delivery wrongfully turn it over to him;

(3), On the second delivery rightfully made, it takes effect by relation, in respect of title and right to the intermediate rents, from the original delivery.

(4), Supposing the conditions performed, and the deed delivered the second time, its effect is not impaired by the death of either or both of the parties, or by a supervening disability in the grantor, such as coverture of a *feme*, before the second delivery. (2 Lom Dig. 37; 3 Prest. Abs. Tit. 73 & seq.; Shepp. Touchst. 59; Butler & Baker's Case, 3 Co. 35 b.)

As the escrow takes effect from the original delivery, if the grantor were then under disability, as of infancy, from which he is relieved before the second delivery, yet the deed operates nothing; but if at the first period there be a mere impediment connected with the situation of the property, and having no concern with his personal capacity to contract, and the impediment is removed prior to the second delivery, the deed is good. Thus, where a disseisee, being out of possession, makes at common law a lease for years, and delivers it to a stranger as an escrow, bidding him *enter on the land*, and there to deliver the writing to the lessee, as his deed, it is a good lease. (2. Lom. Dig. 37-'8; Shepp. Touchst. 59; Butler & Baker's Case, 3 Co. 35 b.)

The *mode* of delivering a deed as an *escrow* is not *necessarily* marked by any distinguishing peculiarity, further than suffices to show that the delivery is conditional, and not absolute; but in prudence, it is wise to observe substantially the apt and proper form of words, namely, "I deliver this to you *as an escrow*, to deliver to A as my deed, upon condition that he first pay you for me \$100;" or upon any condition then named. And that the delivery is *conditional*, ought to be noticed in the attestation. (2 Lom. Dig. 83; Currie v. Donald, 2 Wash. 58.)

And whatever form of words be employed, care must be taken that the language shall signify that the instrument is delivered as the *grantor's writing of escrow*, and not *as his deed*; for in the latter case, although it is to be delivered to the grantee only on some future event, yet it is the *grantor's deed* immediately, and the third person is a trustee of it for the grantee: so that, if the grantee obtain the



writing from the trustee before the event happens, it will avail him fully, at least in a court of law, and the grantor is put to his remedy against the trustee. (2 Lom. Dig. 38-9.)

It has been stated that, in general, the delivery of a deed as an *escrow* must be to a *stranger*, and not to the grantee; but it must now be observed that that proposition supposes the deed to be upon its face a complete contract, requiring nothing but delivery to perfect it, according to the intention of the parties. It does not, therefore, apply to any instrument which on its face imports that something more than delivery is needful to make it a complete and perfect contract according to the views of the parties. Hence, a bond purporting *on its face* to be the joint bond of G and J, which is signed and sealed by G, and by him delivered to the *obligee*, upon condition that J should execute it, or otherwise that it should be null as to G, is, notwithstanding the delivery to the obligee, an *escrow*; and J having failed to execute it, it is void as to G. (2 Lom. Dig. 38; Hicks v. Goode, 12 Leigh, 479; King v. Smith & als. 2 Leigh, 157; Ward v. Churn, 18 Grat. 801; Nash v. Fugate, 24 Grat. 202; Wendlinger v. Smith, 75 Va. 317.)

#### 9<sup>l</sup>. Attestation of the Deed by Witnesses.

This ninth circumstance is not essential to the validity of the deed, but is only a prudent precaution to ensure evidence of its authenticity; and in the reign of Queen Elizabeth deeds were often without witnesses. (2 Bl. Com. 307, and n. (18); 2 Lom. Dig. 39.) In the execution of a conveyance, however, in pursuance of a power of appointment, witnesses may be indispensable, and are so if they are required by the power; for the terms of the power must be strictly observed in respect to all the formalities and circumstances prescribed. (2 Bl. Com. 307, n. (18); 2 Lom. Dig. 233; 1 Sugd. Pow. (3d Am. ed.) 250.)

In Virginia, a deed may be as well admitted to record upon the proof by two witnesses in the court of registry, or before the clerk thereof *in his office*, as upon the acknowledgement of the parties before the prescribed authorities (V. C. 1873, ch. 117, § 2; V. C. 1887, ch. 111, § 2500); but it is not necessary that the witnesses should subscribe their names, as in the case of wills. (Turner v. Stip, 1 Wash. 319.)

The witness need not actually see the deed executed. If the grantor acknowledge it to him as his deed, that is sufficient. (2 Lom. Dig. 39; Parks v. Mears, 2 Bos. & P. 217.)

Where there are attesting witnesses to a deed, they must, in general, be produced to prove it, in pursuance of the

familiar rule which requires the *best evidence* available to be employed; but where the attesting witness is dead, or otherwise not to be procured, the next best evidence is the *witness'* hand-writing; and if that be not capable of proof, the hand-writing of the grantor. (Gilliam's Adm'r v. Perkinson's Adm'r, 4 Rand. 325; Raines v. Philips's Ex'or, 1 Leigh, 483; 2 Lom. Dig. 39.)

A deed of conveyance, when produced in evidence, must generally be proved to be authentic before it can be read; but when it is very old (as thirty years or upwards) and *possession has gone according to its provisions*, or even though possession may not have continued so long as thirty years, if such account be given of the deed as may be reasonably *expected* under the circumstances of the case, there being no circumstance of suspicion about it, such as an erasure or alteration, it is allowed to be read without further proof of genuineness. (1 Gr. Ev. § 21; Roberts v. Stanton, 2 Munf. 129; Caruthers v. Eldridge, 12 Grat. 670.) If, however, it be unaccompanied by possession, the deed is not admissible in evidence, without proof of execution, (2 Lom. Dig. 39; Dishazer v. Maitland, 12 Leigh, 524.)

#### 4<sup>k</sup>. The Circumstances which Avoid a Deed of Conveyance.

The circumstances which avoid a deed may be classed under the two heads of, (1), Such matter as exists at the time of its execution; and (2), Such matter as arises *ex post facto*, after its execution;

W. C.

#### 1<sup>l</sup>. Matter Existing *at the Time of the Execution* of the Deed.

From what has been said, it appears that a deed is void *ab initio*, or voidable, which wants any of the requisites before mentioned as essential, namely, either (1), Proper parties and a lawful subject-matter; (2), A legal consideration; (3), Writing on paper or parchment; (4), Sufficient and legal words properly disposed; (5), Reading, if desired, before execution; (6), Sealing and in general signing also; or, (7), Delivery. (2 Bl. Com. 308.)

#### 2<sup>l</sup>. Matter Arising *Ex Post Facto* after the Execution of the Deed.

The several circumstances which, occurring after the execution of a deed, may avoid it, or at least impair its effect, may be enumerated as follows: (1), Rasure, interlining, or other alteration; (2), Breaking off or defacing the seal; (3), Delivering it up to be cancelled; (4), Disclaimer of title by the grantee; (5), Disagreement of persons whose concurrence is necessary in order for the deed to stand; and (6), Judgment or decree of a court of judicature. (2 Bl. Com. 308-'9);

W. C.

#### 1<sup>m</sup>. Rasure, Interlining, or other Alteration.

An important distinction as to the effect of a rasure, interlineation, or alteration in a deed, is between conveyances or *contracts executed* on the one side, and *contracts executory* on the other ;

W. C.

1<sup>n</sup>. Rasure, &c., of Conveyances, or *Contracts Executed*.

No rasure or alteration in a conveyance, nor even the cancellation thereof, by mutual consent of parties, can divest an estate already vested by the operation of the deed ; for that would be in conflict with the statute of conveyances, which declares that “ no estate of inheritance or freehold, or for a term of more than five years in lands, shall be conveyed unless *by deed or will*.” (V. C. 1873, ch. 112, § 1 ; V. C. 1887, ch. 107, § 2413.) But the estate being vested according to the *original tenor* of the deed, if the rasure or alteration makes it impossible to see what that was, and there is no extrinsic evidence to show it, such rasure or alteration may in that way be fatal to the title evidenced by the conveyance. (2 Lom. Dig. 379–’80 ; Grayson v. Richards, 10 Leigh, 57 ; Ross v. Archbishop of York, 6 East. 86 ; Doe v. Bingham, 4 B. & Ald. (6 E. C. L.) 672 ; 2 Bl. Com. 309, n. 22.)

2<sup>n</sup>. Rasure, &c., of *Contracts Executory*.

In respect to the rasure or alteration of contracts executory, the most material consideration is, whether it were made by a *stranger*, in which case it is styled a *spoliation*, or by a *party to the instrument*, or one interested therein, when it is known as an *alteration*. (1 Greenl. Evid. §§ 565 & seq. ; 2 Lom. Dig. 380 ; 3 Th. Co. Lit. 332, n. (12).)

W. C.

1<sup>o</sup>. Rasure, &c., of a Contract Executory, *Made by a Stranger*.

This, which is called a *spoliation*, in no wise affects the validity of the instrument, provided only the original tenor of it can be made to appear. The remedy upon the instrument thus changed may be either in a court of law or in equity, the latter forum obtaining cognizance, because formerly the courts of law declined to allow the contents of a *deed* to be proved otherwise than by the deed itself ; and because also, it was often necessary to demand a discovery upon oath of the original tenor of the writing, and independently of statute, a court of law has no power to coerce a discovery. (1 Greenl. Evid. §§ 565 & seq. ; 2 Lom. Dig. 380 ; V. C. 1873, ch. 172, § 44 ; V. C. 1887, ch. 164, § 3370.)

2<sup>o</sup>. Rasure, &c., of a Contract Executory, *Made by a Party or One Interested*.

If the change be *immaterial*, and of such matter as

the law itself would supply, and be made *innocently*, it does not affect the validity of the writing, which, however, is binding only according to its original terms and effect; and if they cannot be proved, the instrument can of course avail nothing. But where the change relates to a matter *material*, or although it be immaterial, where it appears to have been made with an ill intent, the writing is avoided so far as it relates to what is executory. So far as it actually *vests an estate*, no subsequent alteration, by whomsoever made, or with what intent soever, can divest it, although, as already explained, it may defeat the estate by reason of the failure of proof. (1 Greenl. Evid. §§ 565 & seq.; 2 Lom. Dig. 380.)

It should be observed that this doctrine is by no means confined to *sealed* instruments, but applies as well to all writings. No party to any writing is to be allowed to tamper with it by any alteration, either material, or made with a bad intent, without subjecting himself to the just penalty of thereby avoiding the instrument altogether, so far as its future effect is concerned. And it must be remembered, that it is a well established principle, that every endorsement or memorandum attached to the writing, with the knowledge of the parties, at the time of its execution, is as much a part of it as if it had been contained in the body of the instrument. (Shermer v. Beale, 1 Wash. 11; Gordon v. Frazier & als. 2 Wash. 130; Newell v. Mayberry, 3 Leigh, 250; Harnsberger v. Geiger, 3 Grat. 138; Smith v. Spiller, 10 Grat. 318.)

It is an important question, where an erasure, interlineation, or alteration appears, whether it was made prior or subsequent to the execution of the writing. It seems to be the better opinion (in pursuance of the maxim, *omnia rite acta præsumuntur*), that the presumption is, that it was made *before the execution*, if nothing appear to the contrary, such as a difference in the color of the ink, or in the hand-writing, and the like. When any such circumstance of suspicion occurs, it must, in general, be explained, in order to make the writing available. (3 Min. Insts. 192; 2 Lom. Dig. 380; 1 Greenl. Evid. § 564; 2 Th. Co. Lit. 232, n. (13); 3 Id. 371 and n. (11); 2 Pars. Cont. 228 and n. (a); Beaman v. Russell (20 Vermont, 205), 49 Am. Dec. 775 & seq.; Id. 782, note; Slater v. Moore, 86 Va. 26; Elgin v. Hall, 82 Va. 683.)

The principle of rasure, etc., applies to the filling of blanks. Thus, a blank filled after the paper is signed, without the consent of the party concerned therein, or his *duly authorized* agent, avoids the instrument. When the instrument is *under seal*, an agent to fill a blank must be empowered under seal, or by the personal presence and



assent of the party to be affected. (2 Lom. Dig. 380; Hudson v. Revett, 5 Bingh. (15 E. C. L.) 368; Cleaton v. Chambliss, 6 Rand. 86; Rhea v. Gibson, 10 Grat. 215; *Ante*, p. 730, 3<sup>m</sup>; Preston v. Hull, 23 Grat. 616-'17.)

It is worth while to observe, that a deed or writing may be considered as an entire transaction, operating as to the different parties from the time of execution by each, but not perfect till the execution by all. Any alteration made in the progress of such a transaction still leaves the instrument valid as to the parties previously executing it, provided the alteration does not affect their situation. Thus if, when A executes the writing, there are blanks, which are filled up before B executes it, but the filling up does not affect A, the obligation and effect of the writing as to A is not thereby impaired. (2 Bl. Com. 308, n. (20): Doe v. Bingham 4 B. & Ald. (6 E. C. L.) 675.) And upon like principles, where, after a bond has been executed by principal and sureties, a memorandum is made and signed by the principal, without the knowledge of the sureties, stipulating that the bond shall bear interest from its date, instead of from nine months after date, as was expressed upon its face, the bond is not thereby invalidated. (Tremper v. Hemphill, 8 Leigh, 623.)

It is usual and prudent, in order to obviate all suspicion and uncertainty, when any rasure, interlineation, or alteration is made in a deed, or other writing, to note it as having been made before execution, at the foot of the deed, so as to be authenticated by the signature, or in the clause of attestation.

## 2<sup>m</sup>. Breaking off or Defacing the Seal.

It was originally held, that if the seal of a deed was broken off, or so defaced that no sign of it could be seen, (unless the party bound by the instrument did it,) the deed was avoided; so that the avulsion of the seal was a species of rasure or alteration, and was governed in general by the same principles. The modern doctrine, however, is that if it appear that the seal has been affixed, and was afterwards broken off or defaced by accident, or by a stranger, the validity of the deed is not thereby affected. And an estate once vested is not divested by the destruction of the seal on the conveyance, whosoever did it, or with whatsoever intent; but as a seal is requisite to make the instrument *a deed*, it will be needful to show that there was once a lawful seal. (*Ante*, p. 737-'8, 1<sup>m</sup>; 2 Bl. Com. 308, n. (21); Bolton v. Bish. or Carlisle, 2 Hen. Bl. 263.)

But the doctrine as to the avulsion of the seal in executory contracts was relaxed at an earlier period than in

the case of rasures, etc., it having been long admitted that the validity of the instrument is not affected if it appears, or there is reason to presume, that the seal was torn off by accident, or by a stranger, or was destroyed by time. (2 Bl. Com. 308, n. (21); Shepp. Touchst. 70; 2 Lom. Dig. 381; Keen v. Monroe, 75 Va. 427-'8.)

### 3<sup>m</sup>. Cancelling the Deed.

In this case also, the distinction between *executed* contracts (or conveyances) and *executory* contracts, is all-important. In the case of a *conveyance*, where the estate is once vested, the cancellation of the deed cannot divest it, because, as already explained, the statute of conveyances (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413,) declares that no estate in lands exceeding a term of five years, shall be conveyed unless *by deed or will*. (2 Bl. Com. 309 n. (22); Doe v. Bingham, 4 B. & Ald. (6 E. C. L.) 672; Roe v. Archbish. of York, 6 East. 86; Bolton v. Bishop of Carlisle, 2 H. Bl. 263; Grayson v. Richards, 10 Leigh 57.)

But in the case of an *executory contract*, where the parties mutually agree that it shall be delivered up to be cancelled; that is, to have lines drawn over it in the form of lattice-work, or *cancelli* (though the phrase has long been used figuratively for any manner of obliteration or defacement); and it is cancelled accordingly or destroyed, the contract is avoided. (2 Bl. Com. 308; 2 Lom. Dig. 381; Shepp. Touchst. 70.)

### 4<sup>m</sup>. Disclaimer of Title by the Grantee.

Where the conveyance is by *deed indented*, as the grantee by executing the deed accepts the estate, he cannot afterwards *disclaim*, although of course he may *reconvey* it. But in case of a *deed-poll*, it is said, that although the estate conveyed passes to the grantee independently of his assent, so that, if he does not choose to accept it, he must formally *disclaim the title*, yet he is not estopped so to do. (2 Lom. Dig. 377.) And this distinction between disclaiming the title, whereby the effect of the conveyance is avoided, and reconveying the estate, which recognizes the previous conveyance as good and effectual, is sometimes of great practical importance: as for example, where a condition is annexed to the grant. In that case, as we have seen, by accepting the estate, the grantee becomes *personally obliged* to perform the condition, notwithstanding the burden may exceed the benefit (Vanneter v. Vanneter, 3 Grat. 142; Crawford v. Patterson, 11 Grat. 364; Hill v. Huston, 15 Grat. 350; Taliaferro v. Day, 82 Va. 95); so that in case of a *re-conveyance*, the obligation, if third persons were concerned in it, would still remain, whilst in case of a *disclaimer*, the effect of the

original deed being annulled, the grantee would be exonerated from all responsibility. (2 Lom. Dig. 376-'7.)

It was once thought that the disclaimer of a freehold estate must be made by matter of *record* (4 Co. 26 a), but it has been long settled that it may be done *by deed*, as by the effect of our statute of conveyances (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413) would seem to be required also, in case of terms exceeding five years. (2 Lom. Dig. 377; *Skipwith v. Cunningham*, 8 Leigh, 285.)

5<sup>m</sup>. Disagreement of Persons whose Concurrence is Necessary in Order for the Deed to Stand.

Thus, if a husband, where a feme covert is concerned; or the wife herself, when the coverture is ended; or an infant, lunatic, or person under duress, when those disabilities are removed, disagree to the conveyance, it is thereby avoided. (2 Bl. Com. 309; 2 Lom. Dig. 377-'8; *Ante* p. 656.)

6<sup>m</sup>. The Judgment or Decree of a Competent Court.

When it appears that the conveyance was obtained by fraud, mistake, force, or other foul practice, or is a forgery; in any of these cases the deed may be avoided, either in part or totally, according as the cause of avoidance is more or less extensive. (2 Bl. Com. 309.)

The jurisdiction to avoid deeds for some of these causes, as for force, and in some instances for frauds (as in the *execution*, in contradistinction to the *consideration* of the instrument), belongs as well to the courts of common law as of equity; but the usual practice has long been to seek redress in most cases in the latter forum, because of the greater variety of averment and larger freedom of inquiry permitted in equity, as well as the more effective modes of investigation there employed. (2 Lom. Dig. 382; 2 Bl. Com. 309, n. (23).)

The common law courts have never hesitated to allow fraud to be proved to vacate a deed where it related to the *execution* of the instrument; as if it be misread to the party, or his signature be obtained to an instrument which he did not intend to sign. But they did not allow proof of fraud in the transaction out of which the deed grew, holding it to be inexpedient, notwithstanding the maxim that fraud and covin vacate every contract, that any inquiry should be permitted into the circumstances which preceded and induced so solemn an act as they esteemed a *deed* to be. In all such cases the redress, independently of statute, is to be had in equity alone. (2 Lom. Dig. 382; *Chew v. Moffet & ux.* 6 Munf. 120; *Taylor v. King*, Id. 358; *Wyche v. Maclin*, 2 Rand. 426.) So also, it is to be had in equity only where the party complaining has only an equitable, and not a legal title. Thus, if a trustee make

a fraudulent sale of the subject, to the prejudice of the *cestui que trust*, and in disregard of the terms of the trust-deed, his conveyance to the purchaser vests a good *legal title* in the latter, and the *cestui que trust* can obtain relief nowhere else but in a court of chancery. (2 Lom. Dig. 382; Taylor v. King, 6 Munf. 358; Harris v. Harris, Id. 367.) Again, a court of law must, for the most part, await some attempted action on the part of the claimant under the deed, whilst a court of equity, in the interests of peace and to prevent the party from being injured in his title, may compel the claimant, ere yet he has set up any demand upon the instrument, to give it up to be cancelled, at the instance of any party liable to be injured by it. (Jones v. Robertson, 2 Munf. 187; Shepherd v. Henderson, 3 Grat. 350.) In short, whilst courts of equity are said to have concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter, they have an exclusive jurisdiction in very many cases beyond the reach of the law courts, and not remediable there. (2 Lom. Dig. 383; Chesterfield v. Janssen, 2 Ves. Sr. 115; *Ante*, pp. 668 & seq.)

But here let it be remembered, that in Virginia we have a statute which very considerably and prudently enlarges the jurisdiction of the courts of common law in respect to frauds and mistakes in the procurement of contracts under seal, by allowing such fraud or mistake to be set forth in a special plea to an action on the deed, constituting a partial or a complete answer to the action, as the case may be. The defendant who files such a plea avers that he has, by reason of the fraud or mistakes which he sets forth, sustained damages to an amount which he specifies, and offers to *set off and allow* those damages against the claim set up by the plaintiff; and hence, such a plea is often styled a “special plea in the nature of a *plea of set off*.” (V. C. 1873, ch. 168, §§ 5, 8; V. C. 1887, ch. 160, §§ 3299, 3300, 3301; 4 Min. Insts. 661 & seq.)

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## CHAPTER XXI.

### ON THE SEVERAL SPECIES OF CONVEYANCE.

#### 31. The Several Species of Conveyance.

Having thus explained the general nature of deeds, and more particularly of deeds of conveyance of landed property, we are next to consider the several species of conveyances of lands, together with their respective incidents; of all of which species of conveyances *the deed* is the common instrument—at common law by usage, and by statute by positive require-



ment (29 Car. II., c. 3; V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.) Of these several classes of conveyances, (1), Some operate at *common law*; and (2), Some receive their force and efficacy by virtue of *statutes*, namely, the *statute of uses*, and the *statute of grants*. (V. C. 1873, ch. 112, §§ 14, 4; V. C. 1887, ch. 107, §§ 2426, 2417.) And to an explanation of all these it will be necessary to add some observations upon, (3), A certain other class of assurances, which are used not to *convey*, but to *charge* or encumber lands, and to *discharge* them again, such as bonds, recognizances, and defeasances;

W. C.

# 1<sup>k</sup>. The Several Species of Conveyances at Common Law.

Of conveyances at common law, (1), Some may be called *original* or *primary* conveyances, which are those by means whereof the benefit or estate is created, or first arises; and (2), Others are *derivative* or *secondary*, whereby the benefit or estate originally created is enlarged, restrained, transferred, or extinguished. (2 Bl. Com. 309);

W. C.

## 1<sup>l</sup>. Original or Primary Conveyances.

*Original* conveyances are the following, viz.: (1), Feoffment; (2), Gift; (3), Lease; (4), Grant; (5), Exchange; and (6), Partition. (2 Bl. Com. 310.)

W. C.

## 1<sup>m</sup>. Feoffment.

The doctrine applicable to feoffment may be stated under the heads of, (1), The nature of a feoffment; (2), The mode of making it; and (3), The form of a feoffment;

W. C.

## 1<sup>n</sup>. The Nature of a Feoffment.

A feoffment is derived from the verb to enfeoff, *feoffare*, or *inféodare*, to give one a feud; and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered by the public, and proved. It is applied to *corporeal property* alone, and as Lord Coke says, “properly betokeneth a *conveyance in fee*,” although it is sometimes improperly used with reference to estates of freehold merely, as for life. He that so gives, or enfeoffs, is called the *feoffor*, and the person enfeoffed is denominated the *feoffee*. (2 Bl. Com. 309; 2 Th. Co. Lit. 332, 353; 1 Id. 622.)

## 2<sup>n</sup>. The Mode of Making a Feoffment.

The mode of making a feoffment involves, (1), The appropriate words for a feoffment; and (2), Livery of seisin;

W. C.

## 1<sup>o</sup>. The Appropriate Words for a Feoffment.

The aptest word of feoffment is "*do*" or "*dedi*," according to the very mode of the feudal donation, although it may be performed by the word "*enfeoff*," or "*grant*." And it is still governed by the same feudal rules, inso-much that the principal rule relating to the extent and effect of the feudal grant, "*tenor est qui legem dat feudo*," is, with a slight change of phrase, become the maxim of the common law with relation to feoffments. "*modus legem dat donationi*." And, therefore, as in pure feudal donations, the lord from whom the feud moved must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus presumatur donasse quam in donatione expresserit*;" so if one grants by feoffment lands and tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath, at common law, barely an estate for life. For as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducement to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life, unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made; for feoffment was for ages the only conveyance whereby our ancestors were wont to create an estate in fee-simple, by giving land to the feoffee, to hold to him and his heirs for ever; although it serves also, not without some inaccuracy of language, to convey any other estate of *freehold*. (2 Bl. Com. 310-11; 2 Th. Co. Lit. 332 & seq.)

## 2°. Livery of Seisin.

The common law required *no deed nor writing* in order to constitute an effectual feoffment. Such a requirement would have been ill-suited to so illiterate a population as composed the Saxon and Norman communities; nor was it made until so recently as the statute of frauds, etc., 29 Car. II., c. 3, §§ 1, 2, 3, (A. D. 1678), in England, to which the statute of conveyances with us corresponds. (V. C. 1073, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.) But *mere words*, whether contained in a deed or expressed by word of mouth, do not suffice, at common law, to perfect the feoffment. There remains to be performed the indispensable ceremony of *livery of seisin*, without which the feoffee has but a mere *estate at will*. The word *seisin* imports the *possession of a freehold*, and the phrase *livery of seisin* signifies the actual *delivery* by the feoffor to the feoffee of the corporeal possession of the *freehold* of lands or tenements, which was held absolutely necessary to complete the

donation; so that livery of seisin is no other than the pure feudal investiture or delivery to the grantee of the corporeal possession of the lands. (2 Bl. Com. 311.)

Let us observe, (1), The origin of livery of seisin; (2), The nature of livery of seisin; (3), The different kinds of livery of seisin; and (4), The effect of livery of seisin when the grantor is in possession;

W. C.

#### 1<sup>p</sup>. The Origin of Livery of Seisin.

The practice of requiring livery of seisin in order to complete the transfer of a freehold in lands at common law seems to have originated, as suggested in the preceding sentence, from the feudal ceremony of *investiture*. Something similar to this livery was practiced in the east in the earliest times; as, for example, in case of Abraham's purchase of the cave of Machpelah and its appurtenances (Gen. xxiii. 17, 18), and in the purchase by Boaz of the inheritance of Ruth's deceased husband (Ruth iv. 7-9).

Investitures were doubtless designed at first to demonstrate in conquered countries the fact of the actual possession of the *lord*, who assumed to donate the land, showing that he did not grant a bare litigious right, which the soldier was ill-qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practiced, a mere oral gift, at a distance from the premises given, was not likely to be either long or accurately retained in the memory of by-standers, who were little interested in the transaction. That this ceremony should have been retained in the common law (the law of a wise and thoughtful, but unlettered people) as a public and notorious act, whereby the *country* might take notice of and attest the transfer of the estate, and all parties concerned be secured and confirmed in their rights touching the same, was a suggestion of prudence too natural to be overlooked, which is, indeed, in accordance with the *principles* of the Roman and Canon laws, and of the jurisprudence of most well-governed states, which seldom fail to require some *notoriety* in order to acquire and ascertain the property of lands. (2 Bl. Com. 311.) Accordingly, Bracton ascribes the prudent policy of requiring such solemnity in the alienation of a *freehold*, to the solicitude of the law to secure *sure evidence* of the transaction, *ne contingat donationem deficere pro defectu probationis*. And Littleton lays down the doctrine clearly: "And it is to be understood, that in a lease *for years*, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may

enter when he will by force of the same lease. But of feoffments made in the country, or gifts in tail, or lease for *term of life*; in such cases where a freehold shall pass, if it be by deed or without deed, it behooveth to have livery of seisin." (2 Th. Co. Lit. 334.)

## 2<sup>d</sup>. Nature of Livery of Seisin.

Livery of seisin, which, by the common law, is thus necessary to be made upon every transfer of an estate of *freehold* in hereditaments corporeal, whether of inheritance or for life only, consists in the corporeal tradition of lands. In hereditaments incorporeal, including estates in remainder and reversion, it is impossible to be made; for such things are not the object of the senses, and in leases for years it is not necessary. In leases for years, indeed, an actual *entry* is necessary to vest the estate in the lessee; for the bare lease, at common law, though it be to take effect *in presenti*, gives him only a right to enter, which is called his interest in the term, or *interesse termini*; and when he enters in pursuance of that right, he is then, and not before, in possession of his term, and complete tenant for years. This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot be made (at the common law) but by livery of seisin, which livery, being an actual manual tradition of the land, must take effect *in presenti*, or not at all. (2 Bl. Com. 314; 2 Th. Co. Lit. 334.)

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years, we have seen (*Ante*, p. 391), that, at common law, livery must be made to the particular tenant. But if such a future estate be created *afterwards by feoffment* (as it may be), expectant on a lease *for years* now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest*;" but it must be made to the grantee himself, by consent of the lessee for years; for without his consent no livery of the possession can be given; partly because such possible livery would be an ejectment of the tenant from his term, and partly because of the feudal doctrine which forbade a lord to aliene his seignior, and thus transfer the tenant's *fealty* to another without the tenant's consent or attornment. (2 Bl. Com. 314-'15, 288; 2 Th. Co. Lit. 347 '8, 350, 357, and n. (B).)



3<sup>d</sup>. Different Kinds of Livery of Seisin.

"There be," says Lord Coke, "two kinds of livery of seisin, viz. : a livery *in deed*, and a livery *in law*. A livery *in deed* is when the feoffor, taking the ring of the door, or a turf, or twig of the land, delivereth the same to the feoffee, in name of seisin of the land;" whilst "a livery *in law* is when the feoffor saith to the feoffee, being in view of the house or land, I give you yonder land to you and your heirs, and go enter into the same, and take possession thereof accordingly; and the feoffee doth accordingly, in the *life of the feoffor, enter.*" (2 Th. Co. Lit. 335, 346; 2 Bl. Com. 315.)

W. C.

1<sup>a</sup>. Livery in Deed.

The manner of making *livery in deed*, in general, has been already described. It must be observed, however, that if made not by or to the party himself, but by or to his attorney in fact, the attorney must be empowered *by deed* to make or to receive the livery, because, says Lord Coke, "it concerneth matter of freehold;" this being one of the two transactions (the other being the execution of a *deed*), the authority to perform which, for their solemnity and importance, the common law required should be *under seal*. (2 Th. Co. Lit. 339, and n. (H.); Bac. Abr. Feoffment, (E.); 2 Bl. Com. 315, n. (28).)

When several tracts of land are in the same county, livery of seisin of one, in the *name of all*, sufficeth for all; but if they be in several counties, there must be as many liveries as there are counties; propositions which depend upon a state of the law which has long since ceased to exist, namely this: that originally all trials, especially those involving title to lands, took place before the *pares comitatus*, or freeholders of the county, who determined the questions of fact which arose before them, not upon the testimony of witnesses, but as *recognitors*, upon their own knowledge, and of course the freeholders of one county were no judges of the notoriety of a fact in another. And also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants; because, as we have seen, no livery can be made in this case but by consent of the particular tenant in possession; and the consent of one will not bind the rest. And in all these cases it is prudent and usual, at common law, in cases where feoffments are employed, to indorse on the deed a memorandum specifying the manner, place, and time of making the livery, together with the names

of the witnesses, as will be presently illustrated in the form of a deed of feoffment. (2 Bl. Com. 315-'16; 2 Th. Co. Lit. 335, 337-'8.)

## 2<sup>a</sup>. Livery in Law.

We have seen already what is meant by livery in law. The student will observe besides, that it cannot be given or received by attorney, but only by the parties themselves; and that the feoffee must enter during the *life of the feoffor*, or else it is not a good livery; unless indeed, at common law, he dares not enter, through fear of his life or bodily harm; and then his *continual claim*, made yearly, in due form of law, as near as possible to the lands, will suffice without an entry. (2 Bl. Com. 316.) It will be remembered, however, that in Virginia we have a statute that declares that "no continual or other claim upon or near any land shall preserve any right of making an entry or of bringing an action." (V. C. 1873, ch. 146, § 3; V. C. 1887, ch. 139, § 2911.)

## 4<sup>p</sup>. Effect of Livery of Seisin when Grantor is in Possession.

Although the grantor may have no lawful estate in the premises, or a less one than the feoffment accompanying the livery specify and purport to pass, yet such solemnity and importance is attached by the common law to the ceremony of livery, that supposing the grantor to be *in possession*, the full compass of the estate designated passes, liable to be divested *by action only*, and not by entry. Hence, wrongful conveyances thus sanctioned by livery are known as *tortious conveyances*, because they are liable to be in this manner perverted so as to work a *tort* or wrong to the true owner. (2 Th. Co. Lit. 353-'4, and n. (B. 1).)

In Virginia it is provided by statute, in substance, that a conveyance shall pass or assure no greater right or interest in real estate than the person making it may lawfully pass or assure. (V. C. 1873, ch. 112, §, 7; V. C. 1887, ch. 107, § 2419.)

## 3<sup>n</sup>. Form of Feoffment.

The ancient feoffment is at once so simple and complete, and presents so good an illustration of the several parts of a conveyance, and of the office of each, that it is worth while to study the form in the note given on next page, translated from a Latin precedent (2 Bl. Com. App'x I.), which appears to be of the time of Edward II.

## 2<sup>m</sup>. Gift.

The conveyance by *gift* (*donatio*) is properly applied to the creation of an *estate-tail*, as feoffment is to that of an *estate in fee-simple*, and lease to that of an estate *for life or years*. It differs in nothing from a feoffment, but

in the nature of the estate passing by it; for the operative words are the same, namely, *do* or *dedi*; and gifts in tail, like all estates of freehold, are equally imperfect without livery of seisin as are feoffments in fee-simple. And this is the only distinction which Littleton seems to take when he says (1 Th. Co. Lit. 622), "It is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee," namely, as he explains, that feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life or for years, or at will. In common acceptance, gifts are not unfrequently confounded with grants, presently to be mentioned. (2 Bl. Com. 316 '17.)

### 3<sup>m</sup>. Lease.

The doctrines connected with leases may be ranged under the heads following, namely, (1), The nature of a lease; (2), The proper words of lease, and how its effect is consummated; (3), The usual incidents which belong to a lease; (4), What may be leased; (5), Who may make leases; (6), Persons incapable of making valid leases; (7), Leases void and voidable; (8), Who may be lessees; (9), Covenants contained in leases; and (10), The form of a lease;

W. C.

### 1<sup>n</sup>. The Nature of a Lease.

A lease is a conveyance of any lands or tenements (usually in consideration of rent, or other annual or periodical recompense), made for life, for years, or at will, but always for a *less time* than the lessor hath in the

#### NOTE.

#### *Ancient Charter of Feoffment.*

Premises.	Know all men that I, William, son of William de Segenho, have given, granted, and by this my present deed have confirmed unto John, son of the late John de Saleford, in consideration of a certain sum of money to me in hand paid beforehand, one acre of my arable land, lying in Saleford plain, adjacent to the land of the late Richard de la Mere; to HAVE and to HOLD the whole of the aforesaid acre of land, with all its appurtenances, unto the said John and his heirs and assigns, of the chief lords of the fee;
<i>Habendum</i> and <i>Tenendum.</i>	<i>Rendering</i> and doing annually, to the said chief lords therefor, due and accustomed service. And I, the aforesaid William, and my heirs and assigns, the whole of the aforesaid acre of land, with all its appurtenances, to the aforesaid John de Saleford, and his heirs and assigns, against all persons will warrant forever. In testimony whereof, to this present deed I have affixed my seal:
<i>Reddendum</i> Warranty.	In the presence of the following witnesses, Nigel de Saleford, John the miller of the same town, and others. <i>Dated</i> at Saleford, on Friday next before the feast of Saint Mary the Virgin, in the sixth year of the Reign of King EDWARD, son of King EDWARD.
Conclusion.	

L. S.

Livery of Seisin endorsed.	MEMORANDUM, that on the day and year within written, full and quiet seisin of the within specified acre, with the appurtenances, was given, and delivered by the within-named William de Segenho, to the within-named John de Saleford, in their proper persons, according to the tenor and effect of the within-written deed, in the presence of Nigel de Saleford, John de Seybrooke, and others.
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premises ; for if it be for the *whole interest*, supposing the lessor to have an estate for life or years, it is more properly an *assignment* (one of the secondary conveyances) than a lease. (2 Bl. Com. 317 ; 2 Th. Co. Lit. 403, n. (A).) Hence, where one, being in possession of land to which he has no title, but which he is authorized by the owner to rent out for his own benefit, makes a written contract to let the land to another for a year, for one-half of the crops raised on it, the transaction is not a lease, but constitutes the parties joint-tenants of the crop raised. (Lowe v. Miller, 3 Grat. 205. 212.)

2<sup>n</sup>. The Proper Words of Lease, and how its Effect is Consummated.

The proper technical words of lease are “demise, lease, and to farm let,” yet any other words which sufficiently show the intention of the parties, that the one shall divest himself of the possession, and the other come into it for a certain time, whether they run in the form of a license, covenant or agreement, will in construction of law, amount to a lease. (2 Bl. Com. 317-’18 ; 2 Th. Co. Lit. 403, n. (A.) ; Michie v. Wood’s Ex’or, 5 Rand. 571 ; Tunis v. Grandy, 22 Grat. 24-’5 ; Upper Appomattox Co. v. Hamilton, 83 Va. 319, 324.)

On the other hand, although the most proper words of leasing are made use of, yet, if upon the whole instrument there appears no such intent, but that it is only preparatory and relative to a future lease, the law will rather do violence to some of the words than break through the intent of the parties, by construing that to be a present lease which was plainly intended only as an agreement for one. (Goodtitle v. Way, 1 T. R. 735 ; Doe v. Clare, 2 T. R. 739 ; Tempest v. Rawlings, 13 East. 18 ; Doe v. Smith, 5 East. 530 ; Tunis v. Grandy, 22 Grat. 125-’6.) Yet if the instrument contain words of *present demise*, it will not the less operate as a lease, merely because there is a clause for a *future lease*. Thus, where it was stipulated that “A agrees to let, and B agrees to take,” certain premises for a designated term of years, and upon compliance with certain terms, A agreed to grant a lease, but meanwhile that “this agreement should be considered binding till one fully prepared could be produced.” The instrument was held to amount to a lease *in presenti*, the court considering that the stipulation for a future and more formal lease might be for the more convenient under-letting and assignment of the premises. (Poole v. Bentley, 12 East. 168 ; Doe v. Groves, 15 East. 244.) So that whether an instrument shall be a lease, or only an agreement for one, or neither, but having some other effect, as a *surrender*, depends on the intention of the par-



ties, as it is to be collected from the whole instrument. (*Morgan v. Bissell*, 3 Taunt. 65; 2 Th. Co. Lit. 403 n. (A.); 2 Lom. Dig. 120-'21; *Scott v. Scott*, 18 Grat. 159-'60, 164.)

In accordance with the principle that the *intention* of the parties must determine whether or not a lease was contemplated or only a *license*, "it was held that an agreement conferring on one an exclusive right to *raise ore* on land, passed *no estate in the land*, but was a mere *license* revocable at the will of the licenser; and that even though the transaction were witnessed by an *indenture* between the parties." (*Barksdale v. Hairston*, 81 Va. 765; *Hodgson v. Perkins*, 84 Va. 706; 3 Kent's Com. (12 ed.) 452, & n. (b); *Ruggles v. Lesure*, 24 Pick. (Mass.) 190; *Jackson v. Babcock*, 4 Johns. (N. Y.) 417.) And it is to be observed, that if a license merely, it is unassignable, and any attempt at assignment operates a revocation of the license. (*Jackson v. Babcock*, 4 Johns. 418; *Hodgson v. Perkins*, 84 Va. 711; *Ante* pp. 34-'5; 3 Kent's Com. (12 ed.) 452.)

By the common law, where a freehold estate is created by lease, *livery of seisin* must be given to the lessee. And where the lease is for a term of years, there must be an *entry* by the lessee. (2 Bl. Com. 144; *Id.* 318, 2 Lom. Dig. 119; 2 Th. Co. Lit. 404, n. (A.); 1 *Id.* 630-'31; *Ante*, pp. 184-'5.) But no deed or writing is, at common law, required in any case (*Ante*, pp. 184-'5, 659-'60); although by the statute of frauds and perjuries in England (29 Car. II., c. 3, §§ 1, 2, 3), and our corresponding statute of conveyances (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413), this principle is materially qualified.

Thus, in Virginia, "no estate of *freehold*, or for a term of *more than five years*, in lands, can be conveyed unless *by deed or will*." (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.) And provision is made both for the *form* of a lease (V. C. 1873, ch. 113, § 4; V. C. 1887, ch. 108, § 2440), and for the construction of the more familiar covenants contained therein. (V. C. 1873, ch. 113, §§ 17 & seq.; V. C. 1887, ch. 108, §§ 2453 & seq.)

The student will observe that, both in England and in Virginia, by the statute of *Uses* (27 Hen. VIII., c. 10; V. C. 1873, ch. 112, § 14; V. C. 1887, ch. 107, § 2426), and the statute of *Grants* (8 & 9 Vict. c. 106; V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417), leases may be made of the freehold without *livery*; and for terms of years, by the statute of *Uses*, without entry, merely by the effect of the deed of conveyance, under the operation of the above-mentioned statutes, respectively. (*Post*, 808 & seq., 825, 827-'8.)

3<sup>n</sup>. The Usual Incidents which Belong to a Lease.

A conveyance by way of lease is usually attended by certain incidents which may be enumerated as follows, viz. : (1), A certain beginning, continuance and ending, in case of *lease for years*; (2), The existence of a reversion in the lessor; (3), The reservation of a rent; (4), Certain rights and duties of the lessor; and (5), Certain rights and duties of the lessee, and those claiming under him.

W. C.

1<sup>o</sup>. A certain Beginning, Continuance and Ending, in Case of a *Lease for Years*.

"Regularly, in every lease for years," says Lord Coke, "the term must have a certain beginning, and a certain end," that is, supposing it is to take effect in interest or possession. For before it takes effect in possession or interest, it may depend upon an uncertainty, viz. : upon a possible contingency before it begins in possession or interest, or upon a limitation or condition subsequent, afterwards. It is moreover esteemed certain, if, by reference to a certainty, it may be made certain. Thus if A, seised of lands in fee, grant to B, that when B pays to A \$100, that from thenceforth he shall have the land for twenty-one years, and afterwards B pays the \$100, this is a good lease for twenty-one years from thenceforth. And if A lease his land to B, for so many years as B has in the manor of Dale, and B has then in that manor a term of ten years, this is a good lease by A to B, of the land of A for ten years. If tenant for life lease his lands for so many years as *he shall live*, this is at once uncertain in duration, and incapable of being reduced to a certainty, and therefore is no *lease for years*, nor indeed any *lease* at all, because, if accompanied by the proper ceremonies, it passes the tenant for life's whole interest, and is therefore properly an *assignment*; but if the tenant for life make a lease for twenty-one years, if he shall so long live, that is a good lease for twenty-one years, albeit it is liable to be determined sooner by the death of the lessor, for it must at all events expire with that number of years. (1 Th. Co. Lit. 633; 2 Do. 405.)

A lease to begin from an *impossible* date, as from the 30th of February, takes effect *from its delivery*, which is always its true date; but when the date of commencement is *uncertain*, and there is nothing to remove the uncertainty, the *lease is void*, as in case of a lease from 20th *November*, without saying or indicating what *November*. (2 Lom. Dig. 121; Bac. Abr. Lease, (2).)

In respect to the mode of computing the time of the commencement of a lease, Lord Coke and the older writers insist upon a distinction between the computa-

tion “from the *day of making*,” and “from the *making*” of the instrument, holding that where the computation is to be “from the *day of making*,” the day is to be excluded; whilst when it is “from the *making*,” it is to be included. (2 Th. Co. Lit. 407–8; 2 Lom. Dig. 121.) The more modern, and the better doctrine, however, appears to be that the word “from” may, in the strictest propriety of language, be taken either inclusive or exclusive, as the circumstances of the case may require. Thus, in a lease made under a power to grant leases in possession, but not in reversion, the word “from” ought to be construed inclusive, for otherwise the lease would be inoperative (*Freeman v. West*, 2 Wils. 265; *Pugh v. Duke of Leeds*, Cowp. 714; *Hatter v. Ash*, 1 Ld. Raym. 48); and perhaps it is not too much to say that, in general, the words “from the date,” when used to *pass an interest, include the day* (*Bellasis v. Hester*, 1 Ld. Raym. 280; *The King v. Adderley*, 2 Dougl. 465; 2 Th. Co. Lit. 408, n. (D.);) a construction which depends upon the well-known doctrine that conveyances are to be construed most strongly against the grantor, and in favor of the grantee. (*Lester v. Garland*, 15 Ves. 248; *Lyell v. Williams*, 18 Serg. & R. 135; 4 Kent’s Com. 95, n. (b).)

The *continuance* of the lease must likewise be certain, which does, indeed, generally result from the certain beginning and ending. But here also, *id certum est quod reddi potest certum*. Therefore, a lease for so many years as J. S. shall name, is a good lease; for though at first uncertain, yet when J. S. has named the years, it is reduced to a certainty. Hence, too, a lease for seven, fourteen, or twenty-one years, is not in law uncertain in its continuance. At first it was a lease for seven years; and when the lessee had indicated his purpose to continue, it was a lease for fourteen years; and if after that he continued again, it was a lease for twenty-one years. (2 Lom. Dig. 122, *Ferguson v. Cornish*, 2 Burr. 1034.)

## 2°. The Existence of a Reversion in the Lessor.

This incident is embraced in the very nature of a lease, as it has been already explained (*Ante* p. 750): being a conveyance always for a less time than the lessor has in the premises; for if it be for the *whole interest*, it is more properly an *assignment*. (2 Bl. Com. 317.) Hence, if A, having a term for twenty-one years, disposes of the land for twenty, as he still has a remnant of interest, namely, for one year, which is his reversion, it is a lease; but if he had disposed of his whole estate of twenty-one years, leaving nothing in himself, it would have been, not a lease, but an assignment. See *Lowe v. Miller*, 3 Grat. 212.

## 3°. The Reservation of a Rent.

The reservation of a rent is not a necessary nor an invariable incident to a lease, but it usually accompanies it; and it will be proper to consider in this connection *the terms* in which it is best to reserve it: not that any particular words are required, but because one or another mode of expression may more or less clearly set forth *the intent* of the parties, at which it is the aim of all construction to arrive. The most *appropriate* words of reservation, as Lord Coke shows, are reserving, rendering, paying, etc. (*reservando, reddendo, solvendo, faciendo*, and the like) *during the term*; but words of covenant, promise, or any form of engagement which evidence the purpose distinctly, will suffice. (2 Th. Co. Lit. 412, and n. (14).)

The terms employed ought to set forth how often, and at what times the rent is to be paid, and be accompanied by a covenant or promise on the part of the lessee to pay it; for else, by assigning the premises (when he is not prohibited so to do), he would himself be discharged from the obligation to pay, and the assignee might be insolvent. It is an excellent general rule upon the subject, as the rent will follow the reversion, to reserve it generally, thus—"yielding and paying therefor yearly *during the said term*, the sum of," etc. (Gilb. Rents, 64; 2 Th. Co. Lit. 405, n. (A).) This mode of reservation will entitle the lessor, and those to whom the reversion may come from him, to the rent during the continuance of the term, and will avoid all difficulty as to who will succeed the lessor in the enjoyment of the rent. It will always be payable to him to whom the reversion in the land belongs, unless it be severed therefrom by some subsequent transfer of the rent expressly separate from the reversion, or of the reversion expressly separate from the rent.

Provision that rent shall be apportioned in case of destruction of premises by fire without default of tenant. (V. C. 1887, ch. 108, § 2455.)

If the lease is for life, or a long term of years, the lessor should secure to himself a right of *re-entry*, in case the rent be not paid. This is effected by making the punctual payment of the successive instalments of rent the *condition* of the enjoyment of the premises (the premises being demised "on condition that the lessee pay annually," etc.), or by reserving *expressly* a right to re-enter, if the rent be in arrear. (2 Th. Co. Lit. 405, n. (A).) Very ample provision is made by statute to facilitate the practical exercise of the right of re-entry; whilst at the same time due care is taken to protect the inter-



ests of the lessee. (V. C. 1873, ch. 134, §§ 16 & seq.; V. C. 1887, ch. 127, §§ 2796 & seq.)

On the other hand, even though no right of re-entry be reserved to the landlord, yet by statute in Virginia, provision is made to obviate the consequences of his neglect, first, where the premises are situated in the *country*, and secondly, where they are in a *town or city*.

1, *Where the premises are situated in the country*: It is enacted that, "If any tenant from whom rent is in arrear and unpaid shall *desert* the demised premises, and leave the same uncultivated or unoccupied, without goods thereon subject to distress, sufficient to satisfy the said rent, the lessor or his agent may post a notice in writing upon a conspicuous part of the premises, requiring the tenant to pay the said rent within *one month*. If the same be not paid within that time, the lessor shall be entitled to the possession of the premises, and may enter thereon, and the right of such tenant thereto shall thenceforth be at an end; but the landlord may recover the rent up to that time." (V. C. 1873, ch. 134, §§ 6, 16; V. C. 1887, ch. 127, §§ 2786, 2796.)

2, *Where the premises are in a city or town*: It is provided that, "If any tenant or lessee of premises in a city or town, being in default in the payment of rent, shall so continue for *five days* after notice in writing requiring possession of the premises or the payment of rent, such tenant or lessee shall thereby forfeit his right to the possession. In any of such cases the possession of the defendant may, at the option of the landlord or lessor, be deemed unlawful, and he may proceed to recover the same in the manner provided by this chapter." (V. C. 1873, ch. 130, § 4; V. C. 1887, ch. 123, § 2719.)

#### 4°. Certain Rights and Duties of the Lessor.

The rights of the lessor may be briefly summed up as follows. Of course reference is had to those rights which commonly attach by virtue of the relation of lessor and lessee, independently of special agreement; for the rights arising from special agreement may be infinitely varied in each case. But independently of special agreement—(1), The lessor may *assign his reversion*; (2), Has a *right to the rent reserved*, in general without abatement; and (3), Is entitled *to the forfeiture of the premises* for various acts of default by the tenant.

(1), The lessor may *assign his reversion*, and no *attornment* or assent of the tenant thereto is needful to give it effect; but no tenant who, before notice of the assignment, shall have paid the rent to the grantor, shall suffer any damage thereby. (V. C. 1873, ch. 134, § 4; V. C. 1887, ch. 127, § 2783.)

As a general rule, the assignment of a reversion carries with it the rent to *accrue due thereafter*, but not that which is *then due*. Whoever owns the reversion at the time the rent became due, is, at common law, entitled for the most part to the *whole* sum then becoming due, no apportionment ever being made of periodical payments *in point of time*, according to the maxim, *annua nec debitum judex non separat*. Hence, if the lessor should assign the reversion the day before the rent was payable, without reserving the rent, it would belong to the assignee of the reversion. It is worthy of consideration, whether this doctrine has not been changed with us by the statute touching periodical payments, which declares that, “on the *determination*, by death or otherwise, of the estate or other thing, from or in respect of which any rent, hire, or money coming due at fixed periods, issues or is derived, or on the death of any person interested in such rent, hire, or money, the person, or the personal representative or *assignee* of the person who would have been entitled, but for such death or determination, to the rent, hire, or money coming due at any such period, shall have a *proportion* thereof, according to the time which shall have elapsed for which the said rent, hire, or other money was growing due, including the day of such death or determination, deducting a proportional part of the charges.” (V. C. 1873, ch. 136, § 1; V. C. 1887, ch. 129, § 2810.) It must be admitted, however, that strong objections may be urged against such an application of that statute. Thus, the statute applies, according to its terms, only in case of the *determination of the estate*; and if the estate does not determine, but devolves on the reversioner or remainderman, there is no room for the operation of the statute. And so the corresponding English statute of 11 Geo. II., c. 19, seems to have been interpreted. (*Chm’s Case*, 10 Co. 128 a, n. (F.); Opinion of Ld. Kenyon, *Ex parte Smyth*, 1 Swanst. 351, n. (b); *Duppa v. Mayo*, 1 Saund. 288, n’s (17) and (2); *Norris v. Harrison*, 1 Madd. (Am. ed.) 486.) See also *Strafford v. Wentworth*, Prec. in Chan. 556–7.

The assignee of the reversion has, at common law, a right to *distrein* for any rent falling due after the assignment to him, and by statute in Virginia, corresponding to 31 Hen. VIII., c. 13, and 32 Hen. VIII., c. 34 (*Ante*, pp. 274–5), it is provided that an assignee of the reversion, and his representatives, shall enjoy against the lessee and his representatives the like advantage, by action or entry for any forfeiture, or by action upon any covenant or promise in the lease, which the grantor,

assignor, or lessor, or his heirs, might have enjoyed. (V. C. 1873, ch. 134, § 1; V. C. 1887, ch. 127, § 2781; Spence's Case (5 Co. 16), 1 Smith's L. C. 92. 96 & seq.)

(2), The lessor has a right to the rent reserved without abatement, except in the cases where the tenant has been evicted from the land by title paramount; or where he has surrendered the premises to the lessor; or where the lessor has released to the tenant the arrears of rent, or the rent yet to fall due; or perhaps where the premises have been annihilated, as by being swallowed up by an earthquake, or *permanently* invaded by the sea. Neither the total destruction of the *erections* upon the premises (although the premises have no value without them), nor their becoming untenable, unless by default of the lessor, nor the existence in the vicinity of nuisances, physical or moral, with which the lessor has no concern, will at common law constitute any excuse for non-payment of the rent, nor justify even a diminution of it, without an agreement to that effect. (*Ante*, pp. 58 & seq.; *Holzapffel v. Baker*, 18 Ves. 115; 1 Washb. Real Prop. 353.)

The student will remember, however, that by the Code of 1887, it is provided that where the buildings on leased premises are destroyed by fire or otherwise, without fault or negligence on the part of the lessee, or if he be deprived of the possession by the public enemy, no covenant to pay the rent, or to leave the premises in good repair, shall have the effect to bind him to make such payment or to erect such buildings again, unless there be other words showing it to be the intent of the parties that he be so bound. But in case of such destruction there shall be a reasonable reduction of the rent for such time as may elapse until there be again upon the premises buildings of as much value to the tenant for his purposes as what may have been so destroyed, and in case of such deprivation of possession, a like reduction until possession of the premises be restored to him. (V. C. 1887, ch. 108, § 2455; *White v. Stuart, &c.*, 76 Va. 563-'4.)

Nor is the lessor, in the absence of covenants, bound to do any repairs, nor to remove nuisances not caused by himself, nor is he in any wise answerable either to the lessee or to strangers for any damage arising from the condition of the premises. (1 Washb. R. Prop. 355-'6.)

(3), The lessor is, at common law, entitled to the forfeiture of the premises for various acts of the tenant injurious to his interests,—as by conveying, by the *tortious* conveyances of feoffment with livery, etc., a greater estate than belongs to the tenant; disclaiming *in a court*

of record to hold of the lessor; or claiming in a court of record a greater estate than belongs to him; of which causes of forfeiture, it will be remembered that we retain in Virginia only the last two, and certainly not the first. (*Ante*, pp. 111 & seq.)

The duties of the lessor are next to be considered, of which it may suffice to mention two, namely: that it is the duty of the lessor, (1), To defend and maintain the lessee's right to the possession of the premises; and (2), Not himself to disturb the lessee in the enjoyment thereof.

(1), It is the duty of the lessor to defend and maintain the lessee's right to the possession of the land leased. And as the rent is a *retribution for the land*, the loss by the tenant of part or all of it, by a title superior to that of the lessor, involves a proportionate abatement, or an entire extinction of the rent, as the case may be, from that time. (*Ante*, pp. 55, 58; *Tunis v. Grandy*, 22 Grat. 109, 131.) Indeed, in the absence of any special stipulation to the contrary, it seems that, as the rent is *not due* until the period for which it is reserved (year, half year, month, etc.), is expired, if at that time the lessee has been *evicted*, he is, at common law, excused from paying *any portion* of the rent for that period (*Ante*, p. 52), and the statute touching the apportionment of periodical payments (V. C. 1873, ch. 136, § 1; V. C. 1887, ch. 129, §§ 2810 &c.), would seem not to qualify the doctrine. And although, in general, the lessee is estopped to deny the lessor's title, that principle does not apply where it has actually turned out to be bad, and the lessee has lost the possession. (1 Washb. Real Prop. 346, *Watson v. Alexander*, 1 Wash. 340; *Ross v. Gill*. 1 Wash. 90.)

As to the recovery of compensation by the lessee for the lands from which he is evicted, it seems that, although there be no express warranty of the title by the lessor, yet in consequence of the rent reserved, and the reversion remaining in him, a warranty is implied, in case of a lease *for years*, from the usual terms of demise (as *grant or demise*), and in case of a lease *for life*, from the word *dedi*, or give. (2 Lom. Dig. 320-21, 329; *Black v. Gilmore*, 9 Leigh, 946.)

(2), It is the lessor's duty *not himself to disturb the lessee* in the enjoyment of the premises, or any part thereof; and in this particular the law is justly much more stringent than when the act is done by a stranger. Thus, if he evicts the tenant wrongfully from only the least part of the premises, it operates a suspension of the *entire rent*, as the law is understood in Virginia, dur-



ing the *whole year* of tenancy (or other period for which the rent is reserved) in which the eviction occurs, and that notwithstanding the tenant remains in undisturbed enjoyment of the residue, and of much the greater portion of the premises, and soon regains the possession of the part of which he was evicted. (*Briggs v. Hall*, 4 Leigh, 484; *Tunis v. Grandy*, 22 Grat. 109–110, 120. But see 1 Washb. Real Prop. 348 & seq.; *Ante*, p. 56.)

But the landlord's mere entry upon the land, and doing acts of trespass there, however aggravated, will not alone amount to an eviction. He must exercise acts of ownership contrary to the will of the tenant; and it is not always easy to determine whether the lessor's conduct amounts to eviction or not. In *Briggs v. Hall*, *supra*, the landlord's coming upon the premises, and mowing several acres of hay in a meadow, contrary to the express wishes of the tenant, was regarded as an eviction. See *Hunt v. Cope*, Cowp. 242; *Smith v. Raleigh*, 3 Campb. 513; *Upton v. Townsend*, 17 Com. B. (84 E. C. L.) 30; *Dyett v. Pendleton*, 8 Cow. 727; 1 Washb. Real Prop. 349 & seq.; *Tunis v. Grandy & al.* 22 Grat. 130.

5°. Certain Rights and Duties of the Lessee, and those Claiming under Him.

The *rights* of the lessee, in the absence of covenants, are, principally, to *assign or under-let* the premises; to be defended by the lessor against eviction by a superior title; not to be evicted by the lessor himself; and to use the premises in any way which will not involve the commission of waste.

(1), The lessee has a right *to assign or to under-let* the premises, or any part thereof, unless he is restrained by covenants. (2 Th. Co. Lit. 405, n. (A).) The difference between an assignment and an under-letting is, that an assignment is a transfer of the lessee's *whole interest* in the premises, whilst an under-letting leaves a portion of lessee's estate still in him (though it be but an interest for a day or an hour) as a *reversion*. (2 Th. Co. Lit. 566, n. (S).)

At common law the assignee had a right to the benefit of any covenants of the lessor contained in the lease; at least of those covenants which *run with the land*, but he could not insist upon such covenants as against the assignee of the reversion; but when, in the reign of Henry VIII., upon the assignment of the estates belonging to the monasteries, it became necessary to provide by statute for the king and his great lords, who were assignees of the reversions belonging to the religious houses, the legislature found itself constrained, for very shame, to

allow, reciprocally, to the lessees of those houses, and their assigns, against the grantees of the reversion, the like benefit of any condition, covenant or promise in the lease, as they could have had against the lessors themselves. And such substantially is the effect of our statute in Virginia. (V. C. 1873, ch. 134, § 1; V. C. 1887, ch. 127, §§ 2781-'2.)

As between the assignee and the lessor, there is a privity of estate; so that the lessor may not only distress the assignee for rent in arrear (which does not require any privity but that of possession), but may *sue him* also for the same, which does require privity of estate. On the other hand, the sub-lessee, although liable to distress for the rent, cannot be sued for it by the lessor in a court of law, because between them there is no privity of estate. (1 Washb. Real Prop. 339.)

(2), The lessee has also a right *to be defended and maintained by the lessor in possession* of the premises leased. And if he is evicted by title superior to that of the lessor, we have seen what recourse is open to him, as well by the abatement or extinction of the rent, as by recovery of compensation in damages from the lessor. (*Ante*, pp. 759-'60; to which passage reference is made.)

(3), The lessee has a right *not to be evicted by the lessor himself*.

This *right of the lessee* in this respect was explained in describing the *correlative duty* of the lessor. (See *Ante*, pp. 759-'60.)

(4), The lessee has a right, in the absence of a special agreement to the contrary, to use the premises in any way which will not bring about technical *waste*, or destruction of the same. Thus, if one hires a house erected for a hotel, but without stipulation as to the purpose to which he would apply it, he may convert it into a public seminary. The special agreement, however, may be *implied* as well as *express*, and whether it be express or implied, no use must be made of the premises contrary thereto. Thus, if one should lease hotel premises with stipulations which proved that it was expected by both parties that it should be devoted to the hotel business, it would not be admissible to employ it for any other, although no special damage could be shown to arise from such new use. (1 Washb. Real Prop. 358-'9.)

As to the *duties* of the lessee, they may be referred to the following heads:

(1), It is the duty of the lessee *to pay the rent* according to the stipulations of the lease; or if there be no stipulations (save as to the *amount*) to pay it on the

*premises* at the *expiration* of each period for which the reservation is made: *e. g.*, at the end of each year, half year, month, etc. And if the amount is not stipulated, the obligation is to pay as much as the premises are really worth, and, as is believed, at the end of *each year*, in the absence of any manifestation by the parties of a different intent. But in this last case, the payment is not properly a rent, which is defined to be a *certain* or ascertained profit. See *Ante*, pp. 39, 40, 46.

From this obligation to pay the rent the lessee is absolved, for the most part, by nothing but a *release* by the lessor, or other person entitled to receive the rent; by a *surrender* of the lessee's estate, accepted by the lessor; by an *eriction* from the premises, in whole or in part, *by a stranger* claiming adversely to the lessor by a superior title; by an *eviction* from the premises, *even in part*, by the *lessor himself*; and by the *total destruction*, in whole or in part, of the *very substance* of the premises, and now by statute in Virginia of the *structures* erected thereon. (1 Wash. Real Prop. 453 & seq.; *Ante*, pp. 56 & seq.)

Hence, at common law, the destruction of the buildings on the demised premises, or their becoming uninhabitable for want of repairs or otherwise, without lessor's default (and, as we have seen, the lessor is under no obligation to repair or otherwise to render the premises habitable, without a stipulation to that effect), does not relieve the lessee from his agreement to pay rent, nor entitle him to a diminution of the amount where it is not so stipulated; a doctrine which rests upon the very rational ground that the lessee is *the purchaser* of the premises, and the *owner* thereof, for the term, and at the price agreed upon, and therefore is not exempt from the obligation to pay the price, whatever casualty may befall the premises, whether by tempest, flood, fire, or otherwise; the loss *to that extent* being his, whilst the lessor or reversioner suffers the residue of it. (1 Washb. Real Prop. 353 '5; *Ante*, p. 60; *Holzappel v. Baker*, 18 Ves. 115; *Scott v. Scott*, 18 Grat. 168.) Even where the lessee has essayed to protect himself from the payment of rent in the event of casualty, by covenants, the restriction is not extended to casualties other than those specified. Thus, where a lease provided that the rent should cease upon the premises becoming untenable by fire or other casualty, it was held no defence that they had become so by the widening and altering of the grade of the street on which they stood, by the authority of the city. So where the rent, or a proportionate part, was to stop, if the premises or any part thereof were destroyed or

damaged by "unavoidable casualty," it was held not to extend to cases of gradual and natural decay. (1 Washb. Real Prop. 356; Mills v. Bachr, 24 Wend. (N.Y.) 254; Welles v. Castler, 3 Gray, (Mass.) 325; Bigelow v. Collamore, 5 Cush. (Mass.) 226.)

But this doctrine is now changed in Virginia, by statute, which enacts that no promise "by a lessee to pay the rent, or that he will leave the premises in good repair, shall have the effect if the buildings thereon be destroyed by fire or otherwise, without fault or negligence on his part, or if he be deprived of the possession of the premises by the public enemy, of binding him to make such payment or erect such buildings again, unless there be other words showing it to be the intent of the parties that they should be so bound. But in case of such destruction, there shall be a reasonable reduction of the rent for such time as may elapse until there be again upon the premises buildings of as much value to the tenant for *his purposes* as what may have been so destroyed; and in case of such deprivation of possession, a like reduction until possession of the premises be restored to him. (V. C. 1887, ch. 108, § 2455.)

(2), It is the duty of the lessee *not to deny* the lessor's title.

This doctrine is to be referred in part to the system of feuds; but it appears to be due not less to a very sensible and often applied principle of reason and honesty, that one shall not be permitted, in general, to deny, when he wishes to avoid a liability, a fact which, by words or conduct, he has previously admitted in order to obtain a benefit. A man who has hired a horse of A, and has obtained the advantage he thereby sought, cannot say, when called on to pay the hire, that it was not A's horse. Such denials savor, for the most part, of bad faith, and as between landlord and tenant especially, are generally recognized as inadmissible. The doctrine extends in like manner for and against persons claiming under either party, as heir or personal representative, assignee, or sub-tenant. But it should be observed, that the prohibition to the tenant to plead *nil habuit in tenementis*, does not apply where the title of the lessor, or of those claiming under him, has expired since the lease was made; or where the lands have been recovered by title paramount to that of the lessor; or where the lessee is threatened with suit upon a paramount title, the threat, if the title turns out to be paramount, being equivalent to eviction; or where the lessee, being already in possession of the premises, has been induced by *fraud or mistake* to believe that another has a better



right than himself, and has, therefore, accepted a lease from him; nor does the doctrine so apply as to prevent the lessee from himself *afterwards* acquiring or asserting an adverse title against the lessor, provided it is not to the prejudice of the latter in recovering rent, or regaining the possession from the lessee, and the like; and supposing also, that the lessee gave notice to the lessor that he abandoned the possession, and surrendered the estate received from him. (1 Washb. Real Prop. 366 & seq.; 2 Th. Co. Lit. 410, 415-'16 & n. (M.), 417, 418; Blight's Lessee v. Rochester, 7 Wheat. 548; Merryman v. Bourne, 9 Wal. 599, 600; Walton v. Waterhouse, 2 Saund. 418, n. (1); Cooke v. Loxley, 5 T. R. 4; Brooksby v. Watts, 6 Taunt. 333; Mayor of Poole v. Whitt, 15 M. & W. 577; Ross v. Gill, 1 Washb. 90; Watson v. Alexander, 1 Washb. 340; Smoot v. Marshall, 2 Leigh, 138; Emerick v. Tavener, 9 Grat. 220; Creigh v. Henson, 10 Grat. 231; Wild v. Serpell, 10 Grat. 405, 415; Miller v. Williams, 15 Grat. 219; Alderson v. Miller, 15 Grat. 279; Turpin v. Saunders, 32 Grat. 32-'3.)

It is to be further observed, that when the lease is by *deed indented*, the lessee cannot deny the title of the lessor, even though he may not have occupied the premises (unless he were evicted therefrom by title paramount), for "by the making of the lease, the estoppel doth grow." And the estoppel prevails notwithstanding the lease be of the lessee's *own land*. (2 Th. Co. Lit. 410, 415-'16 & n. (M.), 417, 418; Com. Dig. Estoppel, (A. 2), (A. 3); 1 Greenl. Ev. § 25.)

(3), It is the duty of the lessee not to *disclaim in a court of record* holding of the lessor.

If the *disclaimer* is made in the country (*in pais*) and not in a court of record, it operates no prejudice to the lessor, and, therefore, is visited with no penalty upon the lessee. But if the disclaimer occur in a court of record (as in the progress of an action to recover the rent), it is attended, at common law, with a forfeiture of the term, which is supposed to be also the law with us. (*Ante*, p. 112; Wild v. Serpell, 10 Grat. 405.)

(4), It is the duty of the lessee not to *claim in a court of record* a greater estate than he has a right to.

This conduct on the part of the lessee operated at common law a forfeiture of the term, as it is supposed to do also in Virginia. (*Ante*, p. 112.)

(5), It is the duty of the lessee *not to aliene by conveyances operating upon the possession only* (as feoffment with livery, etc.), a greater estate than he possesses.

At common law, when a person in possession alienes

by feoffment with livery, or by other *tortious* conveyance, it passes *prima facie* what it *purports to pass*; and if that estate exceeds the limits of the alienor's interest, it converts the lessor's *right of entry* into a *right of action*, which is so seriously detrimental to his interests (from the inordinate delays attendant at common law, upon the prosecution of real actions) as to be attended with *forfeiture* of the alienor's actual estate, as a penalty upon him for his wrongful conduct, and also to make amends to the injured lessor. Such a conveyance with us can never operate to convey more than the lessee's interest (V. C. 1873, ch. 112, § 7; V. C. 1887, ch. 107, § 2419), and, therefore, doing the lessor no injury, is not accompanied by forfeiture. (*Ante*, p. 111.)

#### 4<sup>a</sup>. What may be Leased.

Whatever restrictions, by the severity of the feudal law, might, in times of very high antiquity, be observed with regard to leases, yet by the common law, as it has stood for many centuries, all persons *seised or possessed* of any estate may let leases to endure for any time less than the duration of their own interest, but no longer. Therefore, tenant in fee-simple may let leases of any duration, for he has the *whole interest*; but tenant in tail, or tenant for life, can make no lease which will bind the issue in tail, or the reversioner or remainderman; nor can a husband seised in right of his wife make a valid lease for any longer term than the joint-lives of himself and his wife. Yet the common law allows some tenants for life, where the fee-simple is in abeyance, with the concurrence of such as have the guardianship of the fee, to make leases of equal duration with those granted by tenants in fee-simple. The principal instances of this are to be found amongst ecclesiastical persons, such as parsons and vicars, with the consent of the patron and ordinary. But corporations aggregate, though seised only of a *quasi* estate for life (although with them that life is *perpetual*), may make what lease they please, without the confirmation of any other person whatsoever. In England several statutes have been enacted (known as *enabling* and *restraining* statutes, respectively,) to *restrict* the common law power of leasing where it seemed liable to abuse, and to *enlarge* it when the restraint seemed too hard. (2 Bl. Com. 318 & seq.)

These enabling and restraining statutes do not exist in Virginia; but whereas, at common law, a lessor must be *in possession* in order to make a valid lease, it seems that, under the statute (V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418), allowing *any interest in or claim to real estate to be disposed of* by deed or will, a lease may be

made of land in the adversary possession of another, leaving the lessee to assert whatever title the lessor had.

Incorporeal hereditaments seem to be as much the subjects of lease as any other real property, only the lease is required by the common law itself to be by deed (the thing lying *in grant*); and if a rent be reserved, it is not recoverable *as rent*, by distress or otherwise, but only by an action upon the contract to pay; and, therefore, because it is not a rent, it does not pass with the grant of the reversion, as an incident thereto. (2 Th. Co. Lit. 411.)

Leases are distinguished into, (1), Leases of the possession; (2), Leases of the reversion; and (3), Leases by way of reversionary interest. (2 Th. Co. Lit. 404, n. (A.);

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### 1<sup>o</sup>. Leases of the Possession.

These confer a present *right* of present enjoyment, although, at common law, no *estate* passes till *entry by the lessee*. Meantime, the lessee has *no term or estate*, but merely an *interesse termini*, which may be assigned and released, but cannot be surrendered; nor does it, while thus executory, admit of enlargement by release. But whilst, at common law, a lessee has no *term* until actual entry, a bargainee, in a lease operating by *bargain and sale*, has an actual estate or term, by force and effect of the statute of uses, immediately upon the execution of the lease, without any actual entry at all (*Ante*, pp. 213-'14); and this is the reason that the estate of a bargainee for years may be enlarged by release without an actual entry; which, indeed, is the theory of the conveyance by lease and release under the statute of uses. (*Ante*, p. 213; 2 Th. Co. Lit. 404, n. (A).)

### 2<sup>o</sup>. Leases of the Reversion.

A lease *of the reversion* is a lease granted by one who has a reversion, and it passes the reversion, or such part as it may designate, for the period limited as a *vested interest*. It confers a right to the reserved rent and services, and creates, for the time being, the relation of landlord and tenant between the lessee of the reversion, and the lessee of the land. Such a lease of the reversion (a reversion *lying in grant*), cannot be made but *by deed*, even at common law. (2 Th. Co. Lit. 404, n. (A.); Bac. Abr. Leases, (N.); 2 Lom. Dig. 123.)

### 3<sup>o</sup>. Leases by Way of Reversionary Interest.

A lease by way of reversionary interest, or as it is more briefly designated, a *reversionary lease*, is a lease to commence on a *future day*, or on an event, and is to operate meanwhile by way, or in the nature of an *in-*

*teresse termini.* It may be granted with or without dead, save when the term is to exceed *five years*, in which case it must be *by deed* (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413); and it will be good, though granted without deed, by a person who has merely a reversion or remainder; but in that case it confers no right to the possession till the possession is *vacant*; nor can it meanwhile confer a right to the rents and services. (2 Th. Co. Lit. 404, n. (A.); 2 Lom. Dig. 123; 2 Prest. Convs. 144.)

## 5<sup>n</sup>. Who may Make Leases.

The general doctrine is that all natural persons who are capable of alienating their property, or of entering into a contract respecting it (*Lute* pp. 642 & seq.); and all corporations which may lawfully hold lands, may make leases which will endure for any period short of their interest in the thing leased, but no longer. (2 Lom. Dig. 123.)

The several classes of persons who may be concerned more or less operatively in making leases are, (1), Persons who have *no estate* in the premises; and (2), Persons who are possessed of *an estate* in the premises;

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### 1<sup>o</sup>. Leases Made by Persons who have *no Estate* in the Premises.

A lease made by a person who has *no estate* in the premises can of course operate nothing immediately; but it may operate *by estoppel*, in case the lessor should afterwards acquire the land. A lease *by estoppel* is defined to be one made by a person who has *no interest* at the time, or at least no *vested* interest, but which is to operate on his ownership, whenever he shall acquire any in the premises. Thus, if an heir *apparent*, or a person having a contingent remainder, or an interest under an *executory devise*, or who has no title whatever, at the time, makes a lease *by indenture*, and afterwards an estate in the land vests in him, the indenture will operate, by way of *estoppel*, to entitle the lessee to hold the lands for the term granted to him; and this *estoppel*, when it becomes efficient, and can operate on the interest, will be fed by the interest; and the lease will be regarded as a lease derived out of an actual ownership. (2 Th. Co. Lit. 415, n. (L.); Bac. Abr. Leases, (O).)

A lease operates by way of *estoppel*, upon the maxim, *ut res valeat*, etc.; and therefore it is a rule that, if a lease *can* operate by way of *passing an interest*, it shall not operate by *way of estoppel*. Hence, where a lease



by indenture takes effect in point of interest, which interest, in respect of duration, may be co-extensive with the lease, but in fact determines before it, the lease may *then* be avoided, and the parties are not estopped from showing the facts which determine the lease; as where A, lessee for the life of B, makes a lease for twenty years, by deed indented, and afterwards purchases the reversion in fee; B dies; A shall avoid his own lease, seeing that it took effect in point of interest (and therefore did not operate *by estoppel*), and was determined by B's death. (2 Th. Co. Lit. 416, n. (L.); Id. 432; Wynn v. Harman, 5 Grat. 157.)

2<sup>o</sup>. Leases Made by Persons who are *Possessed of an Estate* in the Premises.

We have already seen the general doctrine to be, that all persons, in general, who are *sui juris*, may make leases commensurate with their estate in the lands (*Ante*, p. 764-5; 2 Bl. Com. 318); but it is expedient to notice several cases more particularly, namely: (1), Leases by tenants for life; (2), Leases by tenant for years; (3), Leases by guardians; (4), Leases by executors and administrators; (5), Leases by co-parceners, joint-tenants, and tenants in common; (6), Leases by trustees; and (7), Leases under powers;

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1<sup>o</sup>. Leases by Tenants for Life.

Agreeably to the obvious reason just stated, a tenant for life, including tenants by the *curtesy* and in *dower*, cannot make leases to continue longer than their own lives, or the life of *cestui que vie*. Lord Coke notices in this connection a singular contrast, which also will illustrate the action of a lease by *estoppel*. Where A, lessee for life of B, makes a lease for years by deed indented, and after purchases the reversion in fee; B dieth; A shall avoid his own lease, for as he had an interest at the time, the lease operates not by *estoppel*. But if A, having *nothing in the land*, makes a lease for years by deed indented, and after purchases the land in fee, the lease operates by *estoppel*, and concludes A to say he had nothing when he made the lease. (1 Th. Co. Lit. 417; Bac. Abr. Leases, (L.) 2.)

It may be observed, that when tenant for life makes a lease which is liable to outlast his own term, it may be *confirmed* by the person in remainder or reversion; and that when so confirmed, it is considered, during the continuance of the estate of tenant for life, his lease, and the confirmation of the remainderman and reversioner, and after his death, the lease of the remainderman or reversioner, and the confirmation of

the tenant for life. (2 Th. Co. Lit. 431; 2 Lom. Dig. 124.)

## 2<sup>d</sup>. Leases by Tenant for Years.

Lessees for years may grant a lease for a term less than their own, although they leave in themselves a reversion but for a day, or an hour, or a minute. But if they grant their *whole interest*, it is an assignment, and not a lease. (Bac. Abr. Leases, (I.) 3; 2 Lom. Dig. 125.)

## 3<sup>d</sup>. Leases by Guardians.

A guardian may lease the lands of his ward for a term not longer than the continuance of the wardship, that is, *during the infancy of the ward*, if the wardship does not sooner terminate. The rent ought regularly to be reserved to the guardian; but if reserved to the ward, it will be good, because of the privity existing; and in either case payment of the rent ought to be made to the guardian. (Bac. Abr. Leases, (I.) 9; 2 Lom. Dig. 125; Ross v. Gill & ux. 1 Wash. 87.) Leases thus made by the guardian seem, at common law, to be *absolutely void* upon the termination of the wardship, and to be therefore incapable of confirmation by the ward upon his coming of age. (Ross v. Gill & ux. 4 Call, 450; Roe v. Hodgson, 2 Wils. 129; Bac. Abr. Leases, (I.) 9.) And such seems at present the law in Virginia. We formerly had a statute expressly making such leases *voidable* at the ward's election (1 R. C. 1819, ch. 108, § 15), but there appears to be no corresponding provision in the present Code.

Provision is made by statute, with us, that where an infant, insane person, or married woman, is bound or entitled *to renew a lease*, any person in his or her behalf, or any person interested, may apply by petition or motion, in a summary way, to the *circuit or corporation court* of the county or corporation where the land, or part of it, lies, and procure the lease *to be renewed* under the direction of the court, by a commissioner appointed by it for the purpose, with proper guards to protect the rights of the party. (V. C. 1873, ch. 124, § 1; V. C. 1887, ch. 117, § 2615.)

## 4<sup>d</sup>. Leases by Executors and Administrators.

As executors and administrators may dispose absolutely of terms for years and estates *pur auter vie*, vested in them in right of their decedents, so they may lease the same for any shorter time; and the rents reserved on such leases will be assets in their hands. (Bac. Abr. Leases, (I.) 7; V. C. 1873, ch. 126, § 18; V. C. 1887, ch. 119, § 2653.) With freehold estates other than estates *pur auter vie*, the personal representative

of a decedent has no concern, except the will constitute him a *trustee* thereof, in which case he will have the powers the will confers, and except also in respect to the doctrine of emblements. (*Ante*, pp. 102 & seq.; V. C. 1873, ch. 135, § 2; V. C. 1887, ch. 128, §§ 2806 & seq.)

5<sup>p</sup>. Leases by Co-Parceners, Joint-Tenants, and Tenants in Common.

Co-parceners, joint-tenants and tenants in common may severally make leases of their own *undivided respective shares*, or else may all join in a lease of the whole. One may likewise lease his part to his companion; for this only gives the lessee a right to take the *whole* profits, where before he had but a right to a *part*; and he may contract with his companion for that purpose as well as with a stranger. (Bac. Abr. Leases, (L.) 5; 1 Th. Co. Lit. 733, 750 to 757.) But one such tenant cannot make a valid lease of the whole premises, nor does such a lease give any right as to the others. (Tuttle v. Eskridge, 2 Munf. 330; Allen v. Gibson, 4 Rand. 477; Baldwin v. Darst, 3 Grat. 132.)

6<sup>p</sup>. Leases by Trustees.

Trustees, as they have the legal estate, may create leases thereof, even without a power to that effect; but if the lease were in violation of, or not in conformity with the terms of the trust, not only would the trustee be liable for any injury which should result to the *cestui que trust*, but the lessee himself would be held, to the extent of his *estate*, a trustee for the purpose of the trust, unless it should appear that he was a lessee *for value, and without notice*. (2 Lom. Dig. 127.)

7<sup>p</sup>. Leases under Powers.

As leases made by tenants for life determine upon the expiration of the life estate, it is customary in England to insert in marriage settlements, powers to enable the tenants for life (say the husband and wife), to grant leases which shall be good against the persons in remainder or reversion. Powers of this kind are productive of great advantage, not only to the tenants for life, but to the persons in remainder or reversion, as well as to the general public. For the encouragement of farmers to stock and improve the land, it is necessary they should be assured of some permanent interest; and unless the owner of the life-estate can make such an interest, he cannot enjoy the property to the best advantage during his own time; they who come after him must suffer by the land being untenanted, out of repair, and in ill-condition, and thus the public good is prejudiced by a diminished produc-

tion. The plan of the power is for the mutual advantage of possessor and successor; and its execution is guarded by carefully considered restrictions, to protect the successor against any diminution of annual revenue from the land, and also in point of convenient remedy, and in respect of any other circumstance likely to affect his ample enjoyment of the estate when it comes into his possession. (2 Th. Co. Lit. 433, n. (C. 1).)

Settlements of this kind are as yet rare amongst us; and such powers of leasing are seldom needed. Yet it is not amiss, especially as thereby the general doctrine of leases will be illustrated, to enumerate the restrictions which are usually imposed:

(1), The instrument by which the power shall be executed is usually prescribed.

As it is important that such an act should be done with deliberation, and not unadvisedly, it is generally required to be an instrument *under seal*, and executed in the presence of several witnesses.

(2), The lands to be demised under the power are *described accurately*.

If all the lands included in the settlement are designed to be subject to the power of leasing, of course no particular designation is then needed. But if certain parts of the property are meant to be excepted from the power, as, for example, the mansion, or the park, it is specified with cautious particularity.

(3), The time when the leases made under the power shall commence, whether *in possession or reversion*, is plainly set forth.

We have seen what is the nature, respectively, of a lease of the possession, of the reversion, and of a reversionary interest. (*Ante*, pp. 765 & seq.) A lease other than of the possession may be supposed to argue some improvidence in the lessor, and at all events to suggest the probability of not obtaining for it the best rent. It is not, therefore, favored; and if the power is designed to authorize such leases, it is usually unequivocally expressed.

(4), The duration of the lease to be made under the power is prescribed within limits.

The common practice is to limit the power of making leases by tenant for life, to a period of *twenty-one years*, although the practice is modified by the usual custom of the locality where the premises are situated.

(5), The rent which shall be reserved in the leases made under the power is prescribed within limits.

It is usual to require that the *best rent* shall be reserved; and if that requirement be not respected, the



lease cannot be supported as against the successor. The *best rent*, however, is not necessarily the *highest rent*, it being needful to consider the character and solvency of the tenant as well as the amount to be paid. Indeed, it seems to be the established doctrine, that when the tenant for life appears to have exercised his power fairly, without injurious partiality to the lessee, and without seeking any peculiar and improper advantage for himself, there ought to be something extravagantly wrong in the bargain to set aside the lease on the ground that the rent is *not the best*.

(6), The clauses and covenants required.

The tenant for life, in exercising his power of leasing, is usually required to insert a *covenant* by the lessee for the payment of the rent reserved, and a clause for re-entry in default of payment, and to allow no clause rendering the lessee punishable for waste. And he is required, also, himself to execute a counterpart of the lease; perhaps in order to remove all doubt of the genuineness of the lease, and to insure a more thoughtful and advised action on his part, through the medium of a greater formality.

It remains to observe that, where the lease is not warranted by the power, it is not merely *voidable* by the successor, but *absolutely void* as to him, and so incapable of confirmation by him, as by the acceptance of rent from the lessee, or otherwise; although such acceptance of rent, or other act of recognition of the lessee by the successor, may, under circumstances, be proof of a new lease from year to year. (See 2 Th. Co. Lit. 433, n. (C. 1).)

6<sup>n</sup>. Persons Incapable of Making Valid Leases.

Persons incapable of binding themselves by contract, whether for want of understanding, or want of freedom of will, such as idiots, lunatics, infants, persons drunken, married women, and persons under duress, are of course incapable of making valid leases. Of this enough has been said before. See *Ante*, pp. 642 & seq.

An infant's lease, like most of his other contracts, is *voidable* by him when he attains to age, or by his heir if he die under age. (2 Th. Co. Lit. 429, n. (A. 1); 2 Lom. Dig. 126.)

A married woman's lease of her lands (not her separate estate), is *absolutely void*, unless executed in conjunction with her husband, with the ceremonies required by the statute. (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502.) Nor is her husband's lease of those lands valid save for his own life, whether executed by

himself alone, or by him and her together, but not in pursuance of the statute just cited; for we have not adopted 32 Hen. VIII., c. 28, which enables a husband, in conjunction with his wife, to make leases of her lands. (2 Th. Co. Lit. 429, n. (A. 1); 2 Lom. Dig. 127.)

#### 7<sup>a</sup>. Leases Void and Voidable.

The distinction between void and voidable leases is material; for where a lease is *void*, no subsequent acceptance of rent, or other conduct recognizing its continued existence, on the part of the reversioner or remainderman, will make it good. *A nullity can never be confirmed.* On the other hand, if a lease be *voidable only*, acceptance of rent, or other clear recognition of it, will operate as a confirmation of it. Hence, as all leases by tenant for life become absolutely void by the determination of his estate, they are incapable of confirmation; although, where the remainderman or reversioner, after the determination of the life-estate, knowing the defect in the lease, accepts rent of the lessee, and suffers him to make improvements, a court of equity has sometimes decreed him to execute a *new lease* to the tenant. (2 Th. Co. Lit. 433, n. (C. 1); Stiles v. Cowper, 3 Atk. 692.)

It must be noted, on the other hand, that it is said that if husband and wife make a lease of the wife's lands, not in pursuance of 32 Hen. VIII., c. 28 (which we have seen does not exist in Virginia), it is *voidable only* by the wife, after the husband's death, and therefore her acceptance of rent, etc., *then*, will amount to a confirmation. (2 Th. Co. Lit. 433, n. (C. 1); Bac. Abr. Leases, (C.); 2 Lom. Dig. 127; Doe v. Waller, 7 T. R. 478.)

A condition avoiding a lease upon a contingency (*e. g.*, the lessee's non-payment of rent), according to the *modern* authorities, does not render the lease absolutely void, *ipso facto*, though it be expressly so declared; for that would enable the lessee, by his own misconduct, to determine the lease at his pleasure; but it leaves the lessor the option of entering for the breach of condition, or not, at his will; and the lease being thus *voidable only*, and not void, it is confirmed by the lessor's subsequent acceptance of rent, or other unequivocal waiver of the forfeiture. (2 Lom. Dig. 129; Dudley v. Estill, 6 Leigh, 562; Jones v. Carter, 15 M. & W. 718.)

When the tenant commits a breach of the covenant or condition, whichever it may be, to pay the rent punctually, the courts, both of law and equity, have long come to consider any cause or right of re-entry therefor as inserted in the lease merely for the landlord's security, and have been accustomed to interpose in favor of the tenant,

or his assignee or mortgagee, upon his satisfying the rent, and any damages sustained by the landlord, not permitting the latter to retain possession of the premises after the purpose in view is thus achieved. (2 Lom. Dig. 129.) And we have seen that such an *equity of redemption* in respect to re-entry is very amply provided for by statute in Virginia. (V. C. 1873, ch. 134, § 17 to 20; V. C. 1887, ch. 127, §§ 2797 to 2800; *Ante*, pp. 298 & seq., 267.)

#### 8<sup>n</sup>. Who may be Lessees.

All persons whatever, though they be idiots, lunatics, infants, persons drunken, or married women, may be lessees, because it is presumed to be for their benefit. Upon the removal of their disabilities, however, such parties may avoid the lease, or may confirm it; and if, after their disabilities cease, they continue to occupy the premises, or otherwise signify their assent, the lease then becomes binding upon them. (*Ante*, p. 656; 2 Lom. Dig. 129.)

An alien's disabilities, at common law, touching the holding of lands, and their entire removal with us in the case of *alien friends*, has been already explained. (*Ante*, p. 655.) By the common law, he may *take* a lease of lands of any sort, as he may *take* a conveyance in fee; but in either case the estate which he acquires is liable to be immediately escheated to the crown or commonwealth. If, however, an *alien friend* be a *merchant* or trader, the common law permits him to lease a house for carrying on his trade or merchandise, which he may continue to occupy without disturbance. But if he leaves the country, or dies, or, it seems, if he ceases to occupy the premises, he can transmit them to no one, but they escheat to the crown or commonwealth. See V. C. 1873, ch. 4, § 18; V. C. 1887, ch. 6, § 43. This statute does away wholly with the disabilities of aliens, not enemies, enacting that any alien not an enemy, may acquire by *purchase or descent* and *hold* real estate in Virginia, and the same shall be transmitted in the same manner as real estate held by citizens.

#### 9<sup>n</sup>. Covenants Contained in Leases.

In respect to covenants contained in leases, there are two prominent distinctions to be noted, namely, (1), The distinction between covenants *implied*, and covenants *express*; and (2), The distinction between covenants which *run with the land*, and bind the assignees, and covenants which *do not run with the land*.

On the part of the *lessor*, where the lease is *for life*, a warranty of title, *i. e.*, a covenant real, is implied, by reason of the *tenure*, from the use of the word *dedi*, or give; and where the lease is *for years*, a personal obligation of

warranty is implied, by reason of the *contract*, from the use of the words *grant, lease, or demise*. (2 Th. Co. Lit. 252, n. (K.), and Butler's note to same; Id 254: Black v. Gilmore, 9 Leigh, 448.) And upon these implied warranties of title, not only shall the tenant be discharged from payment of rent upon eviction, but he shall recover of the lessor damages for the loss of the land. (2 Th. Co. Lit. 252; Butler's note.)

On the part of the lessee, the words "yielding and paying" the stipulated rent, although they are the words of the lessor, yet by his acceptance of the lease, they constitute an implied engagement by the lessee to pay the rent, namely (supposing no other time to be appointed), at the end of the year, or of any other period for which it is reserved payable; and on that engagement the lessor may found an action of debt, or any other appropriate action for the rent. (2 Th. Co. Lit. 252, Butler's note.) This implied obligation, however, continues, it is said, no longer than the lessee retains the premises, ceasing if he *assigns them*; whilst an *express* covenant to pay rent would bind the lessee indefinitely, whether he assigned or not. (1 Washb. Real Prop. 326, 333-'4.)

Covenants which *run with the land* are such as pass with the land, and with the reversion respectively, into whose hands soever either may come. They are such covenants as concern the land demised, and concern the owner of the reversion, in respect of such ownership. Among the covenants which thus run with the land, are all such covenants as we have seen the law implies from the usual terms of leases, such as "lease and demise," "yielding and paying," and the like. Also, all covenants for quiet enjoyment; covenants to pay rent; to insure; to repair; to reside on the premises; to pay the taxes assessed on the premises, etc. (1 Washb. Real Prop. 330-'31.)

On the other hand, if the covenant be such that it would be beneficial to the tenant on the one side, or to the reversioner on the other, without regard to the continued occupancy of the land by the one, or the continued ownership of the reversion by the other, it is a mere collateral covenant which does not run with the land. (1 Washb. Real Prop. 331; Vyvyan v. Arthur, 1 B. & Cr. (8 E. C. L.) 410; Vernon v. Smith, 5 B. & Ald. (7 E. C. L.) 11.)

It is worth while to remark that, at common law, if the subject matter of the covenant which runs with the land be not *in esse* at the date of the lease, the assignee is not charged with the covenant, unless he be named; whilst if it be *in esse* at the date of the demise, he is chargeable,



whether named or not. (1 Washb. Real Prop. 332; Congleton v. Patterson, 10 East. 138.) But in Virginia by statute, *assigns* are always included, whether named or not. (V. C. 1883, ch. 113, § 9; V. C. 1887, ch. 108, § 2445.)

It is proper in this connection again to refer to the statute corresponding to 31 Hen. VIII., c. 13, and 32 Hen. VIII., c. 34, affording mutual redress upon conditions and covenants contained in leases, to the assignee of the reversion against the lessee and his assigns, and to the lessee and his assigns against the assignee of the reversion and his assigns. (See V. C. 1873, ch. 134, §§ 1, 2; V. C. 1887, ch. 127, § 2781; *Ante*, pp. 274-'5.)

Where the premises leased are of much value, and especially if the lease is to be of long duration, it is prudent and usual to introduce such express covenants as will plainly set forth, and duly guard the rights of the parties respectively. The most usual covenants contained in well-drawn leases are the following, subject, however, to an almost infinite diversity, as the views and wishes of the parties vary:

(1), Covenant to pay the rent, *specifying the times of payment*.

(2), Covenant to pay the taxes, as assessed on the premises by public authority.

(3), Covenant not to assign, nor to underlet, without leave in writing.

(4), Covenant to leave the premises in good repair.

(5), Covenant that lessee shall obtain possession of the land, and enjoy quiet possession of his term.

(6), Covenant that lessor may re-enter for default in payment of rent, or breach of any of the covenants by lessee.

(7), Covenant that lessee will cultivate the premises in the manner prescribed.

(8), Covenant that lessee shall not be liable for waste or destruction of the premises, not occasioned by his own default.

(9), Covenant that lessee shall not be liable to pay rent, if the buildings on the premises are totally destroyed without his default; or in case of partial destruction, that the rent shall be abated, until they are rebuilt by the lessor.

For the expression of the first six of these covenants in brief form, the statutes of Virginia make judicious provision. (V. C. 1873, ch. 113, §§ 17 to 21; V. C. 1887, ch. 108, §§ 2453 to 2457.)

And these enactments also provide that, upon a "*covenant to pay the rent*," or to "*leave the premises in good*

repair," the lessee shall not be bound if the buildings on the premises "be destroyed by fire or otherwise," without his fault or negligence, or "if he be deprived of the possession of the premises by the public enemy" to make such payment or erect such buildings again, unless there be other words showing such to be the intent; but the rent shall be reasonably reduced, until other buildings of equal value to the tenant are placed on the premises, or until the possession be restored to him. (V. C. 1887, ch. 108, § 2455.)

It will be perceived, however, that these provisions are not as comprehensive in respect to *waste* as in the 8th covenant above suggested, applying only to the case of a "*covenant to leave the premises in good repair*," and when they are "*destroyed*," and not to waste generally, independently of such *covenants*, or other than *such destruction*.

#### 10<sup>n</sup>. The Form of a Lease.

Our statutes have provided a form for a lease (omitting the covenants, however, which, although expressly declared to be not to the exclusion of others (V. C. 1873, ch. 113, § 8), may yet be consulted with advantage, as illustrating the mere frame-work of such instruments. (See V. C. 1873, ch. 113, § 4; V. C. 1887, ch. 108, § 2440.)

In conclusion of the subject of leases, let it be observed, that whilst at common law, as we have seen, no writing is required, either for an agreement for a future lease, or for an actual lease for life, or for ever so long a term of years (*Ante*, pp. 184 '5, 761, 751) yet, in Virginia, a *contract* for a *future lease, for more than one year, must be in writing*, signed by the person to be charged, or his agent, in pursuance of the statute of parol agreements (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840); and an actual lease *in presenti*, for life, or for a term exceeding *five years*, must be *by deed or will*, according to the statute of conveyances. (V. C. 1873, ch. 112, § 1; V. C. 1887 ch. 107, § 2413.)

#### 4<sup>m</sup>. Grant.

A grant is the regular method, by the common law, of transferring the property of *incorporeal hereditaments*, or of such things whereof, from their nature, *livery* cannot be had. For which reason, as all *corporeal hereditaments*, such as lands and houses, are at common law said to *lie in livery*, so the others, as commons, rents, ways, franchises, remainders, *reversions*, &c., are said to *lie in grant*. The operative technical words of a grant, are *dedi et concessi*, hath given and granted; but any other words that show the intention of the parties will have the same effect, such as *aliene, limit and appoint, bargain and sell*, etc. Even

where A granted and agreed that, in consideration of a certain rent, B *should have* a way over his lands, it was held to be a *grant of a right of way*, and not a mere covenant for enjoyment. (2 Bl. Com. 317; Holmes v. Sellers, 3 Lev. 305.)

A feoffment, as we have seen, might at common law be made *by parol only*, the operative ceremony designed to give certainty and notoriety to the transaction being *livery of seisin*; but a grant required a *deed* always, even at common law; a deed (as *livery* is impossible), affording the only sufficient evidence of what was done. (2 Lom. Dig. 117; 2 Th. Co. Lit. 356.)

Whilst remainders, reversions, and incorporeal hereditaments may be conveyed *by grant*, a bare right or possibility is not, at common law, in general, capable of being transferred at all; although in Virginia, by statute, *any interest in or claim to* real estate may be disposed of by deed or will. (V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418.) Nor can a person grant or charge what he *has not*; and therefore, if a man grants a rent-charge out of Blackacre, when in truth he has nothing therein, and afterwards purchases it, he shall hold it discharged from the grant. (2 Th. Co. Lit. 402, n. (Q. 1); 2 Lom Dig. 117.)

It should be noted that, at common law, in granting a reversion or remainder, the *attornment* of the tenant is indispensable, agreeably to the feudal policy which did not permit a transfer of the relation of lord and vassal by either party, without the other's consent. This doctrine has almost wholly disappeared in England under the provisions of the statutes of 4 Anne, c. 16, and 11 George II., c. 19, which in substance we have in Virginia; our statute enacting that a grant or a devise of a reversion or remainder shall be good without *attornment* of the tenant; but no tenant who, before notice thereof, shall have paid the rent to the grantor shall be prejudiced thereby. And on the other hand, that the *attornment* of the tenant to a stranger shall be void, unless it be with consent of the landlord, or in consequence of the judgment or decree of a court. (V. C. 1873, ch. 134, § 4; V. C. 1887, ch. 127, § 2784.)

Grants *need no consideration* of money or blood to give them effect as between the parties; and they may therefore be effectual in creating ulterior limitations to persons not in being, or not ascertained, which might fail, if they were made by bargain and sale, or by covenant to stand seised, as being outside of the considerations which ought to support them. (2 Lom. Dig. 116.)

We have seen that, at common law, no freehold estate in corporeal property can be created to commence *in futuro*, for two reasons, viz.: (1), That the freehold can pass only

by *livery of seisin*, which is incompatible with any but an immediate estate *in presenti*; (2), That if it were allowed, there would be no one to perform meanwhile the feudal services, or if need were, to sue or be sued for the subject. That this last reason of *policy* was the more operative, is demonstrated by the fact, that a grant of a freehold estate *in rents*, or other incorporeal hereditaments, already *in esse*, or created, to commence *in futuro*, is void at common law, although of course no livery is required, or is possible, whilst an *original grant* of a freehold estate in a rent, etc., created *de novo* may be made to begin *in futuro*, for no stranger can have occasion to sue, nor any one to be sued, for any rent, etc., thus newly created. (2 Lom. Dig. 118.) All distinctions of this kind are obviated with us by the statutory provision that *any estate* may be made to commence *in futuro* by deed, in like manner as by will. (V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418.)

The *operation* of a grant at common law is materially different from that of a feoffment; for, as we have seen, a feoffment by force of the livery operates immediately upon the *possession*, without regard to the actual estate or interest of the feoffor; but a grant only operates on the *estate* of the grantor, and will pass no more than the grantor is by law enabled to convey. Hence, a grant can never operate to produce a forfeiture as a feoffment does. This rule is conjectured to have arisen from the circumstance that a grant being always *by deed*, the grantee's estate might be known by inspection of the deed, and so it was not needful, in order to protect the interests of purchasers, to regard more as passing than the grantor possessed and could really give. However, another reason, at least as satisfactory, is suggested by C. B. Gilbert (Gilb. Ten. 122), namely, that a grant is a *secret conveyance*, and ought not to be allowed the same extensive operation as a feoffment, with its notorious *livery of seisin*. (2 Th. Co. Lit. 402, n. (Q. 1); 2 Lom. Dig. 118.)

By the statute of grants in Virginia (corresponding to 8 & 9 Vict. c. 106), it is enacted that "All real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to *lie in grant* as well as *in livery*." (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417.) And thus the grand distinction between the conveyance of corporeal and incorporeal property is abolished, and a new and far more pliant mode of conveyance is created.

Under the statute of grants, by means of a grant, an estate of freehold in lands may be made to commence at a future time, and an estate in fee-simple, after having become vested, may be made to *shift*, upon the occurrence of a future contingency, from one to another, as at common



law could not be done at all; and before this statute could be done only by means of wills, and very imperfectly with us, by means of the conveyances under the statute of uses; the statute of grants thus introducing a new class of executory or future limitations, namely, executory or future *grants* in addition to executory or future *devises*, and executory or future *uses*.

It may be observed, in conclusion of the subject of grants, that it is a general rule, that where a conveyance is *intended* to operate in one way (*e. g.*, at common law), and for want of some needful observance, fails of effect in the way designed, it may, notwithstanding, operate in another way (*e. g.*, under a statute), if the requisites for such operation exist. Thus in *Rowletts v. Daniel* (4 Munf. 473), a deed which was meant to be a *feoffment*, but for want of livery could not avail as such, was held to operate as a *bargain and sale*, a valuable consideration being mentioned in it; and in *Watts v. Cole* (2 Leigh, 662), what was designed to be a *feoffment*, but was void as such for want of livery, was allowed to take effect as a *covenant to stand seised*, there being a consideration of natural love and affection. Under the statute of grants, therefore, *every deed*, however it was designed to operate, and whether a consideration be or be not expressed, must operate to pass the title, by *way of grant*, if not otherwise.

A few examples will illustrate and make plain these several propositions :

(1), A *enfeoffs* C in fee, with *livery of seisin*, but if C marries Z, then *to go to Y in fee*.

At common law, the subsequent limitation to Y is void.

Good under the *statute of Grants*.

(2), A *devises* to C in fee, but if C marry Z, then *to go to Y in fee*.

Good under the *statute of Wills*.

(3), A *enfeoffs* T in fee, with *livery of seisin*, *to the use of C in fee*, but if C marry Z, then *to go to the use of Y in fee*.

Good as to both limitations, under the *English statute of Uses*, not good under the *Virginia statute*, *to pass the legal title*, but good *in equity*.

(4), A *bargains, for valuable consideration*, *to stand seised to the use of C in fee*, but if C marry Z, then *to the use of Y in fee*.

Good under the *statute of Uses* as to C, but not good under *that statute* as to Y, who is *not within the consideration*, but good as to both *under the statute of Grants*.

(5), A *covenants, in consideration of his love for his son C*, *to stand seised to the use of C in fee*, but if C marry Z, then *to the use of his neighbor Y in fee*.

Limitation to C good under the *statute of Uses*; that to Y not good *under that statute*, because Y is *not within the consideration*, but both good *under the statute of Grants*.

(6), A *grants by deed* to C in fee, but if C marry Z, then to go to Y in fee.

Good as to both, *under the statute of Grants*.

### 5<sup>m</sup>. Exchange.

An exchange is a mutual grant of *equal interest* in lands, the one in consideration of the other. The word "*exchange*" is so individually requisite and appropriated by law to this case, that the conveyance without it cannot operate *as an exchange*. It can be supplied by no other word, nor expressed by any circumlocution. The estates exchanged must be *equal in quantity*; not of *value*, for that is immaterial, but of *interest*; as fee-simple for fee-simple, life-estate for life-estate, and lease for years for lease for years, and the like; and in this aspect an estate in joint-tenancy is esteemed equal to, and is, therefore, exchangeable with a tenancy in common. The exchange may be of things that lie either in grant or in livery, and they may be exchanged, the one kind for the other. But even in the exchange of freeholds in corporeal property, no livery of seisin is necessary to perfect the conveyance. Entry, however, must be made on both sides; for if either party die before entry, the exchange is void for want of sufficient notoriety; except that if one has entered, *he* shall not first begin to avoid the transaction. There is incident to an exchange, tacitly implied in the word, a *condition and a warranty*. By virtue of the *condition*, if either party be evicted from *any part* of the land he receives, by defect of the other's title, he may re-enter upon his own land, and avoid the exchange *in toto*. And by virtue of the *warranty* (which is an ancient warranty, and not a modern covenant of title), upon a like eviction, he may vouch and recover over of the other party so much of *his own land* (the warranty applies to no other), as is equal *in value* to what he has lost. (2 Bl. Com. 323; 2 Th. Co. Lit. 448, n. (G.).)

Lord Coke (2 Th. Co. Lit. 446), enumerates five things as necessary at common law to the perfection of an exchange; namely,

1. That the estates given *be equal*;
2. That the word *escambium*, exchange, be used;
3. That there be an execution *by entry or claim* in the life of the parties;
4. That if it be of things that *lie in grant*, it must be *by deed* indented;
5. That if the lands be in several counties, there ought to be a *deed indented*; or if the things lie *in grant*, albeit they be in one county.

The first and second of these requisites subsist in Virginia comparatively unchanged; but the other three, and indeed the first two also, are much modified in their practical effect by the statute declaring that no estate of inheritance, nor of freehold, nor for more than five years in real estate, shall be conveyed unless by deed or will; whereby a deed is made requisite wherever the estate exceeds five years, whether of lands, or things incorporeal (V. C. 1873, ch. 112, § 1; Id. ch. 15, § 9 (cl. 10); V. C. 1887, ch. 107, § 2413; Id. ch. 2, § 5 (cl. 10);) and by the statute of grants, declaring that all real estate shall, as to the immediate freehold, be deemed to *lie in grant*, as well as *in livery* (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417), whereby the conveyance is made in all cases operative, if not as an *exchange*, yet as a *grant*.

It is to be observed, lastly, that there can be but two *distinct parties* to an exchange, as intimated by Littleton (2 Th. Co. Lit. 446); but there may be any number of *persons*, so they constitute only two parties in interest. Thus, as we have seen, two or more joint tenants may exchange with two or more tenants in common. (2 Th. Co. Lit 447, n. (8); 2 Lom Dig. 133.)

6<sup>m</sup>. Partition; w. c.

#### 1<sup>n</sup>. Between Whom Partition is Applicable.

Partition is applicable between joint-tenants, tenants in common, and co-parceners; and although, at common law, co-parceners alone can be *constrained* to make partition, yet with us all these classes may be compelled to do it. (*Ante*, pp. 480, & seq.; 2 Bl. Com. 324; 2 Lom. Dig. 134.)

#### 2<sup>n</sup>. Mode of Making Partition.

See 2 Bl. Com. 324; 2 Lom. Dig. 134;

w. c.

#### 1<sup>o</sup>. Doctrine as to Making Partition, at Common Law; w. c.

##### 1<sup>p</sup>. Doctrine as to Partition by Joint-Tenants and Tenants in Common.

As between joint-tenants and tenants in common, a partition is a *conveyance*; and in the case of joint-tenants, must, at common law, be evidenced *by a deed*, livery of seisin being as to them mutually impracticable; in the case of tenants in common, it must be evidenced by *livery of seisin*, in case of *freehold*. If the estate be less than freehold, it is believed that tenants in common may make partition *by parol*. (2 Bl. Com. 324; 2 Lom. Dig. 134.)

##### 2<sup>p</sup>. Doctrine as to Partition by Co-Parceners.

A partition between co-parceners is *not a conveyance*, for it makes *no degree* in deducing the title, and there-

fore may, at common law, be made *by parol*, and without livery on either side. (2 Lom. Dig. 134.)

2<sup>o</sup>. Doctrine as to the Mode of Making Partition by Statute.

As between joint-tenants and tenants in common, partition being a *conveyance*, must conform in England to the statute of frauds, etc. (29 Car. II., c. 3, §§ 1, 2, 3), that is, if the estate is for more than three years, it must be *by deed or writing*; and in Virginia it is regulated by our statute of conveyances (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413), which requires that, if the estate be one of inheritance, or freehold, or for a term *exceeding five years*, it must be *by deed*.

As between co-parceners, the partition, not being a *conveyance*, may be *by parol* at common law. (2 Lom. Dig. 134; Bryan v. Stump, 8 Grat. 241.) But by the Code of 1887, it is required to be *by deed or will*. (V. C. 1887, ch. 107, § 2413.)

2<sup>l</sup>. Secondary or Derivative Conveyances.

Secondary or derivative conveyances are so called because they suppose some prior transaction touching the same subject between the same parties, or by one of them; or, as Blackstone says, presuppose some other conveyance precedent; and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. (2 Bl. Com. 324 & seq.; 2 Lom. Dig. 135 & seq.)

The derivative or secondary conveyances are, (1), Release; (2), Surrender; (3), Confirmation; (4), Assignment; and (5), Defeasance.

W. C.

1<sup>m</sup>. Release.

A release, in the most general sense, is the *discharge of a man's right*, whether it be of his right to actions, personal, real, or mixed, or of the right he has in lands or tenements. "Releases," says Littleton, "are in divers manners, viz.: releases of all right which a man hath in lands or tenements, and releases of actions, personal and real, and other things." (2 Th. Co. Lit. 451.) It is with releases in the former of Littleton's senses, namely, as a mode of conveyance of rights in lands or tenements, that we have now to do. In this sense, a release is defined to be a discharge or a conveyance of a man's *right* in lands or tenements to another that hath some former estate therein. (3 Bl. Com. 324.)

The subject may be developed under the two heads of, (1), The proper words of release; and (2), The several ways in which a release may enure or operate;

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1<sup>n</sup>. The Proper Words for a Release.

The *proper* words of release are "remise, release, and quit-claim;" but any words will suffice which clearly ascertain the intent. Brief as is Littleton's treatise on tenures, he illustrates the nature of the transaction by a form:

"Releases of all the rights which men have in lands or tenements, etc., are commonly made in this form or to this effect:

"*Know all men by these presents, that I, A of B, have remised, released, and altogether from me quit-claimed to C of D, all the right, title, and claim which I have, or by any means may have, of and in one messuage, with the appurtenances, in E,*" etc.

Upon which Coke's comment is: "Here Littleton sheweth precedents of releases of right; and precedents doth both teach and illustrate, and therefore our student is to be *well stored with precedents of all kinds*." (2 Th. Co. Lit. 452.)

2<sup>n</sup>. The Several Ways in which a Release may Enure or Operate.

Releases as conveyances of lands, or conveyances or discharges of rights therein, in respect to their operation, are divided into four several sorts, viz.: (1), Releases that enure by way of passing a right,—*de mitter le droit*; (2), Releases that enure by way of passing an estate,—*de mitter l'estate*; (3), Releases that enure by way of enlarging an estate,—*d'enlargir l'estate*; and (4), Releases that enure by way of extinguishing a right,—*d'extinguisher le droit*. (2 Bl. Com. 324-'5; 2 Th. Co. Lit. 451, n. (A.); Id. 459 & seq.) The fifth sort of release mentioned by Blackstone, namely, that enuring *by entry and feoffment*, is no more than one instance of a release operating by way of *passing a right*. (2 Th. Co. Lit. 474-'5.)

W. C.

1<sup>o</sup>. Release Enuring by Way of *Passing a Right*.

Releases are said to enure by way of passing a right (*de mitter le droit*), where nothing but the *bare right* passes, of which the most frequent instance (presently to be described) is that of *disseisee to disseisor*. In a release of this kind no words of limitation are requisite, even at common law; for if made for a day, or an hour, it is as strong as if made to the releasee and his heirs for ever. But it is indispensable that the releasee should be *in possession*, either of the land, or of a reversion or remainder therein; and that not of a term of years, but of a *freehold*, albeit it be a wrongful one, as in case of the disseisor. The lessee for years is only the bailiff of the freeholder, on whom the entry and action must

be, and the latter only, therefore, is capable of receiving a release *of the right*. (2 Th. Co. Lit. 459 to 464, & n. (W.); Gilb. Ten. 54.) But no *privity* is requisite for such a release, as it is in the case of a release enuring *by enlargement*. Hence, disseisee may release to disseisor's tenant for life. (2 Th. Co. Lit. 464-5.) The common law requires that the releasee should have *possession of the land*, or at least of an undivested right therein, by way of reversion or remainder, in conformity with that ancient maxim of the law which forbids a right of entry, or a *chose in action*, to be granted or transferred to a stranger, whereby, says Lord Coke, "is avoided great oppression, injury, and injustice." (2 Th. Co. Lit. 464; Id. 113, n. (K. 3).)

The several instances of a release operating by way of *passing a right* are as follows, viz. :

(1), Release by Disseisee to Disseisor.

This is the simplest instance that can occur of release operating by way of passing a right, and requires no further remark than that the *disseisor* is supposed always to be possessed of a *freehold* (as, indeed, the phrase *disseisin* imports), because, coming in by the wrong, the law does not apportion his wrong, but considers him to have committed the greatest which can be implied from his conduct. (3 Th. Co. Lit. 2, 4, 5, & n. (E).) By such a release the disseisor, whose possession before was wrongful, becomes clothed with all the right of the disseisee. (2 Th. Co. Lit. 465.)

(2), Release by Disseisee to *one of two Joint Disseisors*.

In this case the disseisor to whom the release is made was before the release seised, as a joint tenant always is, of the *whole and every part* of the premises, but it was a wrongful seisin. Upon the making of the release, his seisin becomes rightful of the whole and every part of the land, which necessarily excludes the wrongful seisin of his companion; so that he thereby acquires the sole possession and estate in the land, and he shall hold his fellow out just as effectually as if the disseisee had entered on both, and turned them out and then enfeoffed the one of them with livery. Hence, Blackstone makes of this case a fifth sort of release, styling it a release by *entry and feoffment*. (2 Bl. Com. 325.) It operates, however, only to pass a right, and Littleton and Coke so class it. (2 Th. Co. Lit. 465.)

(3), Release by Disseisee to *One of Two Joint Feoffers of Disseisor*.

In this case the release enures to *both*, for they both came in by the notorious act of feoffment with livery, which, being made by one in possession, confers a title

*prima facie* legal, and the possession thus acquired must be defeated by an act of equal notoriety before the title can be altered. If, therefore, the disseisee wishes to confer the estate on one only of the two feoffees, he must actually enter on both, putting both out, and then enfeoff with livery him whom he proposes to prefer; and he cannot, at common law, accomplish such a result merely by his deed of release. (2 Th. Co. Lit. 465-'6, and n. (Z.)) But under our statute of grants such a deed of release would operate *as a grant* of all of the disseisee's interest in or claim to the land. (V. C. 1873, ch. 112, §§ 4, 5; V. C. 1887, ch. 107, § 2417.)

## 2°. Release Enuring by Way of *Passing an Estate*.

When two or more persons become seized of the same estate by a *joint title*, either by contract or descent, as joint-tenants or co-parceners, and one of them releases his right to the other, such release is said to enure by way *de mitter l'estate*, of passing an estate; for where two several persons come in by the same feudal contract, one of them may discharge to the other the benefit of such contract by a release, because no notoriety is needful, for there was a sufficient notoriety in the prior feudal contract. Thus, two co-parceners come into one entire feud descending from their ancestor, and therefore they may release privately to each other without any notoriety, because they take by the former descent, which established them in possession. But since co-parceners do also transmit distinct estates to their children, they may also pass their estates by distinct feoffments. But joint-tenants can only pass their estates to one another by release, for they all come in by the first feudal contract; and therefore a second feoffment cannot give any further title or notoriety, because every person is supposed to be in by his elder title, which, in the case of joint-tenants, is the original feoffment, so that a second feoffment would be useless. In releases that enure by way of *passing an estate*, *priority* of estate, as already explained, is necessarily supposed; but words of inheritance are not necessary, for the parties are not in by the release, but by the original feudal contract, which passes an inheritance to all of them, and the release only *discharges the right or pretension of one of them*. (Gilb. Ten. 72, &c.; 2 Th. Co. Lit. 514, n. (T. 3).)

One tenant in common cannot release to his companion, because they have *distinct freeholds*, but they must, at common law, pass their estates by feoffment and livery of seisin; for as their estates were or may have been, created by different acts and different liveries, they must also convey to each other by distinct liveries.

(Gilb. Ten. 74; 2 Lom. Dig. 137.) But under our statute of grants, although the deed be not good as a release, it would operate *as a grant*. (V. C. 1873, ch. 112, §§ 4, 5; V. C. 1887, ch. 107, §§ 2417, 2418.)

### 3°. Releases Emuring by Way of *Enlarging an Estate*.

Releases enure by way of *enlargement of estate* when the possession and inheritance are separated for a particular time; and he who has the reversion and inheritance releases all his right and interest in the lands to the person who has the particular estate. Such releases are said to enure *by way of enlargement*, and to be equal to an entry and feoffment, and to amount to a grant and attornment. (2 Th. Co. Lit. 499, n. (Z. 2).)

That a release may operate by way of enlargement, three circumstances are requisite: (1), That the releasee should have a *vested estate*; (2), That the releasor should have a *vested estate* in reversion or remainder, expectant *mediately or immediately*, upon the estate of the releasee; (3), That there should be a *privity of estate* between the releasor and the releasee. (2 Th. Co. Lit. 499, n. (Z. 2).)

The instances of such releases show that it is not sufficient that the releasee should have a mere inchoate executory interest, as an *interesse termini*, or a contingent remainder, or any other executory and contingent interest, nor that he should have a *mere right* or title of entry, as a lessee for life, after he has been disseised, or a lessee for years, after he has been ousted, and while his interest remains a mere right or title of entry. But a release may be made to a tenant at will or by *elegit*, or to a lessee after he has made an underlease for years; but not to a tenant by sufferance, nor to a trespasser in possession. (2 Th. Co. Lit. 499, n. (Z. 3); Id. 503 to 506.)

There must subsist between releasor and releasee, the relation of lessor and lessee, or of particular tenant and remainderman or reversioner, so that there may be a *privity of tenure* between them. And for the purpose of this doctrine the *assignee* or representative of the lessee stands in the place of the lessee; and the assignee or representative, whether *heir* or *devisee*, of the reversioner, stands in the place of the reversioner; and the ability of making, and capacity of receiving such enlargement by release continues, although the lessee, etc., or his assignee, create a particular estate derived out of his own estate; and although the reversioner create a particular estate, which is interposed between the interest of the particular tenant and the reversion; for notwithstanding such particular estates, there is a *continuing*



*privity* between the lessee or his assignee, on the one hand, and the reversioner or remainderman, or his assignee, on the other. But it should be observed, that an estate created out of a particular estate is not, *during such particular estate*, capable of enlargement by release of the remainder or reversion expectant on such particular estate, because in such case there is *no privity*. The material rule applicable to the subject seems to be, that the particular estate, the remainder or remainders, and the reversion, are all *parts of the same estate*. (2 Th. Co. Lit. 499, n. (Z. 2); 2 Bl. Com. 164; 2 Lom. Dig. 137-8.)

Releases which operate by enlargement of estate require, at common law, the same technical words of limitation as feoffments or grants. (2 Lom. Dig. 238.)

It remains only to observe that, with us, in this as in other like cases, if the deed, for want of some needful requisite of *privity* or the like, cannot take effect as a *release*, it will operate as a *grant*. (V. C. 1873, ch. 112, §§ 4, 5; V. C. 1887, ch. 107, §§ 2417, 2418.)

#### 4<sup>o</sup>. Release Enuring by Way of Extinguishment.

A release enures by way of *extinguishing* a right where it *destroys the right without passing it* to the releasee.

W. C.

#### 1<sup>o</sup>. The Reason why a Release Enures by Way of Extinguishment.

A release enures in certain cases by way of extinguishment, because for some reason it cannot by law operate to *pass* what it purports to releasee, and it is therefore construed according to the maxim, *ut res valeat magis quam pereat*, to *extinguish* the right which it cannot transfer.

#### 2<sup>o</sup>. Instances where a Release Enures by Way of Extinguishment; w. c.

##### 1<sup>a</sup>. Where Releasee is not in Possession.

If tenant for life is disseised, and lessor releases the the reversion to him in fee, the release cannot *pass the reversion*, because the releasee is not in possession, but *ut res valeat*, etc., it operates to extinguish it, and the rent along with it. (2 Th. Co. Lit. 389 & seq.; Id. 493, and n. (R. 2); 2 Lom. Dig. 138.)

##### 2<sup>a</sup>. Where the Releasee cannot Take what to him is Released, *without a Manifest Incongruity*.

Where a landlord releases the rent to his tenant, the latter cannot at once receive and pay it, and so the release can *pass nothing*, but it *extinguishes* the rent. (2 Lom. Dig. 138.)

##### 2<sup>m</sup>. Surrender.

A surrender (*sursumreddition*) or rendering up, is of a nature directly opposite to a release: for as a release operates by the transfer or discharge of a *right*, usually to one in possession of the land, so a surrender is the yielding up of the *possession* to him who has the out-standing right. Thus, if the landlord relinquishes his reversion to his tenant for life or years, it is a *release* (operating by enlargement); whilst if tenant for life or years gives up his *possession* to the landlord, who has the reversion, it is a *surrender*.

Let us notice, (1), The definition of a surrender; (2), The words appropriate to it; (3), The circumstances required to give it effect; (4), The doctrine of surrender *in law*; and (5), The effect of surrender;

W. C.

### 1<sup>n</sup>. The Definition of a Surrender.

A surrender is defined to be a yielding up of an estate for life or years to him that hath the *immediate* reversion or remainder, wherein the particular estate may *merge*, or *drown*, by mutual agreement between them. (2 Bl. Com. 328; 2 Th. Co. Lit. 651.)

### 2<sup>n</sup>. The Words Appropriate to a Surrender.

The proper words of a surrender are *surrender*, *grant*, and *yield up*, but any form of words by which the intention of the parties is sufficiently manifested will operate as a surrender. Thus, if lessee for years *renew*, *release*, *discharge*, and *quit-claim* to lessor his right, title, and interest in and to the lands; or if lessee for life *leases* to lessor for lessee's life, it will amount to a surrender. (2 Th. Co. Lit. 551, n. (A.); Smith v. Mapleback, 1 T. R. 441; Scott v. Scott, 18 Grat. 150.)

### 3<sup>n</sup>. The Circumstances Required to Give Effect to a Surrender.

The circumstances to be adverted to in connection with giving effect to a surrender are, (1), Possession of surrenderor; (2), Estate of surrenderee; (3), Privity of estate between surrenderor and surrenderee; (4), Doctrine as to livery of seisin, as between surrenderor and surrenderee; and (5), The written evidence of surrender;

W. C.

### 1<sup>o</sup>. Possession of Surrenderor.

The person who surrenders must be *in possession*. Hence, a tenant for life disseised, or a tenant for years ousted, cannot surrender to his lessor *before re-entry*, because he has nothing *but a right*. So, a lessee for years who has never entered, and has, therefore, only an *interesse termini*, cannot surrender; nor can a widow entitled to dower, before her dower is assigned. An estate at will is also not surrenderable; but that seems to be

because any act of surrender is regarded as being more fitly construed to be a determination of the will. (2 Th. Co. Lit. 554, and n. (D.) ; 2 Bl. Com. 326.)

2°. Estate of Surrenderee.

The person to whom the surrender is made must have a *greater estate immediately* in reversion or remainder, in which the estate surrendered may merge ; that is, it must be *in law* greater, as a reversion and remainder are always deemed to be, in comparison with the particular estate. Thus, a lessee for years may surrender to him who has the reversion only for years, even though the lease be for several years, and the reversioner has it for only one, or a less term still. Hence, also, before a lessee enters, having only an *interesse termini*, his surrender to the lessor is void as a surrender, not only because the lessee has *no possession*, as we have seen, but because the lessor has *no reversion*. The reversion or remainder, it will be observed, must be *immediate*. Thus, if A, lessee for thirty years, demise to B for ten, B cannot surrender to the original lessor, the owner of the fee-simple, because the reversion is not *immediate* ; but if A surrender his lease to his lessor, the reversion of the latter being then immediate, B may surrender to him. (2 Th. Co. Lit. 552, n. (B.) ; Id. 511, n. (Q. 3) ; 2 Bl. Com. 326.)

3°. Privy of Estate Between Surrenderor and Surrenderee.

This privity is essential, for else there would be no immediate reversion or remainder in which the estate surrendered might merge. Thus, if tenant for thirty years make a lease for ten, and both join in a surrender to the reversioner in fee, the surrender is good for both the estates ; and yet, as we have seen, the lessee for ten years could not surrender by himself, for *want of privity* ; but when the other joined with him, his surrender shall be taken in law to precede, and that of the lessee for ten years to follow, which shall then be good. (2 Th. Co. Lit. 554, n. (D.) ; 2 Plowd. 541.)

4°. Doctrine as to Livery of Seisin as Between Surrenderor and Surrenderee.

Livery of seisin is not, at common law, necessary to the surrender of a freehold, nor is entry on the part of the surrenderee to the surrender of a term ; for there is a privity of estate between the parties, their several interests being indeed parts of the same estate ; and livery or entry having been once made at the creation of it, there is no need of it as between the parts afterwards. (2 Th. Co. Lit. 551, n. (A.) ; 2 Bl. Com. 326.)

A surrender is perfected by the *bare grant*, in the

way of surrender; for although the assent of the surrenderee is necessary to impart *mutuality* to the transaction, yet that consent is *presumed*, as it is in all conveyances (seeing that they *import a benefit*), until the contrary appears. (3 Th. Co. Lit. 551, n. (A.); Shepp. Touchst. 301, n. (3).)

#### 5°. The Written Evidence of Surrender.

The common law requires no writing to make a surrender good. Like all other conveyances where an actual and visible possession may be transferred, it may be by parol. But since the statute of frauds and perjuries in England (29 Car. II., c. 3, §§ 1, 2, 3), the policy of having a deed or note in writing as evidence of surrenders and also of assignments, has in all cases been insisted on; and in Virginia, it will be remembered, that no estate of inheritance, nor of freehold, nor for a term of more than five years in lands, can be conveyed except by deed or will. (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.) Hence, the mere cancellation of a lease for life, or for a term exceeding five years, with intent ever so emphatically declared, does not operate a surrender, nor re-vest the land in the lessor. (2 Th. Co. Lit. 551, n. (A.); Graysons v. Richards, 10 Leigh. 61.)

It must, moreover, be remembered, that although, for want of privity or other reason, a transfer *by deed* of a lease in possession, or of a mere right, may not operate as a *surrender*, nor be accompanied by the incidents of one, yet under the statute allowing *any interest in or claim to* real estate to be disposed of by deed or will, it will operate *as a grant* or transfer of the interest. (V. C. 1873, ch. 112, §§ 4, 5; V. C. 1887, ch. 107, §§ 2417, 2418.)

#### 4°. Doctrine of Surrender *in Law*.

A surrender may be either *in deed*, that is, by express words, or it may be *in law*. A surrender in law is where, by the legal effect of the transaction between the parties, a surrender must have been in their contemplation, and is, therefore, implied, being as Lord Coke expresses it, "wrought by consequent, by operation of law." (2 Th. Co Lit. 555.)

Thus, if the lessee for life or years, or the assignee of either, takes a new lease of the reversioner, whether for a greater or shorter term than before, —to himself alone, or to himself and another,—in the same or in another right; —in short, wherever the first lease and the second cannot subsist together, there is a *surrender in law* of the first; for the parties, by making a contract of as high a nature for the same thing, must have tacitly consented to dissolve the former; for without the dissolution of that, the lessor



could not grant the interest which the second lease purports to pass, and the lessee has accepted. Hence, in cases where no such incompatibility exists between the continuance of the first lease and the second transaction, but that they may stand together, there is *no surrender in law*. If, therefore, the lessee only license the lessor to enter upon the land in order to make a feoffment thereof, or for any specific purpose, not inconsistent with the continuance of the lease; or if the second lease be of another, and not the same thing as the first, as where the first lease is *of the land*, and the second *of a rent or other profit* out of the land; or if the second lease is not to begin until the first ends; or if the second lease is not merely voidable, but *void*;—in all these cases there is *no surrender in law*. (2 Th. Co. Lit. 554 & seq., & n's (E.), (1), and (F.); Shepp. Touchst. 301; Prestons v. McCall, 7 Grat. 121.)

It is worthy of observation, that a surrender in law is in some cases of greater force than a surrender in deed. Thus, an *interesse termini* may be surrendered *in law*, by the lessee's accepting another lease from the lessor, whilst, as we have seen, it cannot be conveyed by surrender *in deed*, for want of *possession* in the lessee, and of the *reversion* in the lessor. (2 Th. Co. Lit. 554.)

#### 5<sup>n</sup>. The Effect of Surrender; w. c.

##### 1<sup>o</sup>. Effect of Surrender upon the Stipulations Contained in the First Lease, and upon the Charges Created by the Lessee Previous to the Surrender.

All stipulations and covenants contained in the lease surrendered, must of course come to an end with the lease itself; and this is alike true, whether it be a surrender in law or in deed. (Prestons v. McCall, 7 Grat. 121.) But covenants already broken are of course not discharged by the surrender; nor are grants of interest, or charges created by the lessee during the continuance of the lease, in any wise affected. (Shepp. Touchst. 301.)

##### 2<sup>o</sup>. Effect of Surrender in Respect to *Merger* of the Estate Surrendered.

The doctrine of *merger* is practically one of the most important incidents connected with surrender. It has been already touched upon in connection with the subject of reversions (*Ante*, pp. 428-'9 & seq.); and it must suffice now to refer to that brief exposition.

##### 3<sup>m</sup>. Confirmation.

A confirmation is defined by Lord Coke to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made *sure and unavoidable*, or whereby a particular estate is *increased*. (2 Th. Co. Lit. 516; 2 Bl. Com. 325.)

An instance of the first branch of the definition is, if tenant for life leaseth for forty years. Here the lease for years is voidable by him in reversion, in case the tenant for life should die during the term; yet if the reversioner, before the death of tenant for life, confirm the estate of the lessee for years, it is then no longer voidable, but sure. The latter branch, or that which tends to the *increase* of a particular estate, may be illustrated by the case of tenant for term of years, to whom the lessor confirms *the land*, to have for term of his life or in fee-simple, whereby the term for years is enlarged, in one case, to the compass of a life estate, and in the other of a fee-simple. (2 Bl. Com. 225, 226; 2 Th. Co. Lit. 538.)

We are to observe, (1), The appropriate words for a confirmation; (2), The several modes whereby it enures or operates to make sure a voidable estate; and (3), The requisites of a confirmation;

W. C

### 1<sup>n</sup>. The Appropriate Words for a Confirmation.

The *proper* words of confirmation are *give, grant, ratify, approve, and confirm*; but any words which plainly manifest the intent will suffice. (2 Bl. Com. 325; 2 Th. Co. Lit. 517.)

### 2<sup>n</sup>. The Several Modes whereby a Confirmation Enures or Operates; w. c.

#### 1<sup>o</sup>. Confirmation Enures or Operates to Make Sure a *Voidable Estate*.

A confirmation being an approbation of, or assent to, an estate already created, by which the confirmor, as far as it is in his power, strengthens and makes it valid, it is manifest that it can have this operation only with respect to estates *voidable* or defeasible, and can have no effect on estates which are absolutely *void*. "A confirmation," says Coke, "doth not strengthen a *void estate*; for a confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law." (2 Th. Co. Lit. 516, and n. (A).)

This operation of a confirmation (namely, to make sure a voidable estate) is the proper work of such a conveyance. If it goes to *enlarge* the confirmee's estate, it is by force of the words of enlargement which are employed, and is foreign to its proper business and object. (Gilb. Ten. 75; 2 Th. Co. Lit. 516, n. (A).)

For a confirmation operating to make sure a voidable estate, no *privity* is necessary as it is in the case of a release (or confirmation), enuring by way of enlargement. Hence, if my tenant for life makes a lease for years, although I cannot *release* to the lessee for years for want of privity, yet I may *confirm* his estate, so as to

make it unavoidable. So I cannot release to the *termor* of my disseisor, because there is no *privity* between us, but only a *bare right*; but I may confirm the termor's existing estate. Confirmation requires no words of limitation, such as *heirs*; for if the confirmee's estate be made sure, even for a minute, it can never be defeated by the confirmor, whilst, without words of limitation, a release, at common law, enlarges the releasee's interest merely to a life-estate; and sundry other diversities there are between a confirmation in its proper sense, and a release, for which reference must be made to Gilb. Ten. 75 & seq.; 2 Th. Co. Lit. 521 & seq.

- 2<sup>o</sup>. Confirmation Enures or Operates to *Enlarge* the Particular Estate.

The enuring of a confirmation to enlarge the particular estate is, as C. B. Gilbert observes, foreign to his business and purpose, and is, indeed, due to the special words employed, and not to the nature of the conveyance. So far forth as it thus operates, a confirmation differs little from a release enuring by way of enlargement; and, like that, requires, (1), That the confirmee should have a *vested* estate in *possession*, and not a mere right; (2), That the confirmor should have a *vested* estate in reversion or remainder, expectant mediately or immediately on the estate of the confirmee; and (3), That there should be a *privity* of estate between the confirmor and confirmee. (Gilb. Ten. 75; (2 Bl. Com. 326; 2 Th. Co. Lit. 399, n. (Z. 2).)

- 3<sup>n</sup>. The Requisites of a Confirmation; w. c.

- 1<sup>o</sup>. There Must be *Competent Parties*, Confirmor and Confirmee, as in all Other Cases of Transfers of Rights.
- 2<sup>o</sup>. There Must be in the Confirmee a Precedent Rightful or Wrongful Estate, in his Own or in Another's Right.
- 3<sup>o</sup>. There must be in the Confirmor an Estate of his Own, out of which the Confirmation may Enure.  
See Shepp. Touchst. 312 & seq.
- 4<sup>o</sup>. There Must be a Deed.

It seems always to have been necessary, even at common law, that a confirmation should be evidenced *by deed*, there being no visible and notorious change of possession accompanying it. And in Virginia, it may be supposed to be specially required by the equity, at least, of the statute of conveyances, that no estate of inheritance or of freehold, or for a term of more than five years in lands, shall be conveyed, unless by deed or will. (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.)

It may be proper in conclusion, again to reiterate the remark so repeatedly made, that in consequence of the

statute allowing "*any interest in or claim to real estate*" to be disposed of by deed or will (V. C. 1873, ch. 112, §§ 4, 5; V. C. 1887, ch. 107, §§ 2417, 2418), any deed which, for any reason, cannot take effect as a confirmation, may generally operate as a *grant*.

#### 4<sup>m</sup>. Assignment.

An assignment, in a general sense, is a transfer, or making over to another, of the right one has in *any estate or property*; but in the sense of a conveyance of lands or tenements, it is usually applied to an estate for *life or years*. It differs from a lease only in this: that by a lease one grants an interest *less than his own*, reserving to himself a reversion; in an assignment he parts with the *whole property*, and the assignee stands for many purposes in the place of the assignor. (2 Bl. Com. 326-'7.)

The doctrine touching assignment may be exhibited under the heads following, namely: (1), The appropriate words of assignment; (2), The modes of making an assignment; (3), What may be assigned; and (4), The rights and liabilities arising out of an assignment;

W. C.

#### 1<sup>a</sup>. The Appropriate Words of Assignment.

The proper words of assignment are *assign, transfer, and set over*, but not to the exclusion of any other language that plainly expresses the idea. Thus, if one *leases* the land to another for his *entire term*, reserving a rent, or if he *under-lets*, it is an assignment, and not an under-lease, although a rent be reserved. (2 Th. Co. Lit. 566, n. (S.); Palmer v. Edwards, 1 Dougl. 187, note; Scott v. Scott, 18 Grat. 159 & seq., 177 & seq.)

#### 2<sup>a</sup>. The Mode of Making an Assignment.

At common law, an assignment of a lease, whether for life or years, may be made *by parol* only, although if it were for life, it must be accompanied (as the transfer of every freehold in lands must be) by *livery of seisin*. But since the statute of frauds and perjuries (29 Car. II., c. 3, §§ 1, 2, 3), the policy has been to require it to be, in *all cases* (in pursuance of § 3), even where the interest assigned does not exceed three years, *by deed or writing*, (2 Com. Dig. 110, 150); and in Virginia, it is provided that no estate of inheritance, or of freehold, or for a term of more than five years in lands, shall be conveyed *unless by deed or will*. (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.)

There needs *no valuable consideration* to support an assignment, the liabilities incident to the lease, as to pay rent, etc., which the assignee assumes, being always sufficient. (2 Th. Co. Lit. 566, n. (S).)

#### 3<sup>a</sup>. What may be Assigned.

Assignment, as a specific mode of conveyance, is pro-



perly applicable, it will be remembered, only to the transfer of the lessee's *whole estate* when such estate is *for life or years*. It is often used, however, in a more general sense, to signify the transfer of any estate or interest whatever in real property; and as the general principles which regulate the transaction in its more comprehensive signification are the same as those which govern it in its more limited and proper sense, there will be no need in stating those principles to discriminate between the two senses. The doctrine is, that every *estate and interest* in lands and tenements, and every present and certain estate or interest in incorporeal hereditaments, such as rents, ways, franchises, etc., may be assigned, so that if, in leases for life or years, it is intended to restrict or bar the power of assignment, it must be done by special and precise stipulations. Even though the interest be future, as a term for years to commence at a subsequent period, it may be assigned, for it is vested *in presenti*, though it is to take effect in enjoyment only *in futuro*. But no right of entry or of action can be assigned at common law, so that if one be disseised, and assigns his right to another before he has entered on and dispossessed the disseisor, the assignment is void; which Coke explains to be "for avoiding of maintenance, suppression of right, and stirring up of suits." (2 Th. Co. Lit. 566, n. (S.); Id. 85.) In Virginia, however, it will be remembered that *any* interest in, or claim to *real estate*, may be disposed of by deed or will. (V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418); so that the common law disability to assign rights of entry and of action as to real estate does not exist with us. And even at common law, although the assignment of such interests does not pass the *legal title*, yet it creates an equitable ownership which the court of chancery protects, and to which it gives effect.

A distinction must be noted in respect to assignability, between a *naked power*, which is not capable of being assigned, and a *power coupled with an interest*, which may be. Thus, if a stranger has power to cut and sell timber-trees from certain lands, he cannot assign the power; but if a lessee of the land has such power conferred upon him, by assigning the lease, he may pass the power with it. (2 Lom. Dig. 151.)

#### 4<sup>n</sup>. The *Rights and Liabilities* Arising out of an Assignment of a Lease.

Those rights and liabilities depend, for the most part, on the stipulations and conditions, express and implied, contained in the lease; and in general, forasmuch as they arise as incident to the assignment, they cease and determine when the assignee's possession ceases under

the assignment. Thus, if he assigns over his interest and parts with the possession, he is no longer answerable for any rent which may accrue afterwards, nor for the breach of any of the agreements contained in the lease; not even though he should assign to a beggar, nor though the person to whom he assigns neither takes actual possession, nor receives the lease. (2 Th. Co. Lit. 566, n. (S.); 2 Rob. Pr. (2d ed.) 102; *Staines v. Morris*, 1 Ves. & B. 11; *Taylor v. Shum*, 1 Bos. & Pul. 21.)

The general doctrine is that, in respect to *the lessor and his representatives*, the assignee may have the benefit of, and is chargeable with, all the covenants contained in the lease which *run with the land*, and are broken *during the continuance of his interest*. But at common law, the assignee of the reversion is neither liable upon any *express* covenants contained in the lease, nor is entitled to the benefit thereof, either as against the lessee, or his assignee; a doctrine which it has been found needful materially to modify by statute. It will therefore be proper to consider, (1), The covenants which run with the land; (2), Collateral covenants which do not run with the land; (3), Covenants broken before the assignment, or after the determination of the assignee's interest; and (4), The doctrine as to the rights and liabilities of the assignee of the reversion.

W. C.

### 1°. Covenants which *Run with the Land*.

A covenant is said to *run with the land* when it relates to or concerns it, affecting the nature, quality, or value, or the mode of enjoyment of the property, independently of collateral circumstances; and where, also, there is a *privity of estate* between the parties between whom the question arises. Thus, covenants *implied*, such as to pay rent, to avoid or prevent waste, to cultivate the land in a proper and customary manner; and on the part of the lessor, not to interfere with the tenant's enjoyment of the premises, and in certain cases, already explained, to warrant the title, always run with the land, and the benefit and obligation of all of them pass to the assignee. Covenants *express*, which run with the land are such as covenants to repair the houses demised, to cultivate the premises in the particular manner prescribed, to dwell upon the premises, to pay taxes, not to carry on particular trades on the premises, to grind all corn made on the premises at the lessor's mill, to build a house upon the land, to construct *new* walls or fences thereon; and on the part of the lessor, to warrant the title in all cases, to repair the premises, etc.; in which cases, the benefit and liability arising from the cove-

nants pass to the assignee. (2 Lom. Dig. 332 & seq.; 2 Rob. Pr. (2d ed.) 83, &c.; Spencer's Case, 5 Co. 19; S. C. 1 Smith's L. C. 92, 96, 107, &c.; *Ante*, p. 715.)

A covenant by grantor, selling a tract of five and a half acres of land at a railroad junction, that the grantee and his assigns should always have the exclusive privilege of selling goods thereon, or keeping a tavern, or establishing factories and shops, and that the grantor would abstain from all sorts of business on his tract of three hundred and sixty-eight acres lying around the junction, and that these covenants should apply to his heirs and assigns, is yet a personal covenant, binding only the grantor and his heirs, and not his assigns; so that a person to whom the grantor sold another part of the tract of three hundred and sixty-eight acres, was not debarred from establishing a mercantile business thereon. And it was held, moreover, that such covenants were in restraint of trade, and therefore void as against public policy. (*Tardy v. Creasy*, 81 Va., 553, 562.)

A distinction is taken in *Spencer's case* (5 Co. 16), between covenants concerning a thing not *in esse* at the time of the demise made (as to erect a *new wall*), and concerning a thing which was then in being (as to repair a wall then standing); it being held that, whilst the latter class of covenants pass to the assignee, whether named or not, the former pass only when the covenant expressly mentions the assigns; for which no other reason is stated than that the law will not *annex a covenant to a thing which has no being*. The good sense of such a distinction is not perceived; but whether it exists or not at common law, it is obviated with us by statute, which declares that the words, "the said ——— covenants" shall have the same effect as if it were expressed to be for himself, his heirs, personal representatives, *and assigns*. (V. C. 1873, ch. 113, § 9; V. C. 1887, ch. 108, § 2445.)

It has been already stated, that in order that a covenant may run with the land, there must be a *privity of estate* between the parties concerned. Between the lessor and lessee there is always such privity, and it continues, for many purposes, after, and notwithstanding an assignment. Thus the lessee continues liable, notwithstanding the assignment, upon all his *express* covenants, and also upon his covenants *in law*, until the lessor accepts rent of the assignee. Such privity, likewise, exists between the lessor and the assignee of the lessee; and this privity of estate accompanies every subsequent assignment, its duration being co-existent with the term. But between the lessor and a sub-lessee,

no privity, either of estate or of contract, exists: so that, as between them, no advantage can be taken of the covenants, either in law or in deed, contained in the original lease. (2 Lom. Dig. 334-5; *Spencer's Case*, 5 Co. 16; S. C. 1 Smith's L. C. 92, 96, 107; 1 Saund. 241, n's; *Holford v. Hatch*, 1 Dougl. 182; *Webb v. Russell*, 3 T. R. 393; *Stokes v. Russell*, Id. 678; 2 Th. Co. Lit. 330-'31, n. (G. 3); *Ante*, p. 714-'15.)

2°. Collateral Covenants which *do not Run with the Land*.

Although the covenant be for the lessee and his assigns, yet if the thing to be done be merely *collateral* to the land, and do not touch or concern the thing demised in any sort, there the assignee will not be charged; as a covenant by lessee to build a house *on other land*, to pay a collateral sum not relating to the land, whether to the lessor or to a stranger, etc. And this is a perfectly reasonable conclusion; for if the covenant in no wise touches or concerns the thing demised, it is plain that the assignment of the lease can no more charge the assignee with the covenant than any other stranger. (2 Lom. Dig. 334; *Ante*, pp. 714-'15.)

3°. Covenants Broken Before the Assignment, or after the Determination of the Assignee's Interest.

An assignee, whether named or not, is never liable for a breach of the covenants, whether in law or in deed, which occurred before the assignment to him, nor after he assigns to another; nor can he take advantage of any one on the lessor's part which preceded his acquisition of title. Hence, if a lessee covenant to rebuild a house on the demised premises within a time limited, and fail to do so, and then assigns his lease, the assignee is not chargeable, the covenant not having been broken by him. (2 Lom. Dig. 335; *Rawle's Cov'ts of Title*, 285, &c.; 1 Rob. Pr. (2d ed.) 100, &c.; *Farmers Bank v. Mut. Assur. Soc.* 4 Leigh, 69; *Dickinson v. Hoomes*, 8 Grat. 395-6; *Prestons v. McCall*, 7 Grat. 132.)

4°. The Doctrine as to the Rights and Liabilities of the Assignee of the Reversion.

Whilst it seems to have been always admitted that, at common law, covenants in the lease are binding as between the lessee and his *assignee* on the one side, and the lessor and his representatives on the other, it is equally an accepted doctrine of the common law, that the assignee of the *lessor* can neither maintain actions on the *express* covenants against the lessee, nor is he liable to be sued upon the lessor's express covenants. Such covenants are said to run, at common law, with the *land*, but not with the *reversion*. (2 Lom. Dig. 336; *Thursby v. Plant*, 1 Saund. 240.) With covenants *in law* it is otherwise. They



pass, even at common law, with the reversion; so that the assignee of the reversion may sue the tenant for the rent reserved, which there is an implied promise to pay. (2 Lom. Dig. 336; *Vyvyan v. Arthur*, 1 B. & Cr. (8. E. C. L.) 410.)

This doctrine of the common law, however, upon the occasion of the assignment to the king, of the great landed estates of the monasteries (which were, for the most part, under long leases) in the reign of Henry VIII., and of the subsequent transfer of many of them by the king to his favorites, proved so disastrous, by denying to the royal and noble assignees the benefit of the covenants and stipulations contained in the leases which the monasteries had granted their tenants, that the statutes 31 Hen. VIII., c. 13, and 32 Hen. VIII., c. 34, were enacted to remove the grievance, and the tenants were admitted reciprocally to the benefit, as against the assignees, of the covenants made by the monasteries. (2 Th. Co. Lit. 89 & seq., & n. (M. 2).) The corresponding statute in Virginia closely follows its English prototype, enacting in substance that the grantee or assignee of any land *let to lease*, or of the reversion thereof, shall enjoy, against the *lessee* and his assigns, the like advantage, by action or entry for forfeiture, or by action upon any covenant or promise in the lease, which the grantor, assignor, or lessor, or his heirs might have enjoyed. And reciprocally the lessee, or his assigns, may have against the alienee of the reversion, or of any part thereof, his heirs or assigns, the like benefit of any condition, covenant or promise *in the lease*, as he could have had against the lessors themselves, and their heirs and assigns, except the benefit of any warranty in deed or law. (V. C. 1873, ch. 134, §§ 1, 2; V. C. 1887, ch. 127, §§ 2781, 2782; 2 Rob. Pr. (2d ed.) 77-8.)

It is apparent, from the tenor of the statute, that it extends only to *leases* for life or years, and not to conveyances of the inheritance; and it is held to apply as well to assignees of the reversion in a *part of the land*, as to assignees of part of the *estate of the reversion*, notwithstanding Lord Coke states the first part of the proposition otherwise. Thus, says he, if there be a lease for years on condition, and the reversion be granted *for years*, the assignee shall take the benefit of the condition; but if there be a lease of three acres on condition, and the reversion is granted of *two acres*, the assignee shall not have the benefit of the condition, which is extinct, being entire and against common right. (2 Th Co Lit. 90, where many observations upon the statute occur.) But the doctrine is clearly settled as above

stated. (2 Lom. Dig. 338; *Twyman v. Pickard*, 2 B. & Ald. (4 E. C. L.) 105.)

It may be observed, in conclusion, that in order to make a person an assignee, within the statute, he ought to come in of the same estate in respect of which the covenant was made. Hence, if he comes in by title paramount, the statute does not apply. Thus, if lessee for twenty years leases for ten, and afterwards surrenders to him in reversion, the reversioner, being in by elder title, cannot have the benefit of a condition or covenant entered into by the under-lessee. (2 Lom. Dig. 338.)

### 5<sup>m</sup>. Defeasance.

A defeasance is a collateral deed, made at the same time with a feoffment, or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*. And in this manner mortgages were formerly made, the mortgagor enfeoffing the mortgagee, and he at the same time executing a *deed of defeasance*, whereby the feoffment was rendered void on repayment of the money borrowed at a specified time. And this, when executed at the same time with the original feoffment, was considered *as part of it*, and therefore only indulged; no subsequent *secret* revocation of a solemn conveyance, executed by *livery of seisin*, being allowed in those days of simplicity; though when *uses* were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things merely executory, or to be completed by matter subsequent, as rents, annuities, covenants, promises, and the like, were always liable to be recalled by defeasances, made subsequent to the time of their creation, by the party entitled to enjoy them. (2 Bl. Com. 327; 2 Th. Co. Lit. 122-23, and n. (O. 3).) A defeasance, it will be observed, differs from a condition in being contained in a *separate deed*, executed at the same time with the original, whilst a condition is contained in the *same deed*. And this diversity has led, in a great degree, to the disuse of defeasances in practice, partly because they were often employed as a cover for fraud, and so became objects of suspicion, and partly from the apprehension that, as the conveyance without the defeasance was absolute, if the defeasance were lost, the proof of the condition might be difficult, if not impossible. (2 Lom. Dig. 151-2; *Shepp. Touchst.* 396 & seq.)

The defeasance must contain sufficient words, as that *the thing shall be void* in the event designated, although no particular expressions are indispensable. But it must always be by matter as high as the thing to be defeated. Hence, an obligation *under seal* cannot be defeated or discharged by writing *unsealed*. (2 Th. Co. Lit. 122, n. (O.

3); *Cabell v. Vaughan*, 1 Saund. 291, n. (1); *Lacy v. Kynaston*, 2 Salk. 575; *Shepp. Touchst.* 397-'8.)

2<sup>k</sup>. Conveyances Operating under Statutes.

There are two statutes (besides the statute of wills, which is reserved for a separate head) by virtue of which conveyances may operate *inter vivos*, in a manner unknown to the common law. Those statutes are, (1), The statute of *Uses*, 27 Hen. VIII. c. 10 (A. D. 1536), and (2), The statute of *Grants*, 8 & 9 Vict. c. 106 (A. D. 1845), both of which exist in Virginia, the last almost *in ipsissimis verbis*, and the former with considerable modifications. (See V. C. 1873, ch. 112, §§ 4, 14; V. C. 1887, ch. 107, §§ 2417, 2426.)

W. C.

1. Conveyances Operating under the Statute of Uses.

The origin, nature, and history of uses, and the futile attempt to destroy them by the Statute 27 Hen. VIII. c. 10, known as the *Statute of Uses*, have been already explained (*Ante*, pp. 204 & seq.); and mention was also made in the same connection (*Ante*, p. 208) of the conveyances to which the English statute gave rise, followed by a statement of the tenor of our Virginia statute, and of the conveyances to which it gives effect. (*Ante*, p. 213.) It is not designed to repeat these explanations, but they must now be recalled.

It will be remembered that the doctrine of uses, having originated in the latter part of the reign of Edward III. (say about A. D. 1370), very soon so materially modified the manner of holding land in England, that an immense proportion of the real estate of the kingdom passed under the cognizance and protection of the court of chancery alone. Almost every proprietor conveyed his land to a feoffee in fee, *to the use* of the grantor himself or his heirs, or otherwise contrived that he himself should be merely the beneficial equitable owner, whilst the legal title was vested in some one else, whom we should now call a *trustee*. The considerations which chiefly recommended to the English people this substitution of the equitable use of their lands instead of the legal title, were at first numerous (*Ante*, p. 206), and some of them by no means legitimate; such, for example, as the non-liability of uses to the debts of the equitable owner. But by various statutes, that and other peculiarly impolitic incidents were pruned away, leaving only three important advantages belonging to them, namely: (1), Their comparative exemption from some of the feudal burdens; (2), The facility with which they might be conveyed from one to another, *merely by deed* without livery; and, (3), That they might be *devised* by last will and testament: for in respect to the two last named, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary, and as the intention of the parties was the lead-

ing principle regarded in respect to this sort of property, any instrument declaring that intention was in equity allowed its full effect accordingly. These last two considerations may well be conceived to have been the most potent. (2 Bl. Com. 330 & seq.)

It may not be denied, on the other hand, that some inconveniences attended the system of uses, as particularly that it made it practicable to convey the actual beneficial ownership *by secret deeds* alone, which tended to facilitate frauds, and left it always uncertain to whom the land really belonged. There were, however, political reasons which, about A. D. 1536, influenced the rapacious prince then on the throne to desire that uses should be abolished, and accordingly the famous statute, 27 Henry VIII., c. 10, was enacted, with the design to *do away with uses altogether*, and to restore, as was said, "the ancient laws of the realm." The statute proposed to accomplish the desired result by transferring, in all cases then existing or thereafter to arise, the possession and legal title to the use, so as to clothe the *cestui que use* always with the legal title, and to make it impossible, under any circumstances, to create an equitable estate. But never was statute introduced in a manner so solemn and pompous, and for a purpose so important, so utterly frustrated of its contemplated effect. Notwithstanding its peremptory terms, the courts gave it such a construction as to make it as easy to create uses, which should be cognizable in equity only, as it was before 27 Hen. VIII. (although, to be sure, they have since decently taken the name of *trusts*); and the sole practical effect of the statute has been to introduce new and more convenient modes of conveying lands. (See *Ante* pp. 208 & seq.; 2 Bl. Com. 335 & seq., and n. (52), 337; Gilb. Uses, 139 & seq., and n. (1).)

The various instances of *trusts*, some arising from the failure of the statute of uses to transfer the possession to the use in certain cases (which are denominated *direct trusts*) and others arising from implication or construction of law (which are styled *indirect trusts*), have been already stated, together with the general principles which regulate them. (See *Ante*, pp. 215 & seq.)

Let us have regard to, (1), The English Statute of Uses; and (2), Conveyances under the Virginia Statute of Uses.

W. C.

1<sup>m</sup>. The English Statute of Uses, 27 Hen. VIII., c. 10.

Let us look to, (1), The terms and effect of 27 Hen. VIII., ch. 10; (2), The conveyances to which the statute is applicable; (3), The circumstances necessary to the operation of the statute; and (4), The modern doctrine of uses under the statute.



W. C.

1<sup>n</sup>. The Terms and Effect of 27 Hen. VIII., c. 10.

The statute of 27 Hen. VIII., c. 10, is printed at large in Gilb. Uses, App'x, 510. After a long preamble, reciting with some rhetorical exaggeration the mischiefs of uses, as they then existed, it enacts, in substance, that when *any person* is or shall be *seised* of any lands, tenements, or hereditaments, to the use, confidence, or trust of any other person, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, (that is, by the custom of particular places in England, 2 Bl. Com. 374,) or otherwise, by any manner of means, whatsoever it be; that in every such case, every person that has, or shall have any such use, confidence, or trust, in *fee-simple, fee-tail, for life, or for years, in possession, remainder or reversion*, shall be deemed in *lawful seisin, estate and possession* of all such lands and tenements, reversions and remainders, for *such estates as they have in the use, trusts or confidence*.

These words are as comprehensive as they could well be made. It will be observed that they include *every species* of real property; *every mode* whatsoever whereby a use or trust can be created; *every interest* which can possibly be had in the use or trust; *every possible beneficiary*, whether natural persons or corporations; and are limited only in respect to the *estate in the land* which he must have whose possession is to be transferred (which *must be a freehold at least*, because of the word *seised*), and in the *character of the person* who is to be in possession, who must be a *natural person*; so that corporations cannot take lands to the use of others in such a manner that the statute will *execute the use*, by transferring the possession to it; although they may stand seised of *their own lands* to the use of others, which the statute will execute. (Gilb. Uses, 6 & seq., & n. (1).)

Hence, the statute is held to apply to uses and trusts raised *by devise*, although the statute of wills was not enacted until 32 Henry VIII., five years afterwards. (1 Spence Eq. Jur. 464; Gilb. Uses, 356, and n. (2).)

2<sup>n</sup>. The Conveyances to which the Statute is Applicable.

Every possible conveyance whereby an use may arise, as we have already seen, is embraced in the terms of the statute; but it is desirable to class them under two great heads of, (1), Conveyances operating *with actual transmutation of the possession*; and (2), Conveyances operating *without actual transmutation of the possession*; to which two heads all the modes of raising uses prior to the statute may also be referred:

W. C.

## 1°. Conveyances Operating with Actual Transmutation of the Possession.

Conveyances which operate under the statute of uses, with actual transmutation of the possession, suppose that a conveyance operating at common law is made by the grantor to the intended trustee, (as by feoffment, lease and release, fine, common recovery, etc.), accompanied by a declaration of the uses and trusts to which it is designed the trustee shall be seised. For example, a feoffment, with livery of the land, is made by the grantor, whom we may call A, to the trustee, T, and his heirs, *in trust for, or to the use of* (the form of the phrase is immaterial), the *cestui que use*, C, and his heirs. The common law operates to transfer the land, by means of the feoffment and livery, to T. and then the statute takes the *seisin* out of him, and transfers it to C.

This class of conveyances is employed in England in marriage-settlements, and wherever it is desired to create *future uses* in favor of persons not in being or not ascertained (*Ante*, p. 208; Gilb. Uses, 163, n. (5), 398 & n. (2);) and there is a grave doubt whether the statute applies to execute such uses when created by *bargain and sale*, because, it is said, the *cestui que use* cannot, in the nature of things, have supplied the valuable consideration which the conveyance requires. (Gilb. Uses, *supra*.)

This statement resolves a question which is liable to perplex the student, namely, why resort to a feoffment, or other common law conveyance, to vest the land in one person, in order that the statute may take it out of him and transfer it to another? Why not at once convey it to that other? The statute must of course have included uses declared on such conveyances, in order to accomplish its purpose of abolishing uses altogether; but the question relates rather to the reasons which influence grantors to choose the apparently roundabout method of conveyance by feoffment to uses, instead of some more direct mode of transfer, as by simple feoffment and livery immediately to the intended beneficiary. It will be perceived, that by conveying thus by feoffment, etc., to the uses declared, there is created in the feoffee, etc., what may be denominated a kind of *reservoir of seisin*, which will apply to (or *serve*, as it is termed), any future uses which are limited agreeably to law, without the embarrassment arising from the necessity that *cestui que use* should be *within the consideration*. Hence it is that this mode of conveyance is in England invariably used in family settlements, which often contemplate very

remote limitations, and always limitations to persons not in being.

2°. Conveyances Operating *Without Actual Transmutation of the Possession.*

As prior to the enactment of the statute of uses a use might be raised, either by a declaration contained in or annexed to a feoffment or other conveyance transmuting the possession of the land to another person, who was then a trustee, for the uses declared; or, as it was usual to style him, *feoffor to uses*; or by any *contract* founded upon an adequate consideration, without any actual transfer of the possession, the bargainor being himself, in that case, the trustee: so also under 27 Hen. VIII., c. 10, which embraces *all uses*, howsoever created, we have a similar division. The *adequate consideration* on which a contract or covenant must be founded, in order to raise a use before the statute, as well as since, may be either, first, a consideration of *value*, in which case the instrument is known as a *bargain and sale*; or it is, secondly, a consideration of *natural love and affection* for the covenantor's wife, or some near relative, when the instrument has been always designated as a *covenant to stand seised*. And these two exhaust the modes of raising uses prior to the statute without *actual transfer* of the possession, and *in principle* exhaust such modes under the statute. There is, however, under the statute, a third mode, according to the usual classification, whereby a bargain and sale is made for a year, and the bargainee being thus put statutorily into possession for a year, is thereby enabled to receive a release enuring by *way of enlargement* (*Ante*, p. 787); and to this the name of *lease and release* has been given. We are to consider, then, under the head of conveyances operating without transmutation of possession, (1), Conveyance by *bargain and sale*; (2), Conveyance by *covenant to stand seised*; and (3), Conveyance by *lease and release*;

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1<sup>st</sup>. Conveyance by *Bargain and Sale.*

A *bargain and sale* is a contract by which one agrees for *any valuable consideration* (it is not indispensable that it should be *money*, as Lord C. B. Gilbert insists), to *stand seised* of his lands to the use of another. At common law it might have been by *words only*, without writing; but by statute 27 Hen. VIII., c. 16, it was required, if it were for an estate of *inheritance* or of *freehold*, to be by *deed* indented and *enrolled*; and by statute of frauds and perjuries (29 Car. II., c. 3, §§ 1, 2, 3), it must be *in writing*, even though it relates to

estates for years only, if it exceeds three years. (Gilb. Uses, 187 & n. (10); Id. 95, & n. (5); 2 Th. Co. Lit. 578, n. (B).) By such a contract a use arises to the bargainee, to whom the statute immediately passes the legal estate and possession of the land for the estate or interest that he had in the use, without any entry, or other act on his part. (2 Th. Co. Lit. 578 n. (B.); Id. 461, n. (Q).)

The proper technical words of this conveyance are *bargain and sell*; but they are by no means essential to its operation. The material thing is a *valuable consideration*, and, therefore, if for such consideration a man, without making livery of seisin, *covenants to stand seised*, or *gives and enfeoffs*, or *alienes, grants and demises*, it will operate as a *bargain and sale*. (2 Th. Co. Lit. 578, n. (B.); Rowletts v. Daniel, 4 Munf. 473.)

The consideration, if valuable, may be a trifling one, and the actual amount need not be stated; nor, if it be expressed in the deed, need it be actually paid, no averment or proof to the contrary being admitted. Indeed, it seems not absolutely necessary that the consideration should be mentioned at all in the deed, as extrinsic proof of any valuable consideration *not inconsistent with the deed*, is admissible. (2 Th. Co. Lit. 579, n. (B.); Id. 9, n. (E.); Gilb. Uses, 96, and n. (6), 462; Eppes v. Randolph, 2 Call, 125, 152; Duval v. Bibb, 4 H. & M. 113; Harvey v. Alexander, 1 Rand. 219.)

For every conveyance under the statute of uses, there must be *a use*, and *a seisin to serve it*. Hence, a person *not seised* (that is, not possessed of a *freehold*), cannot convey by bargain and sale. Thus, whilst all corporeal hereditaments, of which the bargainor has a *seisin*, and all incorporeal hereditaments in *actual existence*, may be conveyed thereby; and whilst one seised of a freehold in lands may, by bargain and sale, convey a term for years, no term for years already created can be so transferred, because the owner *has no seisin*, as the statute requires. (Gilb. Uses, 492; 2 Th. Co. Lit. 578, n. (B).)

When the statute of uses was enacted, its framers easily foresaw that conveyances would frequently be made by bargain and sale, being a conveyance of a private nature, not requiring the notoriety of livery; and in order to protect society against the ill consequences of such secrecy, it was enacted in the same session of parliament, by statute 27 Hen. VIII., c. 16, that such bargains and sales should not enure to pass an estate of inheritance, or of freehold, unless they



were by deed indented and *enrolled within six months* from the date, in one of the courts of record at Westminster, or with the *custos rotulorum* of the county where the lands lay; and to this day this is the only *general statute* of registry in England. (2 Th. Co. Lit. 579, n. (B.); Gilb. Uses, 200, &c. 520; Wms. Real Prop. 423.)

Contingent uses limited to a person not *in esse*, or not ascertained, it is said, cannot be *raised* by bargain and sale, because the intended *cestui que use* cannot provide the consideration; and it is asserted that a consideration paid by other parties, as for example, by the precedent tenant for life, would not suffice (Gilb. Uses, 398, and n. (2), 163, n.); and yet it is admitted, that when there are several bargainees, as A, B, and C, a consideration furnished by any one will enure to all; nay, where the remainder is *vested*, a consideration paid by the particular tenant will enure to the successors. Thus, if A agree for a valuable consideration *paid by* B, to stand seised to the use of B for life, remainder to C, the statute will execute as well the remainder to C as the particular estate to B. It is even said that if the consideration be paid by a *stranger*, it will suffice. (Gilb. Uses, 458, 96, n. (7).) This question, however, is at present of little practical interest, for although such a conveyance be incapable of taking effect under the statute of uses, it is believed that it would be unquestionably good to vest the contingent estate *as a grant*, under the statute of grants. (V. C. 1873 ch. 112, § 4; Rowletts v. Daniel, 4 Munf. 473; Watts v. Cole, 2 Leigh, 662; Gilb. Uses, 151, n. (2).)

A bargain and sale (like a covenant to stand seised, and a lease and release, operating under the statute of uses), is said to be an *innocent conveyance*, in contradistinction to a *tortious* one. (*Ante*, p. 749.) Neither of these three conveyances pass any interest but that which the seller may lawfully pass. They therefore produce no *discontinuance* when made by a tenant in tail, nor any forfeiture when made by a tenant for life. These conveyances, moreover, of themselves pass only a *use*, the legal estate and possession being transferred *by the statute*. Hence, no use can be limited upon the estate of the bargainee, &c., so as to be executed by the statute; but the second use is no more than an *equitable estate* (as all uses were prior to the statute), under the denomination of a *trust*. (*Ante*, p. 216; 2 Th. Co. Lit. 581, n. (B).)

2<sup>d</sup>. Conveyance by Covenant to Stand Seised.

A conveyance by covenant to stand seised, like that

by bargain and sale, is a contract by which one agrees to *stand seised* of his lands to the use of another ; but it differs from a bargain and sale in the fact that a *deed* is in all cases necessary (Gilb. Uses, 243 n. (4).) and also in the consideration required for it, which, instead of being *valuable*, is a consideration of *natural love and affection* for a near relative, or a wife ; friendship, long acquaintance, having been school-fellows, or even love for a *natural child*, not being sufficient to raise a use, and therefore not sufficient for the operation of the statute. Supposing the consideration sufficient, the covenantee, by deed, acquires the use, to which the statute transfers the corporeal possession of the land, without his ever seeing it, by a kind of parliamentary magic, as Blackstone observes. (2 Bl. Com. 338 ; 2 Th. Co. Lit. 580, n. (B.) ; Gilb. Uses, 456, and n. (4), 459.)

The *consideration* is the foundation of this conveyance, and if that exist, the words *covenant to stand seised* are not essential, but may be substituted by any words demonstrative of the intent, such as grant, bargain, sell, assign, enfeoff, etc. ; nor is it needful, supposing that there is the near kindred, etc., *expressly* to declare the consideration. (2 Bl. Com. 338, n. (59) ; 2 Th. Co. Lit. 580, n. (B.) ; Gilb. Uses, 251, n. (2), 250 n. (10) ; Watts v. Cole, 2 Leigh, 662 ; Bedell's Case, 7 Co. 40.)

It will be observed that a covenant to stand seised can raise no use in favor of strangers to the consideration ; and hence, if one covenants with three persons, one of whom is his brother, to stand seised to their use, it raises a use in favor of the brother alone, and operates only to transfer the possession to him, he taking all. (Gilb. Uses, 246, 457-'8, and n. (5) ; 2 Th. Co. Lit. 580, n. (B).) So no one can transfer lands by this conveyance who cannot be seised to a use, and who has not a vested estate in possession, remainder or reversion in the lands ; nor can any property be transferred by it which cannot be conveyed to uses. (2 Th. Co. Lit. 581, n. (B).)

Covenant to stand seised, we have seen, is an *innocent conveyance*, and never passes more than the grantor has a *right to pass*. (*Ante*, p. 808.)

### 3<sup>p</sup>. Conveyance by Lease and Release.

The conveyance by lease and release consists of two parts, namely, a lease for a short period, say a year, which, when it is consummated by *statutory* possession in the lessee, is followed by a deed of release, which operates by *way of enlargement*, enlarging the lessee's

estate to the full compass of the terms of the release. This was a conveyance very well known to the common law before the statute of uses, being employed hardly less frequently than feoffment; but at common law, the lessee, in order to qualify himself to receive the release, was obliged *actually to enter* and take possession of the premises, and then only was competent to have the reversion released to him. (*Ante*, p. 787; Gilb. Uses, 225, 228, n. (2).)

In lease and release, taking effect under the statute of uses, the lease is a *bargain and sale for a year*, whereby the possession is, by the operation of the statute, transferred to the lessee for a year, without any actual entry on his part, and thus he is prepared to receive a common law release from the lessor, enuring to enlarge his estate to the extent of the terms of the release. Theoretically, therefore, the lease should be executed first; but it is immaterial how short a time may intervene, and in practice they are generally executed at the same meeting of the parties. It is said, indeed, that they may be contained in the same deed; nay, that the recital of the lease in the release is sufficient evidence of the lease, as against the releasor and those claiming under him, but not as to others, without proof that the lease once existed, and is lost. (Gilb. Uses, 228-9; 2 Th. Co. Lit. 581, n. (B).)

As the lease operates as a bargain and sale under the statute of uses, whatever is requisite to a bargain and sale is necessary to it; none can convey by it who cannot be seised to a use, nor can any property be transferred by this means, which is incapable of being conveyed to a use; and it no more creates a discontinuance or forfeiture than does a bargain and sale, or a covenant to stand seised. (2 Th. Co. Lit. 581, n. (B); Gilb. Uses, 228 & seq. n. (2).)

The conveyance by lease and release under the statute of uses, is said to have been invented by Sergeant Moore, at the request of Lord Norris, in order to prevent some of his relations from learning from the public records, or from the notorious ceremony of livery, what disposition he should make of his estate. Had he conveyed it by feoffment at common law, the livery of seisin would have given a necessary notoriety to the transaction; if by lease and release, at common law, the need of actual entry by the lessee would have made it only a little less notorious; if he had employed a bargain and sale, the statute required an *enrolment* as to all *freeholds*, which again would have occasioned the publicity which it was desired to avoid; but by lease by

bargain and sale *for a year*, the possession was in law transferred to the lessee, as if he had entered, the necessity for enrolment was obviated, and thus by two secret deeds the fee-simple was conveyed. By this device the general registry of conveyances, which was contemplated by 27 Hen. VIII., c. 16, as a substitute for the notoriety of livery, was evaded, and rendered of little effect. (2 Bl. Com. 339; 2 Th. Co. Lit. 582, n. (B.); 4 Reeve's Hist. Eng. Law, 335.)

3<sup>n</sup>. The Circumstances Necessary to the Operation of the Statute, 27 Hen. VIII., c. 10.

The circumstances necessary to the execution of uses by this statute are, (1), A person *seised* to the use of another person; (2), A cestui que use *in esse*; and (3), A use *in esse*, in possession, remainder, or reversion; and unless these circumstances concur, the statute cannot apply to transfer the possession to the use. It will be remembered, however, that although a conveyance wanting this concurrence may be incapable of operating to transfer the legal title and possession under the *statute of uses*, it may, and generally will operate *as a grant*, under the statute of grants, 8 & 9 Vict. c. 106. (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417; Gilb. Uses, 251, n. (2); Rowletts v. Daniel, 4 Munt. 473; Watts v. Cole, 2 Leigh, 662);

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1<sup>o</sup>. A Person *Seised* to the Use of *Some Other Person*.

It had always been held, prior to the statute of 27 Hen. VIII., c. 10, that whilst, in general, *all persons*, including married women and infants, could be feoffees to uses, and would be compelled in equity to execute them, yet that corporations could not be, partly, it was said, because it was foreign to the end of their institution, and partly because it was supposed that they could not be adequately constrained to regard the use; the reigning sovereign for the time being could not be, nor the queen-consort, for want of any adequate power of constraint; and aliens could not be, save only so long as the crown forbore to assert its right of escheat. So, after the statute, the same general principles prevailed. In order that the statute should execute the use there must be some one *seised to the use*, and, therefore, some one *capable of being so seised*. The word *seised*, used by the statute, extends to any estate of *freehold*, and, therefore, it suffices if the person whose possession is to be transferred be tenant *for life*, for that is a freehold: although it seems that, before the statute, all feoffees to uses must have been *seised in fee*. And it will be remembered, that the statute comprehends *every species*



of *real property* in possession, remainder, or reversion, whether corporeal or incorporeal, provided it *belongs to the grantor*, at the time of the conveyance. (Gilb. Uses, 6 & seq.; 2 Th. Co. Lit. 573, n. (A).)

A question which formerly much agitated the profession was as to the manner in which the statute should be understood to operate when the *seisin* of the person *seised to uses* was exhausted in executing the original uses, and afterwards uses limited upon a contingency took effect; the doubt being whose *seisin served* those after-arising contingent uses. The idea which, until a score or two years ago, commonly prevailed, was that there remained in the feoffee, in construction of law, a *mere spark* of *seisin* or right (styled *scintilla juris*), which sufficed to *serve* those uses. Mr. Sugden combats this idea with much good sense upon the ground that the doctrine of *scintilla juris* has no support in reason, nor in the terms of the statute; but that where the statute says, "Where any person shall be seised to the use of *any other person*," etc., its language and policy may be satisfied whenever a person comes into being to whom such a contingent use is limited, by regarding the feoffees as having been seised *by relation* to that person's use when the estate *was created*, whatever may have become of that *seisin* since; so that it is only needful to show, (1), That a sufficient *seisin* was created *at first* to serve the future use; and (2), That such future use should come into *esse* by the happening of the contingency. Thus, if a feoffment be made to J. S. in fee, to the use of A for life, remainder respectively to his *unborn* first, second, and third sons for life, the remainder to B in fee, the estate for life is by the statute immediately executed in A, remainder to B in fee, and then, when the unborn sons respectively come into being, the *seisin* of J. S. is not considered as exhausted of its effect, but instead of the *scintilla juris* either returning to or remaining in him. Mr. Sugden explains that the *original seisin* in J. S. is sufficient by relation to execute or serve the contingent uses. (Gilb. Uses, (Sugd. ed.) 293 and seq., 297, and n. (10).)

2<sup>o</sup>. A Cestui Que Use in *Esse*.

A cestui que use *in esse* being necessary to the execution of a use by the statute, where the use is limited to a person uncertain, or not *in esse*, the statute operates nothing until the *cestui que use* is ascertained, or comes into being. Every person capable of taking land by a common-law conveyance may be a *cestui que use*, including corporations; and by the statute the *cestui que use* may be entitled to any estate in fee-simple, for life,

or for years, or in remainder or reversion. And although a man cannot, at common law, convey to his wife (because they are *one person*), yet he may covenant with another to stand seised to her use, and the *statute* will transfer the possession to her. (1 Th. Co. Lit. 130; 2 Do. 577, n. (A).) The *cestui que use*, as the statute imports, must in general be a *different person* from him who is seised to the use; but where the estate in the use is different from the estate whereof he is seised, the use may be executed by the statute, as where one seised in fee bargains for valuable consideration to stand seised to the use of himself for life, *remainder over* to a third person *in fee*, a new estate is by the statute vested in himself. (2 Th. Co. Lit. 574, n. (A.); 1 Lom. Dig. 210-11.)

### 3°. A Use in Possession, Remainder or Reversion.

When this third circumstance concurs, the statute *executes the use* (as the phrase is), by transferring the possession of him that is seised of the land to him who has the use, for the estate which he has in the use as fully as if he had had livery of seisin of the premises; so that his estate therein being to all intents and purposes a complete legal estate in possession, is entitled to all the incidents to which such estate is liable, such as curtesy, dower, escheat, etc. (2 Th. Co. Lit. 574, n. (A).)

### 4°. The Modern Doctrine of Uses under the Statute 27 Hen. VIII., c. 10.

The modern doctrine of uses under the statute of uses requires us to note, (1), The words whereby estates are limited under the statute; and (2), Uses to take effect *in futuro*;

W. C.

### 1°. The Words whereby Estates are Limited under the Statute.

It is settled that the same words are requisite to create limitations under the statute as are required at common law. Thus, independently of any statutory provision to the contrary, which we have in Virginia (V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420); the word heirs is necessary to create an estate of inheritance; a proviso attached to the estate, hostile to the policy of the law, is void, etc. (Gilb. Uses, 143, n. (1); 2 Th. Co. Lit. 576, n. (A).)

### 2°. Uses to take Effect *in Futuro*.

Amongst the most important changes wrought by the statute of uses in the common law, was the facility which it gave for the creation of estates to take effect at a future time. Thus, under the statute, we have, (1), Springing uses; (2), Shifting uses; (3), Contingent or future

uses; (4), Revocable uses; (5), Appointments to uses; and (6), Resulting uses, and uses by implication;

W. C.

### 1<sup>st</sup>. Springing Uses.

An estate of *freehold* in lands, at common law, cannot be made to arise *in futuro*, for reasons which have heretofore been often stated, and which do not apply to prevent the creation of such future freeholds by conveyances operating under the statute of uses; conveyances which dispense with livery of seisin, and which leave the ownership with all its incidents in the grantor until the time comes for the estate to arise. A freehold estate thus created under the statute of uses to commence at a future time, whether upon a contingency or otherwise, no estate going before, is known as a *springing use*. The principal doctrine to be noted in connection with it is that the future period of its vesting cannot be indefinitely postponed, but in order to prevent perpetuities, it is rigorously required to be so limited that it must take effect, if at all, within a life or lives in being, and the period of gestation, and twenty-one years thereafter, or otherwise it is void *for remoteness*. (*Ante*, pp. 431-'2; Gilb. Uses, 161, n. (A.); 2 Th. Co. Lit. 578, n. (A).)

### 2<sup>nd</sup>. Shifting Uses.

At common law it is impossible, as we have seen more than once, to put an end to a *vested* fee-simple, and to substitute any estate in its place, the reasons for which having been again and again stated, need not now be repeated. (*Ante*, pp. 269-'70, 432.) But by conveyances operating under the statute of uses the inheritance may be made thus to shift from one to another, upon a supervening contingency; for no livery being required to create the estate, no corresponding notoriety of re-entry by the grantor is needful to determine it, so that it may come to an end by the limitation contained in the deed, and thus no reason exists why the subsequent limitation should not take its place. When the subsequent limitation depends upon a condition, it is denominated a *conditional limitation* (*Ante*, pp. 269 & seq.); but for the present purpose it is not necessary to discriminate between such a conditional limitation and any other shifting use. The great principle to be observed in the case of shifting, as of springing uses, is that they must be so limited as to take effect necessarily, if at all, within the period above designated of a life or lives in being, and ten months and twenty-one years thereafter. (Gilb. Uses, 152, & seq., n. (5); 2 Th. Co. Lit. 578-'9, n. (A).)

3<sup>d</sup>. Contingent or Future Uses.

Contingent or future uses do not differ from remainders created by conveyances under the statute instead of at common law; and they are governed by the same rules which prevail in respect to remainders. (*Ante*, p. 389 & seq.) Thus, there must be a preceding particular estate, the regular expiration of which the remainder must await; the remainder must take effect during the continuance of the particular estate, or *eo instanti* that it determines; the particular estate and the remainder must be created by the same conveyance, &c. (Gillb. Uses, 164 & seq., n. (5).)

4<sup>th</sup>. Revocable Uses.

The revocability of uses is one of their most notable attributes. A power, to reside in the grantor, to revoke a common law conveyance, is deemed by the common law repugnant to the conveyance, and is never admitted. But upon the introduction of uses, which were merely the right to declare, and direct the person seised of the legal estate in what manner and to whom he should convey the land, it was concluded, perhaps not very logically, that there was no repugnancy in permitting the person creating the use to follow the bent of his will; and if he reserved the power to revoke, to extend that indulgence to him accordingly, the court of chancery affecting great liberality in directing the uses according to the apparent intent of the parties. And that doctrine having been fully established prior to the statute, and the statute proposing that he should have the land, as before he had the use, the estate created thus under the statute has always been deemed revocable in like manner as the use had been before. (Gillb. Uses, 313; *Id.* 158-9, n. (5).)

Powers of revocation of uses are two-fold. They either, (1), Relate to the land; or (2), Are collateral thereto;

W. C.

1<sup>a</sup>. A Power of Revocation *Relating to the Land*.

A power of revocation *relating to the land* is where such a power is limited to one that had, has now, or is expected to have in future, an *estate or interest in the land*. As in case of a devise to T and his heirs, to his own use for his life, and afterwards to the use of C and his heirs, but with power to T, by deed or will, to revoke the use in favor of C and his heirs, and to limit new uses in lieu thereof. (Gillb. Uses, &c. 314 & seq.; 2 Lom. Dig. 206 & seq.; 1 Sugd. Pow. (3d Am. ed.) 106 & seq.)

Such a power is again two-fold, namely, (1), *Ap-*



*pendant* or *appurtenant*, that is, annexed to the estate in the land; or (2), In gross;

W. C.

1<sup>r</sup>. A Power of Revocation *Appendant* or *Appurtenant*, that is, Annexed to the Estate in the Land.

A power of revocation is said to be *appendant* or *appurtenant*, that is, annexed to the estate in the land, when the person who is to exercise the power has such estate, and the power of revocation, and the execution of the power, falls within the compass of his estate. Thus, when tenant for life has power to make leases, and grants a rent-charge, and then makes a lease according to his power, the lessee will hold the land charged with the rent during the life of the tenant for life, because he has power to charge *his own interest*, and the charge made by himself he cannot by his own act avoid. So when tenant for life has power to grant leases *in possession*, a lease granted under the power has its operation out of *the life estate*, as long as that estate endures, and to that extent displaces the life-estate. (Gilb. Uses, &c. 314-'15; 1 Sugd. Pow. (3d Am. ed.) 107; 2 Th. Co. Lit. 124, n. (Q. 3); Grange v. Tining, Bridg. Judgm'ts, 115.)

Such a power, which enables the person exercising it to create an estate which will attach on an interest actually vested in himself, is a power *appendant*, or, as it is sometimes styled, *appurtenant*. (1 Sugd. Pow. (3d Am. ed.) 107.)

2<sup>r</sup>. A Power of Revocation *in Gross*.

A power of revocation *in gross* is where one has an estate, and a power of revocation which is designed to extend beyond the compass of his interest; as if there be tenant for life, remainder in fee-simple, with a power in tenant for life to make a lease for *thirty-one years*, to commence *after his death*, in order to raise portions for children, or to provide a jointure for his wife *after his death*; this is a power *in gross*. And if tenant for life by *bargain and sale* disposes of the land in fee-simple, the power is not thereby destroyed; for since the execution of the power was to take effect beyond the compass of his own estate only, his conveyance, which passes no more than his life-estate, does not hinder the main use of the power. The estate created under the power cannot, in any event, affect the life-estate of the donee, and so the power is said to be *in gross*, as having no connection with the estate, or sometimes *collateral* thereof, although it is better to es-

chew the latter phrase, lest the student should be led by it to confound such a power as this with a power *simply collateral*, presently to be mentioned. (Gilb. Uses, &c. 315; 1 Sugd. Pow. (3d Am. ed.) 107-'8.)

But if the donee of the power had *leased a fine*, or made a feoffment *in fee* with *livery*, the power would have been destroyed, for the *entire fee-simple* is thereby absolutely passed, and all the remainders are divested, and thus the power of revocation, and of limiting new uses for his own benefit, is destroyed. For this power cannot be executed but out of the remainders, and he has prevented the execution of it by having already disposed of the whole interest to another. (Gilb. Uses, &c. 316.)

He may release such a power of revocation to the remainder-man; for he that is to have an interest by any possibility may release the same to the present possessor, as well as if he had a future right, for it is according to the policy of the law, for the quiet and peace of the possessors. (Gilb. Uses, &c. 316.)

## 2<sup>a</sup>. A Power of Revocation *Simply Collateral*.

A power *simply collateral* is a power to a person who has no present interest in the land, and to whom no estate is given, to dispose of or charge the land in favor of some other person. A devise to such a person as T, by deed duly executed as a conveyance of land is required to be executed, shall appoint for any term of years, for any life or lives, or in fee-simple, creates a power *simply collateral*. (Gilb. Uses, &c. 316, 317; 1 Sugd. Pow. (3d Am. ed.) 108-'9.)

In this case a fine, or a feoffment with livery, would in England not extinguish the power, for though every man is estopped to claim any interest contrary to *his own act*, whereby he passes an estate to another, yet a *stranger* claiming under such fine or feoffment would not be estopped; for no man is estopped by the *act of another* to demand his *own right*. (Gilb. Uses, &c. 316-'17.)

## 5<sup>p</sup>. Appointments to Uses, or Other Estates.

Appointments to uses are in the nature of shifting uses, where the prospective use is to arise by the appointment of some person designated in the deed; which appointment is the exercise of a *power*; always, it is believed, a power of revocation, as well as of appointment of new uses: for the new uses created under the appointment must necessarily, to the extent of the appointment, revoke or abridge the uses which existed previously. (2 Th. Co. Lit. 579, n. (A.), 586, n. (B).) Such powers of appointment are in practice confined to

conveyances which operate *with transmutation of the possession*, it being doubtful whether they can be generally introduced into a bargain and sale, or covenant to stand seised, because those conveyances *require a consideration*, and the appointee could not, or at least might not, be within such consideration. And as in Virginia, our statute of uses contemplates the latter class of conveyances alone, it must be a subject of doubt whether such appointments are with us practicable through the medium of uses, so far as respects the legal estate, except within very narrow limits, where the appointee is within the consideration of the original conveyance. And it will be observed, that in the case of bargain and sale, and covenant to stand seised, the doubt is not whether the statute *executes the use* in the appointee, but whether *any use* in his favor can be raised. But in case of uses declared in connection with conveyances which transmute the possession, such as feoffment, or lease and release at common law, or with devise, etc., such appointments are with us perfectly practicable, only it must be observed that they are appointments of the *equitable*, and not of the legal estate. Thus, in case of a common law lease and release, or of a devise to A in fee, to such uses as Z shall appoint, Z's appointee would, in Virginia, take an estate; not a legal interest, however, as in England, but an *equitable one* only. (2 Lom. Dig. 208, 206.) However, although such future contingent estates sought to be created by bargain and sale, or covenant to stand seised, may not take effect with us, under the statute of uses, yet it may be pretty confidently anticipated that they would take effect *as grants*. (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417; Gilb. Uses, 251, n. (2); Rowletts v. Daniel, 4 Munf. 473; Watts v. Cole, 2 Leigh, 662.)

It would be hardly needful to say more of powers, were they confined to uses; but as they may also operate, to a large extent, under the *statute of wills*, at all events as trusts, and, as is presumed, under the *statute of grants*, it will be proper to state summarily the doctrine touching the *execution of powers*; including, (1), The mode of executing powers; (2), The effect of the execution of a power; and (3), The equitable relief in case of the defective execution of a power;

W. C.

### 1<sup>a</sup>. The Mode of Executing Powers.

It is a general rule, that all the forms and circumstances prescribed by the instrument creating the power must be strictly observed, including whatever

limitations may exist as to the time of execution, the persons who are to execute the power, the persons who are to take, and the shares to be allotted to them severally. (2 Th. Co. Lit. 587, n. (B.); Union Bank of Md. v. Beirne, 1 Grat. 226; Bank of U. S. v. Beirne, 1 Grat. 539; Stainback v. Bank of Va., 11 Grat. 281, 269; Steele v. Livesay, 11 Grat. 454; Roper v. Saunders, 21 Grat. 60.)

Thus, when the particular instrument whereby the power is to be executed is specified it must be adopted; so that if a deed be required, a will does not suffice; and if a will is prescribed, the execution of the power by deed is void (2 Th. Co. Lit. 587, n. (B.); Williamson v. Beckham, 8 Leigh, 23; Pollock v. Glascock, 2 Grat. 439; Hume v. Hord, 5 Grat. 374); although in this latter case, if the instrument be in its nature testamentary, the mere fact of its being in the form of a deed will not invalidate it. On the other hand, nothing need be added to the requirements. Hence, if a writing under *hand and seal* is required, it need not be delivered; and if required to be "duly attested," it suffices if there be one witness. (2 Th. Co. Lit. 588, n. (B.); Pollock v. Glascock, 2 Grat. 439; Thorndike v. Reynolds, 22 Grat. 21; Sherman v. Hicks, 14 Grat. 96.) So, independently of statute, whatever number of witnesses be required, that number must be had, although exceeding the limit usually necessary; and in like manner, if a less number be required, a less number will suffice. If, however, the power is to be executed *by will*, without more, the rule is, that the will must be made as the statute of wills requires. (Longford v. Eyre, 1 P. Wms. 700; 2 Th. Co. Lit. 588, n. (B).) But in Virginia it is provided by statute that in all appointments to be *made by will*, the will must be executed as the statute of wills, and not as the power may require, *except the will of a married woman*, which must conform, it seems, to the power if that require additional witnesses or ceremonies, but must always conform also to the statute. (V. C. 1873, ch. 118, § 5; V. C. 1887, ch. 112, § 2515.) And finally, if no particular mode is prescribed, the appointment must be made in such a way as would pass the title if the property belonged to the appointor. (Knight v. Yarborough, 4 Rand. 566.)

It may be proper, in this connection, to refer to a statutory provision in Virginia touching powers to sell the lands of decedents. "Real estate to be sold," says the statute, "shall, if no person other than the executors be appointed for the purpose, be sold and con-



veyed, and the rents and profits of any real estate, which executors are authorized by the will to receive, shall be received by the executors who qualify, or the survivor of them. If none qualify, or those qualifying die, or are removed before the trust is executed or completed, the administrator, with the will annexed, shall sell *or* convey the lands so devised to be sold, and receive the proceeds of sale, or the rents and profits aforesaid, as an executor might have done." (V. C. 1873, ch. 127, § 1; V. C. 1887, ch. 120, § 2663; *Mosby v. Mosby*, 9 Grat. 584; *Carrington v. Goddin*, 13 Grat. 587; *Davis v. Christian*, 15 Grat. 11.)

It is noteworthy, that a will made in execution of a power not only so operates, but has in most respects the qualities of a proper will. Thus, it is ambulatory until the testator's death, and may be revoked, as, of course, without reserving a power of revocation, as is necessary where the power is executed by deed. So the appointment lapses by appointee's death in testator's life-time (unless where a statute may prevent—V. C. 1873, ch. 118, § 13; V. C. 1887, ch. 112, § 2523), and confers no interest in any case, except from his death. (2 Th. Co. Lit. 588-'9, n. (B).)

The instrument by which the power is executed need not recite the power, and it will be good although it includes other subjects, the property of the appointor. And notwithstanding the power may have contemplated but one instrument, yet if several be employed, which in effect are but one, it suffices. (2 Th. Co. Lit. 589, n. (B).)

In general, the estate or interest given must conform to the power. Not only must it not be greater, but it may not be less. Thus, power to give a freehold does not warrant an appointment of a term for years, although in some cases where the *nature* of the interest is the same, equity will uphold it. (2 Th. Co. Lit. 589, n. (B).)

The persons to and amongst whom the subject is to be appointed, must also be regarded and conformed to. Thus, in case of a power to appoint *unto and amongst his children*, in such proportions as he shall think proper, the appointor must give the whole amongst his *children*, excluding grandchildren and sons-in-law. (2 Th. Co. Lit. 589, n. (B).; *Hudson v. Hudson's Adm'r*, 6 Munf. 356; *Knight v. Yarborough*, Giln. 31; *Morris v. Owen*, 2 Call, 526.) And as to *shares*, whilst at law any share, however nominal, will be a good execution of the power, in equity the bestowal of an amount merely *illusory*, with reference

to the fund, and the objects of distribution will be void. An equal distribution, however, is not required, and a very large latitude of discretion is allowed to the appointor. (2 Th. Co. Lit. 590, n. (B.); Rhett v. Mason, 18 Grat. 541.) When the appointment is set aside as illusory, or for other cause, or no appointment is made, the fund is distributed *equally* amongst the objects. (2 Th. Co. Lit. 590-91; Mitchell v. Johnson, 6 Leigh, 473.)

It is also to be observed, that where no disposition is made of the subject in case no appointment shall be made, as where land is devised to L for life, and then to such uses as she shall appoint, and she makes no appointment, the land *results* to the heirs of the testator as a subject in respect to which he is intestate. (*Ante*, pp. 218-19, 459; 2 Th. Co. Lit. 579 & seq.; 2 Sugd. Powers (3rd Am. ed.), 6; Clive's Case, 6 Co. 180; Frazier v. Frazier, 2 Leigh, 642, 649.)

On the other hand, where the subject is certain, and the objects uncertain, a power of appointment is generally regarded as a trust, and in default of appointment the property goes by the disposition of the grantor or deviser in *equal shares* amongst the *class of persons*, from whom the appointor was empowered to make a selection. Thus where a subject is given by the testator to his wife for her life, with power to appoint it at her death, to and amongst his *children*, and she makes no appointment, the property is to be divided equally amongst the children, in pursuance of the trust supposed to be created by the will. (Harding v. Glyn, 1 Atk. 469; S. C. 2 Wh. & Tud. L. C. Part II., pp. 685, 687 & seq.; Pierson v. Garnett, 2 Bro. C. C. 45; Brown v. Higgs, 4 Ves. 708; S. C. 5 Ves. 495; S. C. 8 Ves. 561; Malin v. Keighley, 2 Ves. Sr. 333, 529; Parsons v. Baker, 18 Ves. 476; Dominick v. Sayre, 3 Sandf. (N. Y.), 559; Milhollen v. Rice, 13 W. Va. 564-5; Morris v. Owen, 2 Call, 520; Knight v. Yarrowborough, Gilm. 27; Mitchell v. Johnson, 6 Leigh, 461.)

## 2<sup>a</sup>. The Effect of the Execution of a Power.

The material observation to be made under this head is, that estates created by the execution of a power take effect in general as if *created by the original instrument*; and it will be remembered that upon this principle two of the devices for barring dower are made to depend, one wholly and the other in part. (2 Th. Co. Lit. 592, n. (B.); Doolittle v. Lewis, 7 T. R. 48; Jackson v. Davenport, 20 Johns. 551; *Ante*, p. 169.)

### 3<sup>d</sup>. Equitable Relief in Case of a Defective Execution of a Power.

Equity does not, in general, undertake to relieve against the *non-execution* of a power, unless it be in the nature of a *trust*; but against the *defective* execution of a power, it does relieve in the cases following, namely:

1<sup>st</sup>, Where there is a *valuable consideration*, in favor of a purchaser or creditor; or a meritorious consideration, in favor of a wife, or a legitimate child; but rarely in favor of others.

2<sup>d</sup>, Where there is any fraud, or surprise accompanied with fraud.

3<sup>d</sup>, Where the party was prevented by accident or disability from fully executing his power.

4<sup>th</sup>, Where the power is fairly executed, but by the wrong instrument, as by will instead of by deed, or without the required number of witnesses. (2 Th. Co. Lit. 593, n. (B.); 2 Sugd. Pow. 125; Tollet v. Tollet, 2 P. Wms. 489-'90; Sneed v. Sneed, 1 Ambl. 64; S. C. Cowp. 264. But see Williamson v. Beckham, 8 Leigh, 27, 23.) But where the power is required to be executed by *will*, it cannot, in general, be executed by *deed*, for that seems to be contrary to the intention of the power, in its creation, which was to reserve an entire control over its execution until the moment of the donee's death, an intention which would be defeated by any other instrument than a will. (Reid v. Shergold, 10 Ves. 380; Richards v. Chambers, 10 Ves. 586; Lee v. Muggeridge, 1 Ves. & B. 118; Scott v. Davis, 4 My. & Cr. (18 Eng. Ch.) 90; Williamson v. Beckham, 8 Leigh, 25-28; 2 Sugd. Powers, (3d Am. ed.) 128; Meth. Ep. Ch. v. Jaques, 3 Johns. Ch. (N. Y.) 114; Ewing v. Smith, 3 Desauss. (S. C.) 417.)

### 6<sup>p</sup>. Resulting Uses, and Uses by Implication:

Resulting uses and uses by implication are such as redound to the benefit of the *grantor* of the estate, either because they are not disposed of at all, or are not validly disposed of to any one else. Thus, if a bargainor bargains for valuable consideration to stand seised to the use of B, after *A's death*, the use during the life of A remains in the bargainor, and is denominated a *use by implication*. And so in England, if the fee-simple owner of lands enfeoffs A and his heirs to the use of Z *for life*, the use, as to the *inheritance*, is said to *result* to the feoffor. It seems that a use is styled a *use by implication* when it arises to the bargainor out of a bargain and sale, or a covenant to stand seised; and a *resulting use* when it proceeds from conveyances

operating with *transmutation of the possession*, and redounds to the feoffor or grantor. (1 Lom. Dig. 215, 217; 1 Spence's Eq. Jur. 488; *Ante*, p. 212.)

2<sup>m</sup>. Conveyances under the Virginia Statute of Uses; w. c.

1<sup>n</sup>. The Terms and Effect of the Virginia Statute of Uses.

The terms of the Virginia statute of uses fall far short of the comprehensiveness of those of 27 Hen. VIII., c. 10. The phraseology of our statute is inverted and somewhat involved, but would hardly seem to admit of doubts as to its meaning. It enacts that, "By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seised to the use, or deed operating by way of covenant to stand seised to the use, the possession of the bargainor, releasor, or covenantor, shall be deemed transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person *has in the use* as perfectly as if the bargainee, releasee, or person entitled to the use, had been enfeoffed *with livery of seisin* of the land intended to be conveyed by such deed or covenant." (V. C. 1873, c. 112, § 14; V. C. 1887, ch. 107, § 2426.)

It will be observed that the statute applies only to conveyances operating *without transmutation* of the possession, namely, to bargain and sale, and to covenant to stand seised; for although lease and release are mentioned, and deeds operating by way of covenant to stand seised, yet the latter, of course, constitutes no conveyance distinct from covenant to stand seised itself, and lease and release under the statute is merely a bargain and sale for a year, the release operating, at common law, by way of *enlargement*. It is also worthy of note, that the statute declares that the possession of the land shall be transferred to the *cestui que use*, for the *estate which he has in the use*, as perfectly as if he had been enfeoffed *with livery of seisin of the land*; the framer of the statute appearing in that clause of it to have contemplated nothing else but conveyances *in fee-simple*, or at all events of *freehold estates*. No such effect, however, has been imputed in practice to the language in question, which appears to have been understood simply as importing that the *bargainor*, etc., shall be *seised*, for else the land could not pass as if by *feoffment with livery*, and as to the bargainee's estate, as controlled by the provision that he shall have it for the *estate or interest which he has in the use*, and as indicating only the complete and unqualified character of the statutory transfer of the possession.

The learned author of Lomax's Digest, as has been elsewhere observed (*Ante*, p. 213), does, indeed, take a different view of the effect of the statute, insisting that



the covenant to stand seised alone operates under the statute of uses; that bargain and sale was designed to transfer the land to the bargainee, not through the medium of uses, but directly by the potency of the statute itself, as if by anticipation of the statute of grants; whilst lease and release operate at common law. (1 Lom. Dig. 220, 576; 2 Do. 184.) To this ingenious view may be opposed the consideration, that *bargain and sale* is a designation which, from the first introduction of uses, has been assigned exclusively to a transaction whereby, for valuable consideration, a use is raised; and in that sense was familiarly known in Virginia, and commonly used as a conveyance operating under the statute of uses; that technical expressions ought not to be wrested from their technical meaning, unless in conformity with manifest intent, which is here wanting; that lease and release, if understood to be the common law conveyance so called, required no aid from any statute to give it effect, whilst, if supposed to owe its effect to the doctrine of uses, its introduction into the statute, although not necessary, was natural; and lastly, that as covenant to stand seised is admitted to enure under the statute of uses, it seems a strange and illogical collocation to blend in the same sentence a provision relative to that and to two other conveyances, also used down to that time habitually and familiarly in connection with uses, when the two latter were not designed to operate in their accustomed manner, but one of them at least in a way then novel and without precedent. The legislature could hardly intend to introduce the new and revolutionary policy, that lands, as to the immediate freehold, should *lie in grant*, in terms so loose, and in a connection so remote.

This question, if it be a question, is not now likely to receive a direct solution, for any deed of conveyance incapable of taking effect under the statute of uses, will and must, it is supposed, operate *as a grant*. (*Ante* p. 817.)

2<sup>n</sup>. The Conveyances to which the Virginia Statute of Uses is Applicable.

We have seen that the Virginia statute of uses embraces those conveyances only which operate *without transmutation* of the possession, namely, bargain and sale, and covenant to stand seised; and that it extends not to uses declared upon conveyances operating *with transmutation* of possession. Hence, a feoffment to A, to the use of B, vests only an *equitable estate* or trust in B, which our statute does not execute; and so a devise by will to A, to the use of B, has only a like effect. (1 Lom. Dig. 228; Bass v. Scott, 2 Leigh, 356; Jones v. Tatum, 19 Grat. 733.)

By reference to pp. 215–216, it will be seen that there are three other cases where a use is held not to be executed by our statute of uses, but to remain still a *trust*, as prior to 27 Hen. VIII., c. 10. It will be remembered, that such unexecuted uses are termed *direct trusts*, and are with us as follows: (1), A use upon a use: (2), *Trusts*, such with us as before the statute 27 Hen. VIII., c. 40, would have been deemed *special trusts*, where the trustee is clothed with a *discretion*; (3), Uses declared not upon *seisin of a freehold*, but upon the *possession of a term for years*; and (4), Uses created by *any other conveyance* (in Virginia) than bargain and sale, and covenant to stand seised:

W. C.

### 1<sup>o</sup>. Conveyance in Virginia by Bargain and Sale.

The conveyance by bargain and sale is understood to exist under the Virginia statute of uses, essentially as under 27 Hen. VIII., c. 10, except that in all cases where it relates to an estate of inheritance, or of freehold, or for a term exceeding *five years*, it must with us be *by deed* (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413); and in like cases, in order to be good as against creditors, or purchasers for value and without notice, must be registered in the clerk's office of the court of the county or corporation where the land lies, and if it lies in several counties, etc., then in each. (V. C. 1873, ch. 114, §§ 5, 6; V. C. 1887, ch. 109, §§ 2465–2466.) Thus, the policy of a general registry, which was imperfectly conceived by 27 Hen. VIII., c. 16, has been with us carried into full and very beneficial effect: and so a notoriety has been established more universal and beneficent than that arising from *livery of seisin*.

And it must not be forgotten, that a conveyance (by deed) which is for any reason incapable of taking effect as a bargain and sale, covenant to stand seised, or lease and release, will yet in general operate effectually to transfer the land, as has been repeatedly remarked, under the statute of *grants*. (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417; *Rowletts v. Daniel*, 4 Munf. 473; *Watts v. Cole*, 2 Leigh, 662; *Gilb. Uses*, 251, n. (2).)

### 2<sup>o</sup>. Conveyance in Virginia by Covenant to Stand Seised.

The conveyance by covenant to stand seised exists under our statute, as under 27 Hen. VIII., c. 10; save only that, in order to be good as against creditors and purchasers for value and without notice, it must be registered, if it relate to estates of inheritance, or of freehold, or for a term exceeding five years. (V. C. 1873, ch. 114, §§ 5, 6; V. C. 1887, ch. 109, §§ 2465, 2466.) A *deed* is necessary in all cases, even though the interest be

less than five years, in order that the conveyance may operate as a covenant to stand seised.

3°. Conveyance in Virginia by *Lease and Release*.

To the conveyance by lease and release, under the Virginia statute of uses, the same principles and remarks are applicable as under 27 Hen. VIII., c. 10, except that with us, as against creditors and purchasers for value and without notice, there is a necessity for registry wherever the estate exceeds five years. (V. C. 1873, ch. 114, §§ 5, 6; V. C. 1887, ch. 109, §§ 2465, 2466); and except also, that it is declared by statute, that every deed of release of any estate or interest capable of passing by deeds of lease and release, shall be as effectual for the purposes therein expressed, without the execution of a lease, as if the same had been executed (V. C. 1873, ch. 112, § 15; V. C. 1887, ch. 107, § 2427); which is indeed but an inconsiderable enlargement of the pre-existing doctrine.

3<sup>n</sup>. The Circumstances Necessary to the Operation of the Virginia Statute of Uses.

The same circumstances are necessary to the operation of the Virginia statute as we have seen are required to concur for the operation of 27 Hen. VIII., c. 10, namely, (1), A person *seised* to the use of *another* person; (2), A *cestui que use in esse*; and (3), A use *in esse*, in possession, remainder, or reversion; and the observations there made need not be repeated. See *Ante*, pp. 811-'12 & seq. It will be observed also, that under the Virginia statutes, as in England since the enactment of the statute of grants (8 & 9 Vict. c. 106), if for want of concurrence of these required circumstances, the deed cannot be effectual under the statute of uses, it will generally avail as a *grant*. (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417; *Ante*, p. 825.)

4<sup>n</sup>. The Modern Doctrine of Uses Under the Virginia Statute of Uses.

The doctrine of uses under the Virginia statute closely resembles that prevailing under 27 Hen. VIII., c. 10, at least as to conveyances operating without actual transmutation of the possession. And where diversities exist, they were noted in connection with the discussion of the English statute. See *Ante*, pp. 811 & seq.

2<sup>l</sup>. Conveyances under the Statute of Grants.

The statute of grants (adopted from 8 & 9 Vict. c. 106), revolutionizes the common law theory of conveyances of *freehold* estates in lands, by declaring that all real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie *in grant*, as well as *in livery*. (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417.)

This statute, as has been so often suggested, will doubtless give effect to many conveyances which previously would either have been void, or at all events would not have passed the legal estate. Thus, a deed mentioning no valuable consideration, and sustained by no consideration of natural love and affection, cannot operate to pass the title under the statute of uses; nor, if not accompanied by livery of seisin, can it operate as a feoffment, so that, prior to the statute of grants, its sole effect, if any, would have been as a *contract to convey*, which a court of equity would enforce specifically. But such a deed under the statute of grants operates as a grant (no consideration being required), and *passes the legal title*. Again, a deed of bargain and sale to a *future contingent use*, may be void even to create a use, for want of a valuable consideration proceeding from the intended contingent beneficiary; and if so, the statute of uses cannot, of course, transfer the possession; but *as a grant*, it is supposed that it must have full effect, according to its terms. And so, many conveyances intended to operate under the statute of uses, which, as we have seen, for want of some of the needful requisites, cannot take effect, will accomplish all that is designed, *as grants*. (Rowletts v. Daniel, 4 Munf. 473; Watts v. Cole, 2 Leigh, 662; Gilb. Uses, 251, n. (2).)

No reason is perceived why there may not be springing and shifting limitations taking effect under the statute of grants, as under the statute of wills, or of uses, subject, of course, to the same qualification, namely, that the future limitations shall take effect necessarily, if at all, within a life or lives in being, and ten months and twenty-one years thereafter.

It is supposed (with diffidence) that under the statute of grants, interests may be revoked, if expressly made revocable, and that powers of appointment may be created and executed, in close analogy to such transactions under the statute of uses.

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## CHAPTER XXII.

### ASSURANCES WHICH DO NOT CONVEY, BUT OPERATE TO CHARGE AND DISCHARGE LANDS.

#### 3<sup>k</sup>. Assurances which do not Convey, but Operate to Charge and to Discharge Lands.

Of this nature are, (1), Obligations; (2), Recognizances; and (3), Defeasances;

W. C.

#### 1<sup>l</sup>. Obligations.

Let us note, (1), The nature and several kinds of obliga-



tions; (2), Parties to obligations, obligors and obligees; (3), Proper words and ceremonies for bonds or obligations; (4), Effect of bonds, as to property of obligor; (5), Assignment of bonds; and (6), The doctrine of subrogation and contribution, in respect to sureties in bonds;

W. C.

### 1<sup>m</sup>. The Nature and Several Kinds of Obligations.

An obligation or bond is a *deed* whereby the obligor (for so the party who *makes the promise* is styled), obliges himself, his heirs, executors and administrators, to pay money to another (called the *obligee*), at a day appointed. If this be all, the bond is called a *single bill*, *simplex obligatio*; but if the obligor bind himself to pay the sum named in the penalty of a larger sum, it is styled a *penal bill*, or penal bond; and where there is underwritten a *condition* that the bond shall be void if a particular thing be done (*e. g.* to perform covenants or stipulations as to collateral acts, or to pay money), it is known as a bond *with condition*; a bond with *condition to pay money*, if that be the tenor of the condition; or with *collateral condition*, if the condition be to do a collateral thing,—as to discharge the duties of a sheriff faithfully, to convey land, to be a faithful guardian or executor, etc. A penal bill, however, is to all practical intents the same as a bond with *condition to pay money*, and may be treated along with it. The penalty, in penal bills and bonds with condition, may be what the parties please, but in bonds designed to secure the payment of money, it is usually double the sum to be paid; and if no more than the sum, the bond is to be regarded as a *single bill*. (Fleming v. Toler, 7 Grat. 310.) It is usual in bonds with condition to designate the part which contains the promise to pay, the *obligation*, and the other part, which usually, but not of necessity, is *underwritten*, the *condition*. (2 Bl. Com. 340; Bac. Abr. Obligation.)

A bond, whether single, penal or conditional, is also called a *specialty*, the debt being therein specified in writing, and a writing of *special dignity*. And the solemnity of the seal renders it a security of a higher nature than those to which no seal is attached, so as to impart to a contract of specialty peculiar attributes and advantages, which are very judiciously summed up by Mr. Chitty. (2 Bl. Com. 465, n. (16). See 3 Min. Insts. 136–142.)

Besides the several kinds of bonds, according to their nature as single bills, penal bills, and bonds with condition, bonds are also, when there is more than one obligor, joint, or several, or they are joint *and* several,—*joint*, when the parties are bound jointly, as “*we promise*,” in which case they must all be sued together, at least all who are alive; *several*, when the parties are bound severally and not

jointly, as “*we severally promise*,” when they can be sued no otherwise than severally; and *joint and several*, when the parties are bound jointly and severally, as “*we or either of us promise*,” when they may all be joined in the suit, or each may be sued separately (though at the *same time*, if the plaintiff thinks fit), but not an intermediate number, supposing all to be living. (Bac. Abr. Oblig. (D.) 4; Leftwich v. Berkeley, 1 H. & M. 69; Saunders v. Wood, 1 Munf. 406; Newman v. Graham, 3 Munf. 187.) But *it is said*, that one cannot be bound to several persons severally, so that a bond to A and B for \$200, \$100 to be paid to A, and \$100 to be paid to B, is void, as to the *solvendum* (Bac. Abr. Oblig. (D.) 3); a proposition which seems to be too unagreeable to reason to be sound. See Carthrae v. Brown, 3 Leigh, 98.

If one of several joint-obligors dies, the obligation at common law survives against the rest, and the decedent's estate is discharged even in equity, unless he were the principal debtor, and the survivors his sureties. (Bac. Abr. Oblig. (D.) 4; Elliott v. Lyell, 3 Call. 268; Chandler v. Neale, 2 H. & M. 124; Atwell v. Milton, 4 Do. 253; Atwell v. Towles, 1 Munf. 181.) In Virginia it is otherwise. Whether the parties are bound jointly in a bond or promissory note, or liable jointly as partners, the personal representative of the decedent is declared to be as liable as if the parties had been bound severally, as well as jointly (V. C. 1873, ch. 141, § 13; V. C. 1887, ch. 134, § 2465); but in no case can the representative of a decedent be sued jointly *in a court of law* with the survivors, for he must be charged *de bonis testatoris*; whilst they are charged *de bonis propriis*.

It may be expedient here to observe, that by statute in Virginia “*no suit shall abate (i. e., shall finally abate)*, as to a party sued jointly with another, who shall die during the pendency of such suit, but in all cases when such suit would have abated before the passage of this act, the same shall be revived against the personal representative of the decedent, and proceed thenceforward as a separate action, against such personal representative, as though such decedent had been a *sole defendant*.” (V. C. 1887, ch. 161, § 3306; 4 Min. Insts. 794.)

It is worth while to observe, that where the promise is to pay twenty pounds, the promisor cannot at the *time and place appointed* pay a lesser sum *in satisfaction* of the whole, because it is apparent that a lesser sum of money cannot under such circumstances be a *satisfaction* of a greater. But if the lesser sum be paid before the day, or at another place than that stipulated, and the creditor receive it in satisfaction of the whole, it is a satisfaction accordingly. (2 Th. Co. Lit. 67; Pimmel's Case, 5 Co. 117 a; Cumber v.

Wane, 1 Stor. 426; Fitch v. Sutton, 5 East. 230; Harrison v. Close, 2 Johns. (N. Y.), 450.) On the other hand, whilst such a part-payment can be *no satisfaction* of the whole demand, it is competent to the creditor to *release* the part not paid, and so discharge the debtor. But the release, in order to be valid, must be founded upon a *valuable consideration*, either actual, or to be implied from its being *under seal*, and if the obligation be under seal, the release must be of as high a nature, that is, under seal too. (2 Th. Co. Lit. 67; Bac. Abr. Release, (A.); Crawford v. Millspaugh, 13 Johns. (N. Y.) 87; Jackson v. Stackhouse, 1 Cow. (N. Y.) 122; Benjamin v. McConmill, 4 Gilh. (Ill.) 536; [S. C. 46 Am. Dec. 479].)

But this is now done away with by the Code of 1887, which enacts that "part-performance of an obligation, promise, or undertaking, either before or after a breach thereof, when *expressly* accepted by the creditor in satisfaction, shall extinguish the obligation." (V. C. 1887, ch. 134, § 2858.)

At common law a release to one of several joint obligors, whether it be express, or arise from an implication of law, operates to *release all*; for the parties can be made liable no otherwise than as they contracted to be; nor is any reservation by the obligee of his recourse against the other obligors of any avail, being *res inter alios acta*. (Bac. Abr. Oblig. (D.) 4; Blow v. Maynard, 2 Leigh, 29; Wright's Adm'r v. Stockton, 5 Leigh, 153.) When it is desired to relieve one of the obligors, without discharging the rest, the object may be effected by a covenant *never to sue* the party in question, which would not, indeed, release him, nor prevent his being sued, but would oblige the obligee to indemnify him. (Bac. Abr. Release, (A.); Garnett v. Macon, 6 Call, 308; S. C. 2 Brock. 125.) But this very reasonable and logical doctrine, that a release to one of several joint promisors discharges all, unless assented to by all, has been altered in Virginia by statute. A creditor may *compound or compromise* with any joint-contractor or co-obligor, and release him from all liability on his contract, or obligation, without impairing the contract or obligation as to the other joint contractors or co-obligors. (V. C. 1873, ch. 141, § 14; V. C. 1887, ch. 134, § 2856.) This provision does not in terms apply to releases *by operation of law*, and is expressly excluded in the case of one of several sureties giving notice in writing to the creditor, to sue on the instrument by which they and the principal are bound, where not only is the surety giving the notice discharged, but all the co-sureties likewise. It is provided, however, that the conditions, rights, and remedies against the principal debtor shall remain unimpaired thereby. (V. C. 1873, ch. 143, § 5; V. C. 1887, ch. 136, § 2891; Wright v. Stockton, 5 Leigh, 153.)

Where the condition of a bond is *impossible at the time of making it*, or is uncertain or insensible, the condition is void, and the bond is single and absolute; for it is the folly of the obligor to enter into such an obligation. If the condition be to do a thing illegal, at least if it be *malum in se*, the obligation itself is void, the law being concerned to discourage any violation of its own policy. (2 Bl. Com. 340; 2 Th. Co. Lit. 22 & seq.) It is, however, a distinction worth noting, that if the illegal thing which the condition requires the party to do were not in itself wrong, but something which the law had, by forbidding, rendered *impossible*, the bond would not be void, but as in the case of other impossible conditions, would be absolute. Thus, if a party should bind himself in a penalty of \$10,000, with condition to be void if he created a *perpetuity* in certain lands, or settled them *in tail*, it being legally impossible to do either, but it being no offence to attempt it, he cannot discharge himself by performing the condition, and the law is not concerned to cancel his engagement, because the interests of society are not injured by any futile effort which may be made to accomplish the result stipulated. (1 Tuck. Com. (B. II.), 266 n. (A.); Noyes v. Cooper, 5 Leigh, 186; Dacosta v. Davis, 1 Bos. & Pul. 243.) Where the condition, having been possible at the time of making it, becomes *afterwards* impossible, by the act of God, of the law, or of the obligee himself, the penalty of the obligation is saved; for no prudence or foresight on the part of the obligor could guard against those contingencies; and as to the last, the obligee is besides estopped to take advantage of his own wrong. (2 Bl. Com. 341; 2 Th. Co. Lit. 22 & seq.) So, if the *consideration* of the bond be illegal, even in *part* (supposing it to be entire), the bond is voidable at the instance of the obligor; as for example, if it be in whole or in part for money lost in gaming, or upon a usurious agreement, or where it originates in any transaction contrary to the prohibition, or to the policy of the law. (Bac. Abr. Oblig. (E.) and (F.); 2 Rob. Pr. (2d ed.) 132; Collins v. Blantern (2 Wils. 341), 1 Smith's L. C. 362 & seq.; *Lute*, p. 281 & seq.) But where the condition or stipulation consists of several *distinct* parts, some of which are lawful and others not, the bond is good as to so much as is not illegal, unless the illegality be created by statute, in which case (as in the instances of gaming and usury), the statute by its terms usually wholly avoids it. (2 Com. Dig. 156; Kemper v. Kemper, 3 Rand. 12.) But where a single promise is induced by several considerations, it is void if *any one* of them be illegal, whether it be a statutory or common law illegality. (Collins v. Blantern, 2 Wils. 341; 1 Smith's L. C. 353, 362, 364.)



On the forfeiture of a bond, that is, on its becoming single and absolute by the failure to observe the condition, the whole penalty, at common law, becomes a debt due, and may be recovered at law; and that measure of justice was actually administered until, in the time of James I., or more probably of his successor, the court of equity interposed, and compelled the plaintiff to accept, in case of bonds conditioned *to pay money*, the principal sum due, with interest, and in bonds with *collateral condition*, the damages which should be assessed for the breach. (1 Spence Eq. Jurisd. 629-30.) And as Blackstone says, the like practice having gained some footing in the courts of law, the statute 8 & 9, William III., c. 11 (A. D. 1697), in the same spirit of equity enacted, as to bonds with collateral condition, and 4 & 5 Anne, c. 16 (A. D. 1707), as to bonds conditioned to pay money, that in the court of law, although suit should be brought, and judgment given as before for the penalty, yet it should be accompanied by a provision in each case, that the judgment should be discharged by the payment of the damages assessed in one instance, and the principal sum and interest in the other. (2 Bl. Com. 341; Bac. Abr. Oblig'n (F.).) And these statutes are in substance found with us. (V. C. 1873, ch. 173, §§ 16, 17; V. C. 1887, ch. 166, §§ 3893, 3894.)

As, at common law, the penalty becomes the debt upon default, so by that law the penalty usually limits the recovery, as it still does in respect to the surety. Equity, however, upon any application by the *obligor for its aid* (because he who asks equity must do equity), will compel the payment of principal and interest, though the aggregate exceed the penalty. (Bac. Abr. Oblig. (A.).) In Virginia, the courts of law habitually, in bonds for the payment of money, allow interest to be recovered in full, although together with the principal it may exceed the penalty, the excess being recovered as damages. (Tenant v. Gray, 5 Munf. 494; Baker v. Morris, 10 Leigh, 285; Tazewell v. Saunders, 13 Grat. 354.)

## 2<sup>m</sup>. Parties to Obligations or Bonds.—Obligors and Obligees.

The maker of a bond is called, as we have seen, *obligor*, and the person in whose favor it is made, *obligee*, and the instrument itself is sometimes described as a *writing obligatory*. The same principles determine who are capable of being respectively obligor and obligee, as we have already traced out in respect to deeds generally. Intelligence to understand the transaction, and freedom of will to enter into it or not, are as indispensable in this as in other contracts; and a like distinction exists between the disabilities of the obligor and of the obligee, as we have seen in the case of

grants, namely, that as the bond is supposed to be for the *benefit* of the obligee, it is presumed, *prima facie*, that the benefit is accepted, although it is competent to the party or his representatives to disclaim the supposed benefit, when the disability ceases, and so to vacate the obligation. (Bac. Abr. Oblig'n, (D.), 1, 2; *Ante*, p. 658.)

The student should take notice that if money secured by *mortgage* (and no reason is perceived why the same proposition is not true also, if it be secured by *bonds*), be payable to the *obligee* by the terms of the instrument, or to the *obligee and his executors*, and the obligee dies, the money must be paid to his *personal representatives*, in regard that it may have come out of the obligee's personal estate; but if it be payable *expressly* to the obligee *or his heirs*, it is, after the obligee's death, to be paid *to the heirs* accordingly; and if it be payable, in *express terms*, to the *heirs or executors* of the obligee disjunctively, the debtor may *pay it to either*, provided he does it on the *very day* the money is due; but if he does not pay it on that day, his election is gone, and he must pay it to the personal representative. (2 Th. Co. Lit. 53-56, and n. (L. 1); Thornborough v. Baker, 1 Ch. Cas. 283; S. C. 3 Swanst. 628; Tabor v. Tabor, Id. 636; *Ante*, p. 382.)

At common law, no one can, in general, assert in a *legal* forum any title or interest arising under a *sealed instrument* to which he is no party. An *equitable* interest is all he can derive from such an instrument, and that, of course, independently of statute, is protected and vindicated in a court of equity alone. Thus, if one promise J. S. by bond to pay \$500 for the benefit of A, A has only a title in equity, and cannot sue at law. (Ross v. Milne & Wife, 12 Leigh, 204.) In Virginia, this doctrine is now otherwise by statute, which enacts that, if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in *his own name* any action thereon which he might if it had been made *with him only*, and the consideration had moved from him. (V. C. 1873, ch. 112, § 2; V. C. 1887, ch. 107, § 2415.)

### 3<sup>m</sup>. Proper Words and Ceremonies for Bonds.

There are three requisites for an obligation, besides competent parties, a legal subject-matter and sufficient words, namely, (1), Writing on paper or parchment; (2), Sealing; (3), Delivery. *Signing* is not at common law necessary, nor is there any statute that requires it; but it would be hazardous to omit it. (Bac. Abr. Oblig. (C.); 2 Lom. Dig. 153-4.)

No particular form of words for a bond, or for the condition of one, is prescribed. Any language manifesting the

intention of the obligor to bind himself will suffice. Bad grammar and bad spelling do not vitiate the obligation, provided it be intelligible and certain. But if it be uncertain or insensible, the bond is void; or rather the proposition should be, that if it be the penal part which is thus uncertain and insensible, that part is void; and if it be the condition which is insensible and uncertain, then *that* is void. (Bac. Abr. Oblig. (B.); 1 Tuck. Com. (B. I.), 275.) The general principle appears to be, that although there be no words of express and direct promise, yet an acknowledgment of indebtedness may amount to such promise if there is nothing to show that the acknowledgment was made with a different view. Thus, an acknowledgment contained in a writing that appears to have been made for no other purpose but to express the acknowledgment, as "I have borrowed," "I owe," etc., will be construed to amount to a promise, whilst similar language contained in a mortgage or deed of trust, or other instrument made *diverso intuitu*, may not, and generally will not, be allowed the effect of an *express promise under seal*, although, doubtless, such an acknowledgment is always a sufficient basis upon which to raise an *implied promise*. (Bac. Abr. Oblig. (B.); Id. Debt (A.); *Ante*, pp. 333-4, 362 '3; Fonbl. Eq. B. III., c. i., § 12; Drummond's Adm'r v. Richards, 2 Muuf. 337; 1 Dyer, 22 b; Baker v. Fawcett, referred to by Tucker, P., in Powell v. White, 11 Leigh, 318; Newby v. Forsyth, 3 Grat. 308; 2 Rob. Pr. (2d ed.) 40; Jackson v. Sackett, 7 Wend. (N. Y.) 102; Lytle's Ex'or v. Pope, 11 B. Monr. 311; Courtney v. Taylor, 6 Man. & Gr. (46 E. C. L.) 851; James v. Cochrane, 7 W. H. & G. 177; Wolf v. Violett's Adm'r. 78 Va. 60.)



Any memorandum or endorsement made at the time when the bond is executed, is considered part thereof; or if it be for the obligor's benefit, and signed by the obligee, or probably if assented to by him, though not signed, it will be taken, it is said, to be part of the obligation, notwithstanding it be without date; whilst if signed by both parties, it is to be so regarded, although made afterwards. (Bac. Abr. Oblig. (B.); 2 Lom. Dig. 154; Shermer v. Beale, 1 Wash. 11; Gordon v. Frazier, 2 Wash. 180.)

If the names of certain obligors be inserted in the body of the bond, and others who are not named seal it also, it constitutes them obligors as much as if they had been named. (Bac. Abr. Oblig. (C.); Beery v. Howman, 8 Grat. 48; Luster v. Middlecoff, Id. 54; Reynolds v. Gore, 4 Leigh, 276; Crawford v. Jarrett, 2 Leigh, 630.)

Nor is the position of the obligor's name material, so that it can be seen to be intended to authenticate the whole instrument. Hence, the obligation is not impaired by the signature being affixed between the penal part and the con-

dition. (Bac. Abr. Oblig. (C.); Reed v. Drake, 7 Wend. 345; Argenbright v. Campbell, 3 H. & M. 144.)

As to the *seal*, which is an indispensable element in a bond, we have seen that, at common law, a seal is an impression on wax, or some other tenacious material, or possibly by later resolutions, upon the paper or parchment, (*Ante*, p. 727-'8,) and need not be acknowledged in the body of the instrument (Bac. Abr. Oblig. (C.); Goddard's Case, 2 Co. 5 a); and that any number of persons may adopt one impression, each as his own seal. (Bac. Abr. Oblig. (C.); Goddard's Case, 2 Co. 5; Ld. Lovelace's Case, Wm. Jones, 268; Ball v. Dunsterville, 4 T. R. 313; Cooch v. Goodman, 2 Ad. & El. N. S. (42 E. C. L.) 598; Bull v. Taylor, 1 Car. & P. (12 E. C. L.) 417; Mackey v. Bloodgood, 9 Johns. (N. Y.) 285; Warren v. Lynch, 5 Johns. (N. Y.) 244; Ludlow v. Simons, 2 Cal. Cas. 1; Bohannon v. Lewis, 3 Monroe (Ky.) 376-'7; Bowman v. Robb, 6 Barr. (Pa.) 302.) In Virginia, it is declared by statute, that any writing to which a scroll is affixed *by way of seal*, shall have the same effect as if actually sealed (V. C. 1873, ch. 140, § 2; V. C. 1887, ch. 133, § 2841); but in order to prove that the scroll is affixed *by way of seal*, the scroll in case of a bond, or any other instrument, not *by statute* required to be under seal, must be acknowledged *as a seal* in the body of the instrument. (3 Min. Insts. 318; Clegg v. Lemessurier, 15 Grat. 105.) It would seem that *one scroll* acknowledged in the body of the instrument, as the seal of all the parties, would suffice for that purpose, *a fortiori*, by analogy to the common law; for in an impression there may be a distinctive character, but there can be none in a scroll. Accordingly, a great preponderance of American cases so decide; of which it must suffice to cite Bohannon v. Lewis, 3 Monroe, (Ky.) 377; Bowman v. Robb, 6 Barr. (Pa.) 302; Yarbrough v. Monday, 2 Dev. (N. C.) 493; S. C. 3 Dev. 420; Pequawkett Br. v. Mathes, 7 N. H. 230; S. C. 26 Am. Dec. 737; Hatch v. Crawford, 2 Port. (Ala.) 54; Davis v. Burton, 3 Scam. (Ills.) 41; S. C. 36 Am. Dec. 512; McLean v. Wilson, 3 Scam. 51; and Witter v. McNeil, Id. 436. But see Rankin v. Roler, 8 Grat. 63. See *Ante*, p. 728-'9.

What constitutes a *scroll* within the statute, is not clearly ascertained. A circle of ink,  with or without the word *seal* written in it, is certainly sufficient, and so are *printed stamps*, . (Buckner v. Mackay, 2 Leigh, 489.) And so also is the word "seal," affixed to the signature of the maker, supposing it to be acknowledged in the body of the writing as his seal. (Lewis v. Overby, 28 Grat. 627.)

The doctrine as to what constitutes the seal of a *corporation* in Virginia is now, by the Code of 1887, made quite clear.



Let the student read the exposition of the point made in 1 Min. Insts. 593, and remember that the conclusion there arrived at, prior to the Code of 1887, was that a *private* corporation was neither within the statute allowing a scroll to be affixed by way of seal (V. C. 1873, ch. 140, § 2), which is supposed to apply to *natural persons* alone (V. C. 1873, ch. 15, § 9), nor within the statute allowing the seal of *any court or public office* to include the impression of the official seal *upon the paper or parchment alone*, as well as *on wax, etc.* (V. C. 1873, ch. 15, § 9, (cl. 12);) and that consequently the seal of such a corporation could still be nothing else than as at common law, *on wax, wafer or some other tenacious material, or possibly, according to recent adjudications, upon the paper or parchment itself.* (*Ante*, pp. 661, 727; 1 Sugd. Pow. (3d Am. ed.) 282, 283; Ang. & A. Corp. § 218, and n. (a); Reg. v. St. Paul's, 7 Q. B. (53 E. C. L.) 238-9; Follett v. Rose, 3 McLean, C. C. 332; Curtis v. Leavitt, 15 N. Y. 9; Bates v. Bost. & N. Y. Cent. R. R. Co. 10 Allen, (Mass.) 251; Haven v. Grand Junct. R. R. Co. 12 Allen, 337; Pillow v. Roberts, 13 How. 473-4.) But as already remarked, the Code of 1887, taking effect May 1, 1888, removes all doubt by enacting that the "impression of a corporate or an official seal on paper or parchment alone, shall be as valid as if made on wax or other adhesive substance." (V. C. 1887, ch. 133, § 2841.)

The authority to execute a bond must be of equal dignity with the bond itself, that is, under seal. (Com. Dig. Attorn. (C. 1) and (C. 5); Shepp. Touchst. 57; 2 Rob. Pr. (2d ed.) 14 & seq.; U. S. v. Nelson, 2 Brock. 64; Preston v. Hull, 23 Grat. 616-17; Penn v. Hamlet, 27 Grat. 342; Harrison v. Jackson, 7 T. R. 209; Elliott v. Davis, 2 Bos. & Pul. 338; Berkley v. Hardy, 5 B. & Cr. (14 E. C. L.) 355. But see Butler v. U. States, 21 Wal. 273.) Hence, one partner, by executing a bond in the name of the firm, even for a firm debt, does not thereby bind the other partners, unless he chance to have authority under seal from them to execute such instruments, or unless they were standing by present, and sanctioned it. But it is a good bond of the partner executing it, who is as much bound by it as if he had made it in his own proper name. (*Ante*, pp. 729 '30; Bac. Abr. Oblig. (D.) 4; Ball v. Dunsterville, 4 T. R. 313; Cooch v. Goodman, 2 Ad. & El. N. S. (42 E. C. L.) 598; Bull v. Taylor, 1 Carr. & P. (12 E. C. L.) 417; Sale v. Dishman, 3 Leigh, 548; McCullough v. Sommerville, 8 Leigh, 415; Davis v. Davis, 2 Grat. 363; Niday v. Harvey, 9 Grat. 454.) And such a bond made thus by a partner for a pre-existing partnership debt, *merges the debt* in the bond in a court of law. In a court of equity, however, such merger is not final; but upon the signer of the bond becoming insolvent,

supposing the bond not to have been taken in *satisfaction* of the demand, which would be negatived if it were in the *firm name*, that court will charge it against the other members of the partnership. (Sale v. Dishman, 3 Leigh, 551, 553, 555; Niday v. Harvey, 9 Grat. 454; McCullough v. Sommerville, 8 Leigh, 415; Weaver v. Tapscott, 9 Leigh, 426, 430, 432.)

*Delivery*, which is another essential element in a bond, as it is in every other *deed*, has been previously explained. See *Ante*, pp. 739-40 & seq.

#### 4<sup>m</sup>. Effect of Obligation as to Property of Obligor.

When an obligation is forfeited by the non-performance of the condition, it is never of itself, and by its inherent force, a charge upon the property, real or personal, of the obligor, *in his life-time*; although, like any other contract, it may, of course, be the means, through a judgment, or through a judgment and execution, of creating such a charge. But when the obligor dies, a bond, like any other contract, is so far a direct charge upon his *personal property* in the hands of his executor or administrator (whether he be named or not), that if the property, as far as it will go, be not applied to pay it, in the order which the law prescribes, the personal representative is liable upon his official bond therefor. The *lands* of the deceased obligor in the hands of his heir (but not in the hands of a *bona fide* purchaser for value from the heir (2 Th. Co. Lit. 567 '8, n. (S.)), are, at common law, more specifically charged, as by a sort of lien, provided that the bond *expressly names and binds the heir*, but not otherwise. And an action in such case may be maintained against the heir upon his ancestor's bond, whereby to subject whatever lands descended to him from that ancestor; and if he has sold them to a *bona fide* purchaser, to subject the heir personally for their value. When, after the enactment of the statute of wills (32 Hen. VIII., c. 1, explained by 34 Hen. VIII., c. 5), it was perceived that obligees were often defeated of their recourse upon the obligor's lands, after his death, in consequence of his *devising* the same, instead of suffering them to pass *by descent* to his heirs (devisees not being chargeable, as heirs were), there was enacted the statute 3 & 4 Wm. & M. c. 14 (A. D. 1693), known as the statute of *fraudulent devises*, by which, and by subsequent statutes of the same character, the obligor's lands in the hands of his devisees were subjected whenever they might have been subjected in the hands of the heir. (2 Bl. Com. 340, and n. (62); Id. 378 and n. (15); Bac. Abr. Heir. &c. (F.).)

In Virginia we have made a sweeping reform of the common law doctrine upon this subject, *all real estate* of a decedent being made liable for the payment of *all his debts, and*

*of all lawful demands against his estate*, in the order in which personal property is directed to be applied; but not so as to affect any lien by judgment or otherwise acquired in decedent's life-time. (V. C. 1873, ch. 127, §§ 3, 7; V. C. 1887, ch. 120, §§ 2665, 2666 to 2670.) With us, therefore, it is quite immaterial whether the demand arise from a sealed instrument or not, or whether or not it expressly binds the heirs. A testator, however, may here prefer certain debts to others, by specifically charging them by will on his lands, or by devising his lands subject to such debts. The lands, however, are never to be subjected by *action at law*, as formerly. If the real assets are in the hands of the decedent's personal representative (as they can only be by virtue of *his will* directing the sale of his lands), they may be administered in the court of *probate*, or in any case in a *court of equity*. And if the heir or devisee has sold to a *bona fide* purchaser for value, whilst he is himself liable for as much as the lands are worth, the purchaser is exonerated. (V. C. 1873, ch. 127, §§ 4 to 6; V. C. 1887, ch. 120, §§ 2667 to 2670.)

It has long been established that, at common law, after the lapse of twenty years from the time when it became payable, a bond should be *presumed to have been paid*; so that, in the absence of any proof to repel the presumption, the lapse of that time would sustain a plea of "payment at the day." It is, however, only a *presumption*, which may be disproved by any satisfactory evidence that it is not true, as, (1), By *express* acknowledgment of the obligor within the twenty years that the debt was still due; (2), By his *implied* acknowledgment, derived from his having within that time paid interest on it, or, it is said, a part of the principal, which may be proved by extrinsic evidence, or by an endorsement of a credit for the payment made on the bond by the obligee himself, while the obligation was in full force, and *before the presumption attached*; (3), By showing the debtor's *inability to pay* during the period; (4), By the long continued absence abroad of the debtor, or, it is said, of the creditor; (5), By showing that the collection of the debt had been long suspended by injunction, or by a state of war; and (6), By the near relationship of the parties. (Bac. Abr. Oblig. (F.); 1 Th. Co. Lit. 13, n. (E.); 1 Rob. Pr. (2d ed.) 461; Wells v. Washington's Adm'r, 6 Munf. 532; Dabney v. Dabney, 2 Rob. 622; Mulliday v. Machir, 4 Grat. 1; Perkins v. Perkins, 9 Grat. 649; Hutsonpiller v. Stover, 12 Grat. 570; Erskine v. North, 14 Grat. 60.) It has only been within a comparatively recent period that the legislature has imposed the peremptory bar of the statute of limitations upon any instrument *under seal*. Beginning in 1826 and 1828, with indemnifying bonds, and

bonds of public officers, and of fiduciaries, such as executors, guardians, etc. (which are now limited by ten years), a limitation, taking effect 1st July, 1850, was afterwards applied to "any other contract by writing under seal." In this last case the limitation was twenty years from the time when the right of action accrued; and by the Code of 1887 it is shortened to ten years; but as no limitation had previously existed in such cases, there is a proviso to the effect that actions which had then accrued on bonds may be prosecuted within the same time as if they had accrued according to the Code of 1850, 2d July, 1850; and according to the Code of 1888, May 1st, 1888; (V. C. 1873, ch. 146, §§ 8, 22; V. C. 1887, ch. 139, §§ 2920, 2938; 4 Min. Insts. 515, 516.) But let it be observed, that the peremptory bar imposed by the statute in no wise impairs the previous common law presumption of payment from the lapse of time, if the statute be not invoked. (1 Rob. Pr. (2d. ed.) 461; Ross v. Darby, 4 Munf. 428; Wells v. Washington, 6 Munf. 532; Tomlin v. Howe, Gilh. 1; Duffield v. Creed, 5 Esp. 52; Hunt v. Bridgham, 2 Pick. (Mass.) 581; Booker v. Booker, 29 Grat. 608-9.)

#### 5<sup>m</sup>. Assignment of Bonds.

By the common law, originally, no bond, nor any other *chose in action* was assignable; and the assignment, if made, had no effect, either at law or in equity. Afterwards, courts of equity thought fit to protect assignments made in satisfaction of a *precedent debt*, but not those made without consideration, or for a consideration then paid, because it was thought to allow assignments of this latter character would lead to maintenance and the stirring up of strifes. The courts of law adopted this distinction so far as to recognize certain classes of assignments as good in equity; and when, at a later period, equity respected and maintained all assignments for valuable consideration, the law courts still followed its example; and for a long time those courts have protected the assignee suing in the assignor's name to the extent of not permitting the latter to release the demand, or to dismiss, or in any wise to obstruct the suit. (Garland v. Richeson, 4 Rand. 266.) Since 1705, the statutes of Virginia have permitted the assignment of bonds and bills for the *payment of money*, and have allowed suits to be brought thereon in the *name of the assignee*. And at present the statute declares that the assignee of any bond, note, or writing not negotiable, may maintain thereupon, in his own name, any action which the original obligee or payee might have brought, but shall allow all just *discounts*, not only against himself, but against the first or any intermediate assignor before the defendant had notice of the assignment. (V. C. 1873, ch. 141, § 17; V. C. 1887, ch. 134, § 2860.) But



a remote assignor shall have the benefit of the same defence as if the suit had been instituted by his immediate assignee. (V. C. 1887, ch. 134, § 2861.) Ever since the enactment of this statute, it has been held that the assignee takes the security subject to all the *equities* (whether coming within the term *discounts* or not), to which it was subject in the hands of the obligee. (Norton v. Rose, 2 Wash. 233; Pickett v. Morriss, Id. 255; Stockton v. Cooke, 3 Mumf. 68; Broadus v. Rosson, 3 Leigh, 12; Moore v. Holcomb, 3 Leigh, 87.) And this shows, what is the acknowledged doctrine, that the statute does not confer on the assignee a *legal title*, as the transfer of a negotiable security does, but only superadds to his equitable title the extraordinary privilege of asserting it *in his own name* in a court of law; so that suit may still be brought, as it often is, in the name of the obligee for the assignee's benefit. (Garland v. Richeson, 4 Rand. 266.) It would follow, also, that the assignee might still prosecute his suit in a court of equity against the obligor, upon this equitable title; for equity never voluntarily relinquishes a jurisdiction which it has once acquired. Winn v. Bowles, 6 Mumf. 23; Moseley v. Boush, 4 Rand. 392; Colvin v. Emerson, 10 Leigh, 663.) But by statute the jurisdiction of equity is expressly excluded, unless it appear that the assignee had not an adequate remedy at law. (V. C. 1873, ch. 141, § 19; V. C. 1887, ch. 134, § 2862.)

6<sup>m</sup>. The Doctrine of Subrogation and contribution, in Respect of Sureties in Bonds.

The doctrine touching the *subrogation* (or substitution) of sureties to the liens, securities and rights of the creditor as against the principal debtor; and touching the *contribution* which sureties may generally enforce amongst themselves, so as to equalize the burden of paying the debt of an insolvent principal, are important branches of the law connected with bonds, but cannot here be treated of. It must suffice to refer to the statute which affords a remedy to the surety against the principal (V. C. 1873, ch. 143, § 6; V. C. 1887, ch. 136, § 2893); and to one surety against another, when the principal is insolvent (V. C. 1873, ch. 143, § 8; V. C. 1887, ch. 136, § 2895); and also to that which enables the surety by notice in writing to require the creditor to sue on the contract, or else, if he omits to do so within a reasonable time, that the surety, and his co-sureties also, shall be discharged. (V. C. 1873, ch. 143, §§ 4, 5; V. C. 1887, ch. 136, 2890, 2891.) See 2 Lom. Dig. 169, &c.; Wright v. Stockton, 5 Leigh, 159.)

The Virginia cases which illustrate the doctrine touching subrogation and substitution are the following, viz.: Enders v. Brune, 4 Rand. 438; Kinney v. Harvey, 2 Leigh, 70; Douglass v. Fogg, 8 Leigh, 588; Robinson v. Sherman, 2

Grat. 178; *Leake v. Fergusons*, 2 Grat. 419; *Jones v. Lackland*, 2 Grat. 81; *Christian v. Ellis*, 1 Grat. 396; *Carr v. Glascock*, 3 Grat. 328; *Rodgers v. McClure*, 4 Grat. 81; *Morris v. Morris*, 4 Grat. 293; *Buchanan v. Clark*, 10 Grat. 164; *Braxton v. Harrison*, 11 Grat. 30; *Hill v. Manser*, 11 Grat. 522; *Hudgins v. Hudgins*, 6 Grat. 320; *Gaw v. Huffman*, 12 Grat. 628; *Barnum v. Frost*, 17 Grat. 398; *Jones v. Phelan*, 20 Grat. 229; *Meade v. Grusby*, 26 Grat. 616; *Burwell v. Fauber*, 27 Grat. 446; *Sands v. Lynham*, 27 Grat. 304-5; *Clevinger v. Miller*, 27 Grat. 741 & seq.; *Pugh v. Russell*, 27 Grat. 796 & seq.; *Barger v. Buckland*, 28 Grat. 863-4; *Cromer v. Cromer*, 29 Grat. 284 & seq.; *Eidson v. Huff*, 29 Grat. 342; *Chrisman v. Harman*, 29 Grat. 498; *Robertson v. Trigg*, 32 Grat. 85; *Grubbs v. Wysors*, 32 Grat. 129; *Harnsberger v. Yancey*, 33 Grat. 539 & seq.; *Penn v. Ingles*, 82 Va. 71; *Rosenbaum v. Goodman*, 78 Va. 126; *Harper v. McVeigh*, 82 Va. 751, 756; *Hanby v. Henritze*, 85 Va. 177; *Scott v. Hillenberg*, 85 Va. 245; *Francisco v. Shelton*, 85 Va. 779.

## 2<sup>l</sup>. Recognizances.

A recognizance is an obligation of record which a man enters into before some court of record or magistrate duly authorized, with condition to do, or to abstain from, some particular act; as to appear at court, to keep the peace, to pay a debt, not to sell intoxicating liquors, or the like. In most respects it resembles a common bond with collateral condition, the difference being chiefly that the bond is the *creation* of a debt or obligation, whereas the recognizance purports to be an *acknowledgment* upon record of an existing debt; the form whereof is "that A B doth acknowledge to owe the commonwealth (or to C D), the sum of \$100, on condition to be void" on performance of the conditions stipulated; in which case the commonwealth (or C D) is called the *cognizee*, and he that enters into the recognizance is styled the *cognizor*. This being certified to or taken by the officer of some court of record, is witnessed only by the record, and not usually by the party's seal; so that in strict propriety it is not a deed, though the effects of it are greater than those of a common bond, being in several particulars allowed a priority over it. Thus, a recognizance is a lien upon all the lands which the cognizor has at the time he acknowledges it, or which he acquires afterwards, not only *after his death*, in the hands of his heir or devisee, as in the case of a bond, but *in his life-time* as well, and in his own hands; nor can any alienation of the land by the cognizor after the recognizance is acknowledged, prevent the cognizee from extending it. (2 Th. Co. Lit. 569, n. (S.); 2 Bl. Com. 341-2, n. (65) & (66).) And as respects the heir or devisee, the statute which makes a decedent's lands liable to his debts

expressly declares that it shall not affect *any lien by judgment or otherwise*, acquired in his life-time. (V. C. 1873, ch. 127, § 7; V. C. 1887, ch. 120, § 2670.) The lien of a recognizance, however, like the lien of a judgment, is with us of no avail against a purchaser for value of the cognizor's lands, unless the recognizance be *docketed*, as a judgment is required to be, in the clerk's office of the court of the county or corporation where the land is, either within twenty days next after the date of the recognizance, or fifteen days before the conveyance of the estate to the purchaser. (V. C. 1873, ch. 182, §§ 8, 3, 4; V. C. 1887, ch. 174, §§ 3570, 3580.)

The most familiar instances of recognizances are those taken to secure the appearance of a person accused of crime at the court which is to investigate his offence, in order to answer an indictment, or to stand his trial; to secure the attendance of a witness in order to testify against an accused party; and to secure that the cognizor shall keep the peace generally, and especially towards a person named, and shall be of good behavior. See V. C. 1873, ch. 199, §§ 15 & seq.; Id. ch. 205, §§ 3 & seq., and 7 & seq.; Id. ch. 196, §§ 4 & seq., §§ 10, 16, 22; V. C. 1887, ch. 194, §§ 3969 & seq.; Id. ch. 200, §§ 4092 & seq.; Id. § 4096; Id. ch. 19, §§ 3915 & seq., 3921 & seq.; Archer's Case, 10 Grat. 627; Gedney's Case, 14 Grat. 318.

The form of a recognizance, taken in court, may be seen Rob. Forms, 249, 246, 308; 4 Min. Insts. 1313; and of one taken before a justice in the country, Mayo's Guide, 553, 635.

The two kinds of recognizance, allusions to which most abound in the English books, are the recognizance in the nature of a *statute merchant*, by statute 13 Edw. I., Stat. 3, and that by *statute staple*, by 27 Edw. III., c. 9, neither of which exist in Virginia. (2 Bl. Com. 160; *Ante*, pp. 330, 331.)

Upon the condition of a recognizance being broken, if it consists of a default of appearance as party or witness in a court of record, the default is recorded therein, and process to recover the penalty issues therefrom; if it do not consist in such default of appearance, but of some matter happening in the country, as by breach of the peace or of good behavior, the fact of the breach is to be proved like any other fact *in pais*, and the process issues from the court wherein it was taken, or if taken out of court, from the court in whose office it is filed. (V. C. 1873, ch. 205, § 8; V. C. 1887, ch. 200, §§ 4096, 4097.) The process, the object of which, as has just been remarked, is to recover the penalty, may be an action of *debt*; but it is more appropriately a writ of *scire facias*, the demand being a matter of record. (2 Saund. 71, n. (4), &c.; Rob. Forms, 260, 46; 4 Min. Insts. 585, 1504-5; V. C. 1873, ch. 205, §§ 8 & seq.; V. C. 1887, ch. 200, §§ 4097 & seq.)

In England, the recognizance, when default occurs in its

condition and a record of the same made, is *extracted* (that is *extracted*) from the records of the court and sent to the Court of *Exchequer*, to be there prosecuted. (Burr. Law Dict. *Estreat*.)

A delivery or forthcoming bond is not a recognizance, but it has two important characteristics of one: it is taken and certified by an officer of the law, and when duly *returned to the clerk's office* whence the execution of *fieri facias* issued upon which it was taken, it has against such of the obligors therein as *may be alive* when it is forfeited, and so returned, the *force of a judgment*, which, however, in order to avail against a subsequent purchaser for value of the lands of such obligors, must be docketed like a judgment or recognizance. (V. C. 1873, ch. 185, § 2; Id. ch. 182, §§ 8, 3, 4; V. C. 1887, ch. 177, §§ 3619, 3620; 4 Min. Insts. 829 & seq., 1312.)

### 3<sup>l</sup>. Defeasances.

A defeasance on a bond, recognizance, or judgment, is a condition which, when performed, defeats or undoes it in the same manner as a defeasance of an estate before mentioned. (*Ante*, p. 801.) It differs only from the common condition of a bond in that the condition is always inserted in the deed or bond itself, whilst the defeasance is made between the same parties, but by a separate and frequently subsequent deed. This, like the condition of a bond, when performed, discharges and disencumbers the person and estate of the obligor. (2 Bl. Com. 342; 2 Th. Co. Lit. 122 n. (O. 3).)

## CHAPTER XXIII.

### THE LAWS OF VIRGINIA TOUCHING CONTRACTS FOR AND CONVEYANCES OF LANDS.

#### 4<sup>k</sup>. The Laws of Virginia Touching Contracts for and Conveyances of Lands.

We have seen (*Ante*, p. 659), that the common law requires no writing, either to convey lands, or to make any contracts concerning them. For the latter class of transactions that law has no security whatever against the fraud and perjury which may be apprehended from the allowance of mere verbal contracts touching a subject so coveted as land; and for the former, it depends exclusively upon the solemnity of *livery of seisin* in the transfer of freehold estates, and of *actual entry* on the part of the lessee, in the creation of leases for years. It is a cause of surprise that the necessities of English society did not sooner suggest new provisions upon this subject; but no statute was passed to guard against the mischiefs in question until late in the reign of Charles II. (A. D. 1678), when, by 29 Car. II., c. 3, very ample and judicious enactments were



made, applicable to a number of cases besides conveyances of and contracts for lands, where it was apprehended that fraud, and the attendant perjury to sustain the fraud, would be likely to find a place, if the transaction were not required to be committed to writing. The cases *principally* contemplated by this statute (for there were some subordinate provisions which need not be here stated) were, (1), Conveyances of lands, (§§ 1, 2, 3); (2), Contracts for lands, or interests therein, (§ 4); and (3), Wills of lands, (§ 5). And so well considered were the provisions of the statute that it has been the model of all the corresponding legislation in the United States, which in relation to executory contracts for, and wills of lands, has been content to follow 29 Car. II., c. 3, and some later statutes on the same topics, with more than usual literalness.

See 3 Min. Insts. 151 for origin of statute, which is claimed by Ld. Nottingham for himself, in *Ash v. Abdy*, 3 Swanst. 664.

(1), *Conveyances of lands* were provided for by 29 Car. II., c. 3, §§ 1, 2, 3, by enacting substantially that all conveyances, of every description of lands, tenements, and hereditaments, for a term *exceeding three years*, should have the effect of *estates at will only*, unless they were *by deed or note in writing, signed* by the grantor or by his agent authorized *by writing*.

The statutory provision in Virginia parallel to this is known with us as the statute of *conveyances*, and in improved phraseology, as compared with its prototype, declares that "no estate of inheritance, or of freehold, or for a term of more than five years in lands, shall be conveyed, unless by deed or will." (V. C. 1873, ch. 112, § 1.) And the statute as contained in the Code of 1887 further enacts that no "voluntary partition of lands by co-parceners, having such an estate therein, shall be made, except *by deed*"; nor shall any right to a conveyance of any such estate or term in land accrue to the donee of the land or those claiming under him, under a *gift or promise of gift* of the same hereafter made and *not in writing*, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him. (V. C. 1887, ch. 107, § 2413.)

(2), *Executory contracts for the sale of lands*, were provided for (along with a number of other contracts having no relation to lands), by 29 Car. II., c. 3, § 4, by enacting that no action shall be brought whereby to charge any person upon "any *contract or sale* of lands, tenements, or hereditaments, or any *interest in or concerning* them; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing*, and *signed* by the *party to be charged* therewith, or some other person by him thereunto lawfully authorized."

The corresponding provision in Virginia, which we are accustomed to designate as the statute of *parol agreements*, enacts that no action shall be brought "upon any *contract* for the *sale* of any *real estate*, or for the *lease* thereof for more than a year," unless the contract, or "some memorandum or note thereof, be in writing, signed by the party to be charged thereby, or his agent." (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840.)

(3), *Wills of lands* having been in no otherwise guarded against frauds by the statute which first authorized them (32 Hen. VIII., c. 1), than by requiring them to be *in writing*, the statute of frauds and perjuries (29 Car. II., c. 3, § 5), added important ceremonies and solemnities besides, not needful here to be stated, which, together with some subsequent English legislation, we have incorporated substantially in our *statute of wills* (V. C. 1873, ch. 118, §§ 4 & seq.; V. C. 1887, ch. 112, §§ 2514 & seq.), as will be fully explained in the chapter on devises. (*Post*, ch. xxvi., p. 913.)

At present we are to consider the laws of Virginia, touching, (1), Contracts for lands; and (2), Conveyances of lands; W. C.

# 1<sup>st</sup>. Contracts for the *Sale or Lease of Lands*.

It is proposed, in unfolding this subject, to consider, (1), The terms of the statute of *parol agreements*; (2), What amounts to a contract under the statute; (3), Certain instances allowed by the courts of equity, as exceptions to the application of the statute; (4), The doctrine touching the *discharge by parol* of such a contract as the statute contemplates; (5), Abstracts of titles; and (6), Remedies upon contracts for the sale of lands;

W. C.

## 1<sup>st</sup>. The Terms of the Statute of *Parol Agreements* in Virginia.

The terms of the statute have been just above stated. They are (so far as concern lands), that "no action shall be brought to charge any person upon any contract for the sale of real estate, or for the lease thereof, for *more than a year*, unless the contract, or some memorandum or note thereof, be *in writing*, signed by the *party to be charged* thereby, or his agent; but the *consideration* need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary), by other evidence." (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840.)

It will be observed, that the *subject* to which our statute relates differs from that contemplated by 29 Car. II., c. 3, § 4. The latter statute applies to "any *contract or sale* of lands, etc., or any *interest in or concerning them*," whilst ours relates to "any *contract for the sale* of any real estate, or for the *lease thereof for more than a year*." Both

statutes apply not to *actual conveyances* of, but only to *executory contracts* for lands: but a contract for a future lease *for a year or less* need not under our statute be in writing, whilst the English statute applies to a contract for *any interest whatever* in lands, etc., be it never so trivial, and demands that it shall be in writing. Our statute *in terms* (whether there be any difference in this particular in *effect* or not), embraces only contracts *for the sale or lease* of lands, whilst 29 Car. II. includes contracts for *any interest in or concerning them*. What is the precise nature of the *interest* which is within the statute, a contract for which must be in writing, is a vexed question. The doctrine generally recognized seems to be, that in contracts for the sale of things growing upon the land, if the vendee is to have *a right to the soil* for a time, for the purpose of further growth and profit of what is sold, it is an *interest in the land*, and must be proved in writing. But where the thing is sold in prospect of a separation from the soil immediately, or within a reasonable or convenient time, without any stipulation for the beneficial use meanwhile of the soil, but with a mere license to enter and take it away, it is to be regarded as a sale of goods only, and so not within the statute; and that notwithstanding the thing be at present attached to the soil, and although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land. (1 Chit. Cont. (11 Am. ed.) 415 & seq.; Crosby v. Wadsworth 6 East. 602; Waddington v. Bristow, 2 Bos. & P. 452; Evans v. Roberts, 5 B. & Cr. (11 E. C. L.) 829; McCoy v. Herbert, 9 Leigh, 548.) It is not very likely that a similar question would arise under our statute, for the severance of the article from the soil will rarely be postponed beyond a year; and even if the agreement amounts to a contract for a lease, if it is not to exceed a year, it may with us be made by parol. Still it is possible to conceive cases which can be resolved only by invoking these English doctrines, as where an agreement is made for the future appropriation of certain timber or fruit-trees, which will not be matured, or fit for removal, for more than a year after the interest is to commence, and must meanwhile receive attention or culture. Such an agreement involves *the use of the land*, and, therefore, amounts to a contract for a lease, and must be evidenced accordingly. (Bac. Abr. Leases; Id. (C.); U. States v. Gratiot, 14 Pet. 526.) Another distinction must be glanced at, which is applicable to both statutes, namely, the distinction between a *license* and an *interest in the land*. A license is not within either statute. It is defined to be an authority to do a particular act or series of acts upon another's land without possessing any estate therein. It is revocable before or after it is

exercised in whole or in part, supposing it to be truly a license, and to confer no interest in the land; but it is not so revocable as to expose the party licensed to an action for what he has done under the license, as for a tort. Nor is it less revocable because thereby the *licensee* will prove to have made expenditures useless to him. All that he can claim is to have a reasonable time to remove from the premises structures or chattels which he may have put there on the faith of the license. (1 Washb. R. Prop. 412 & seq.; 2 Am. L. C. 648 & seq.) Our statute includes a contract between a purchaser of land and a third person for an interest in the property, whether made before the purchase or afterwards; so that, if such agreement be not in writing, etc., it is incapable of being enforced. (Henderson v. Hudson, 1 Mumf. 510; Walker v. Herring, 21 Grat. 680.) Whether contracts touching *trusts in lands* are within our statute, has not been adjudged; but it would seem that little doubt can exist that they are. In England all doubt is obviated by § 7, of the statute of frauds (29 Car. II., c. 3), which requires all creations and declarations of trusts to be in writing, signed by the party, or by last will; whilst § 8 excepts *resulting, implied, and constructive trusts*. (2 Washb. R. Prop. 191 '2.)

As to what is to be *put in writing*, under our statute, it is the *contract* for the *sale* of land, or for the *lease thereof for more than a year*. If, therefore, it is a *present sale*, or a *present lease* and not a *contract* for one to be made at a future time, the case is not within this statute, but is governed by the statute of *conveyances*. (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.) To require the *contract* to be in writing, of course requires its *terms* to be contained therein (1 Sugd. Vend. 118, (6th Am. ed.); Kenworthy v. Schofield, 2 B. & Cr. (9 E. C. L.) 945; Saunderson v. Jackson, 2 Bos. & P. 238; Parkhurst v. Van Cortlandt, 1 Johns. Ch. (N. Y.) 279 & seq.; S. C. 14 Johns. (N. Y.) 32; Seagood v. Meale, Proc. in Ch. 561; Bailey v. Ogden, 3 Johns. (N. Y.) 419 '20; S. C. 3 Am. Dec. 512 '13); and would also require the *consideration* to be expressed (although the word *promise* would not), were it not that the statute expressly declares the contrary.

Finally, in respect to the *terms of the statute*, it is required that the writing shall be *signed* by the *party to be charged thereby, or his agent*.

It is important to observe, as just above stated, that if the contract for lands be *executed* by the delivery and acceptance of possession, it is not within the statute of *parol agreements*; however, the case may be influenced still by the statute of conveyances. Hence, if, upon a contract of lease for a term of years, the lessee has entered and occupied



the premises, an action *for the rent* is not liable to be repelled under the statute of parol agreements, whether the original contract were in writing or not. (Teal v. Auty, 2 Br. & B. 100; Griffith v. Young, 12 East. 513-515; Addis. Contr. 94.) And it has often been held, that if a *parol* contract be made for the sale of lands, of which a conveyance is afterwards made and accepted by the vendee, the contract, as it respects the land, is thereby consummated, and is liable to no objection from the statute of parol agreements. Hence an action may be brought to recover the purchase money; and that although it be acknowledged in the conveyance to have been paid, if it can be proved not to have been paid, such an acknowledgment being regarded as merely formal. (Shephard v. Little, 14 Johns. (N. Y.) 210; Bowen v. Bell, 20 Johns. 340; Goodwin v. Gilbert, 9 Mass. 514; Pomeroy v. Winship, 12 Mass. 514; Wilkinson v. Scott, 17 Mass. 249.)

2<sup>m</sup>. What Amounts to a *Contract* for the Sale, or for the Lease of Lands in Virginia.

The writing may be ever so informal, if it be intelligible and reasonably certain, setting forth the land to which the contract relates, the estate or interest contracted for, and the terms of payment. It may be in print or in manuscript, written with ink or lead pencil, and is not required, like a deed, to be on paper or parchment; but may be inscribed on stone, steel, leather, linen, wood, or otherwise, so it be only *in writing*. And although the writing must have had the final assent of the parties, it is not requisite that it be *delivered*. Hence, an *undelivered* deed, whilst not good as a deed, may yet be good as a *contract*, supposing it to contain the bargain concluded between the parties, and to be founded upon an actual valuable consideration. (Brent v. Green, 6 Leigh, 16; Bowles v. Woodson, 6 Grat. 78; Pannill v. McKinley, 9 Grat. 1; Newl. Cont. 165 & seq.) And as it is immaterial in what form the agreement is, so the parties, the subject-matter, and the terms are *clearly expressed* therein, it may be as well by letters as otherwise, or it may be by a clear and distinct reference to some other writing; but the connection between the writings cannot be established by parol; it must appear clearly by a reference, contained in the writing signed, to the other writing. (Newl. Cont. 165-6, 168-9; Clinan v. Cook, 1 Sch. & Lefr. 22; Boydell v. Drummond, 11 East. 142; Fitzhugh v. Jones, 6 Munt. 83; Stratford v. Bosworth, 2 Ves. & B. 341; Kennedy v. Lee, 3 Meriv. 441; Huddleston v. Briscoe, 11 Ves. 591; 2 Lom. Dig. 45 & seq.)

The statute requires the writing to be *signed by the party to be charged, or his agent*. Hence, although the terms of the contract be set out in writing ever so plainly, and be

ever so solemnly assented to, yet if it be not *signed*, it does not avail within the statute; so that, as a *deed* is said at common law not to require to be *signed*, an instrument might possibly operate *as a deed*, to convey lands under our statute of conveyances (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413), whilst it would not be sufficient as a *contract* of sale, under the statute of parol agreements, which we are now considering. However this may be, it is certain the writing must be *signed* under the latter statute; and the fact that the party's agent, or even the party himself, wrote the contract, does not necessarily make his name appearing therein a sufficient signing, unless it appears that the writing contains the terms of final agreement, and that the name was *designed as a signature*. There is no particular place which the name must occupy in order to constitute it a signature; nor is it necessarily the sign manual of the party or of his agent. It is enough if it be affixed in the presence and by the direction of the party himself, or his agent, as the case may be; and may be at the beginning, or the end, or in the middle, provided only the collocation and connection be such as to authenticate the whole instrument. So it is a signature (because it *authenticates* the instrument, which is what the statute aims at), although it consists of the *surname* only, or even merely *of the initials*. The courts have gone so far as to hold that, as the only purpose of the statute was to cause the writing to be *authenticated*, if a person knowing the contents should sign it only *as a witness*, it is a signing within the statute. (Newl. Cont. 172 & seq.; Stokes v. Moore, 1 P. Wms. 770, note; S. C. 1 Cox, 211; Welford v. Beazley, 3 Atk. 503; Coles v. Trecothick, 9 Ves. 234; Ogilvie v. Foljambe, 3 Meriv. 62; Phillimore v. Barry, 1 Camp. 513; Argenbright v. Campbell & al. 3 H. & M. 187; 2 Lom. Dig. 44.)

It is not necessary that the writing should be signed by *both parties*; it is enough if it be signed by the *party to be charged*; nor does this doctrine conflict, as Lord Redesdale supposed in Lawrenson v. Butler, 1 Sch. & Lefr. 13, with the principle that in every contract there must be *mutuality* of obligation, for the statute determines nothing as to the *obligation* of the contract, but only forbids *any action to be brought* thereon, unless the contract be *in writing*, etc.; and moreover, when the other party institutes proceedings upon the contract, he thereby in writing consents to it. (Newl. Cont. 171; 2 Lom. Dig. 43; Fowle v. Freeman, 9 Ves. 351; Seton v. Slade, 7 Ves. 265; Ballard v. Walker, 3 Johns. Cas. 60; Clason v. Bailey, 14 Johns. 486.) When, however, the applicant for the enforcement of the contract is the *only party who has signed it*, the statute bars the proceeding. (Newl. Cont. 171.) The contract, it will be remembered,

may be as well authenticated by the signature of the agent as of the party himself. Nor is it needful that the authority of the agent should be *in writing*, although it must be satisfactorily proved, and the agent must conform to it; nor is the principal bound beyond the extent of the authority he delegates. (Newl. Cont. 175; 2 Lom. Dig. 45; Coles v. Trecothick, 9 Ves. 250; Clason v. Bailey, 14 Johns. (N. Y.) 490; Yerby v. Grigsby, 9 Leigh, 387); and from the case of Yerby v. Grigsby it seems that the agent may sign *his own name* to the contract, and will thereby bind his principal; a proposition not in conformity with the general common law doctrine touching contracts made by agents (1 Min. Insts. 231 & seq.; *Ante*, p. 730), but sustained by Kemeys v. Proctor, 3 Ves. & B. 57; Coles v. Trecothick, 9 Ves. 234; White v. Proctor, 4 Taunt. 209. It has been for a considerable time established that an auctioneer is, *at the sale*, the agent of both parties, and by *then* writing their names in connection with a minute of the contract, showing the subject, the parties, and the terms, will bind either or both under the statute. And notwithstanding the maxim, *delegatus non potest delegare*, it has been held, apparently from the necessity of the case, that an entry made by the *auctioneer's clerk* is of like validity as if made by the auctioneer himself. The auctioneer's power, however, to bind the *purchaser* continues only in immediate connection with the sale, and must be exercised *at the time and on the spot*. With regard to the *seller*, the auctioneer is his agent peculiarly, selected and paid by him, and acting in his interests; and as to him, therefore, the agency is justly regarded as continuing until the close of the whole transaction. Finally, it should be remembered, that one party cannot be the *agent for the other*, not the seller for the purchaser, nor the purchaser for the seller. (Farebrother v. Simmons, 5 B. & Ald. (7 E. C. L.) 120.) In Brent v. Green, mentioned below, the sale was made by a deputy sheriff, acting for his principal, and the subject sold was the land of an insolvent debtor, which he had surrendered upon taking the insolvent debtor's oath. The deputy sheriff, acting as auctioneer, made a rude memorandum on a bit of paper, setting forth what it was he was selling, the price bid, and the name of the purchaser. The purchaser resisted the enforcement of the contract, upon the ground that, even if an auctioneer was in general the agent of both parties, it could not be so here, for the auctioneer was *himself the vendor*. The objection was overruled, the court holding that it was established law that the auctioneer was the agent of both parties, as above explained, and that the deputy sheriff in the case under consideration, who was the auctioneer, was not the vendor, but the high sheriff was, the property of the insolvent being

vested by law in him. (*Brent v. Green*, 6 Leigh, 16; *Smith v. Jones*, 7 Leigh, 165; *Walker v. Herring*, 21 Grat. 682; *McComb v. Wright*, 4 Johns. C. R. (N. Y.) 659; *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Mews v. Carr*, 1 H. & Norm. 484; *Buckmaster v. Harrop*, 13 Ves. 456.)

### 3<sup>m</sup>. Exceptions to the Application of the Statute.

Exceptions to the application of the statute of parol agreements arise *in equity*, in the five cases following, viz.: (1), Where the reducing of the agreement to writing, or the signing of it, is prevented *by the fraud* of the opposite party; (2), Where the agreement has been *partly performed*; (3), Where, upon application to a court of equity to enforce the contract, the answer *confesses the contract*; (4), In case of deposit of title deeds as security for money; and (5), In case of sales made *under decree of a court of chancery*;

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#### 1<sup>n</sup>. Where the Reducing of an Agreement to Writing, or the Signing thereof, is *Prevented by Fraud*.

When by the *fraud of the opposite party*, it has been brought about that the agreement has not been put into writing, or has not been signed, a court of equity will carry the agreement into effect, without regard to the statute. It would, indeed, be a singular anomaly, were it otherwise; for then a statute, of which one principal object was to prevent fraud, would be made to minister to and assist it. Thus, where a father, on a treaty for the marriage of his daughter with the plaintiff, executed a writing comprising the terms of the agreement, and afterwards, designing to elude it, directed his daughter to get the plaintiff to deliver it up, and then to marry him, which she did, the plaintiff was relieved. And in another case, where instructions were given, and preparations made for the drawing of a marriage-settlement, but before the completion of it, the woman was induced, by the assurance and promise of the man that he would perform it, to marry him, equity notwithstanding enforced it. (*Montacute v. Maxwell*, 1 P. Wms. 618; *Newl. Contr.* 179 & seq.; 2 Lom. Dig. 49, 50.)

#### 2<sup>n</sup>. Where the Agreement has been *Partly Performed*.

Where a parol agreement for the purchase and sale of lands has been in part performed, and the act of part-performance places the plaintiff in a situation which is a fraud upon him unless the agreement is executed, the courts of equity will not permit the defendant to protect himself against the execution of the contract by alleging that it was not in writing. That would be, as has been pithily said, *to sanction fraud in order to prevent perjury*. (*Newl. Contr.* 181; *Heth v. Wooldridge*, 6 Rand. 607; *Wilde v. Fox*, 1 Rand. 165.) And although it has been lamented



that the courts of equity ever departed in this particular from the precise terms of the statute, yet the jurisdiction is now too firmly established to be shaken otherwise than by statute.

But now it is enacted by the Code of 1887, that no "right to a conveyance of any such estate (that is, of inheritance or freehold, or for a term of more than five years), shall accrue to the *donee* of the land or those claiming under him, under a *gift* or *promise of a gift* of the same hereafter made and *not in writing*, although such *gift or promise* be followed by *possession* thereunder and *improvement* of the land by the donee or those claiming under him. (V. C. 1887, ch. 107, § 2413.) The student must observe, therefore, that in Virginia, in the case of a *gift without valuable consideration*, though followed by possession, and improvement of the land, the exposition following must be taken with the needful allowance for the provisions of the foregoing statute. And hence the statute overrules the cases of *Halsey v. Peters*, 79 Va. 60, and *Griggsby v. Osborne*, 82 Va. 373.

It will be observed that it is always necessary that the terms of the contract should be *satisfactorily proved* (for *de non apparentibus et de non existentibus eadem ratio est*); and if that cannot be done, the contract cannot be enforced, whatever act or acts of part-performance may be shown, although, under circumstances of special equity, the court will decree compensation to be made to the extent of the purchase-money paid, and the value of beneficial and lasting improvements made by the purchaser. (2 Lom. Dig. 51-2; *Rowton v. Rowton*, 1 H. & M. 92; *Anthony v. Leftwich*, 3 Rand. 238; *Payne v. Graves*, 5 Leigh, 561; *McComas v. Easley*, 21 Grat. 23; *Wright v. Puckett*, 22 Grat. 370.) It may be observed further, that in later times the prevailing disposition of the courts is to uphold the statute, as a wholesome safeguard against perjury and fraud, there being a sentiment of regret, as already observed, that the exception of part-performance was ever allowed at all. At all events, the doctrine is reluctantly applied, and never further than adjudged cases, and the principles established by them, require. (2 Lom. Dig. 56; *Anthony v. Leftwich*, 3 Rand. 238.)

The circumstances of part-performance to take the case out of the statute, and to induce the court of equity to decree specific execution of a parol contract for lands, must have the following characteristics, viz.: (1), There must be an *act done*, and merely *abstaining from an act* is not sufficient; (2), The act must be done by the party seeking the aid of the court; (3), The act must be done unequivocally in consequence of the agreement, with a design to

perform it, and be such as but for the agreement would not have been done; and (4), The act must be of a character incapable of compensation in damages. (Wright v. Pucket, 22 Grat. 370; Lester v. Lester, 28 Grat. 74 & seq.; Halsey v. Peters, 79 Va. 60; Griggsby v. Osborn, 82 Va. 373.

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- 1°. There must be *an Act Done*, and *Merely Abstaining from an Act is not Sufficient*.

Thus, if two persons desire to buy portions or all of the same tract of land, and in order not to inflate the price, it is agreed *by parol* between them, that one alone shall offer to buy, and that they will share the land in agreed proportions, the *abstaining* from the act of *bidding or offering* for the land is not such an act of part-performance as will warrant the court of equity to decree specific execution of the agreement, however clearly proved. (Newl. Contr. 195-'6; Lomas v. Bailey, 2 Vern. 627; Henderson v. Hudson, 1 Munf. 510; Heth v. Wooldridge, 6 Rand. 611; Walker v. Herring, 21 Grat. 678.)

- 2°. The Act must be Done by the Party who Seeks the Aid of the Court.

This follows from the foundation itself of the doctrine under consideration; for it is impossible that the plaintiff can be placed in a situation where not to enforce the contract would be a fraud *upon him*, by an act of part-performance done by the opposite party, or by any one but himself. (Newl. Contr. 188; Buckmaster v. Harrop, 7 Ves. 341, 346.) It is sometimes said loosely, that *delivery of possession to the vendee* is an act of part-performance which will justify the court in compelling the *vendor* to execute the contract at the vendee's instance; and this has been thought by some to be an exception to this second principle: but it is the *taking possession* by the vendee, and not the *delivery of possession* by the vendor, which constitutes the equity of the case. (Newl. Contr. 182, &c.)

- 3°. The Act must be Done *Unequivocally*, in Consequence of the Agreement, with a Design to Perform it, and be Such as, but for the Agreement, would *not have been Done*.

See Wright v. Puckett, 22 Grat. 370; Pierce v. Catron, 23 Grat. 588.

Hence, *delivery* of possession by vendor is ground for a suit by him, as *taking possession* by the vendee is on his part. And the vendee's case is much strengthened when he has laid out his money in improvements on the land. (Newl. Contr. 181-184; Anthony v. Leftwich, 3 Rand. 238; Payne v. Graves, 5 Leigh, 561; Pigg v. Corder, 12 Leigh, 80; Com'th v. Ricks, 1 Grat. 427; Par-

rill v. McKinley, 9 Grat. 1; Rhea v. Jordan, 28 Grat. 682 & seq.) Hence, too, the mere *continuing in possession* by one who has the possession already, under a former interest (*v. g.*, under a lease), not involving any new act, or at least any *unequivocal* act, is in general not sufficient on either side, whether of vendor or vendee. It is said, however, that if the tenant, after the expiration of the old lease, not only continues in possession, but pays an *increase of rent*, according to the terms of a parol contract for a new lease, to commence on the expiration of the old one, it is such an act of part-performance as will take the case out of the statute; which must be because the payment of the increased rent renders the *continued possession an unequivocal* act of part-performance of the new lease; for it is believed that it is the continuing in possession, thus ascertained to be in fulfilment of the parol contract for the new lease, and not the mere payment of the rent, which constitutes the act of part-performance. (Newl. Cont. 184 & seq.; 2 Lom. Dig. 52.) The expenditure of money by the lessee in improvements on the premises, and especially if the expenditure was made in pursuance of the stipulations of the lease, or with the knowledge of the lessor, will also render the act of continuing in possession an unequivocal act of part-performance by the lessee, and will entitle him to a specific execution of the parol contract. (Newl. Cont. 185-'6; 2 Lom. Dig. 52-'3; Rhea v. Jordan, 28 Grat. 682 & seq.) When the contract is *entire*, and embraces several parcels of land, *delivery* of possession of any one of them by the vendor, or *taking possession* by the vendee, will take the case as to all the parcels, out of the statute. (2 Lom. Dig. 53.)

The viewing of the estate by the parties, having it or the timber on it valued, giving directions for a conveyance, and the like, are not acts of part-performance, but are merely introductory and preliminary to a contract, and at most *equivocal*. (Newl. Cont. 196-'7.) In this aspect it is (namely, that the acts shall not be equivocal), that the conduct of the applicant for a specific execution may ascertain what would otherwise have been an act of part-performance, not to be such. Thus, where the vendee has taken possession of the premises, and paid part of the purchase-money, and being sued for the residue, defeats the action by pleading the statute of parol agreements, he cannot afterwards have in equity a specific execution of the contract which he has disaffirmed and abandoned, but is entitled only to have the purchase-money he has paid refunded to him. (2 Lom. Dig. 56; Payne v. Graves, 5 Leigh, 567.)

To this general doctrine, that an act of part-performance, which being irrevocable and incapable of compensation, would place the party in a situation which would be a fraud upon him if the contract were not performed, entitles him to a specific execution, there is a very notable exception in the case of *contracts of marriage settlement*, which, like contracts for the sale, etc. of lands, are required to be in writing, and signed by the party to be charged. One would think that, although the contract in such case were by parol only, yet if the party complaining has *married the other* in fulfilment of the agreement, the marriage was peculiarly an act of part-performance, which would warrant and demand the intervention of equity. It has been held otherwise, however, upon the ground that the statute clearly designed that settlements in consideration of marriage should be in writing, but that no settlement can fairly be said to be in consideration of marriage until the marriage takes place; and to hold that marriage is such an act of part-performance as may dispense with the writing would virtually be to repeal that clause of the statute. (Newl. Contr. 182; *Montacute v. Maxwell*, 1 P. Wms. 618; *Redding v. Wilkes*, 3 Bro. C. C. 400; *Dundass v. Dutens*, 1 Ves. Jr. 196.) Where, indeed, reducing the agreement to writing, or the signing of it, has been prevented *by the fraud* of the opposite party, who is resisting the execution of it, on that as an independent ground the court will proceed, as we have seen, to enforce the parol agreement. (*Cookes v. Mascall*, 2 Vern. 200; *Douglas v. Vincent*, Id. 202; Newl. Contr. 193-'4; *Ante*, p. 851.)

4°. The Act of Alleged Part-Performance must be of a Character *Incapable of Compensation in Damages*.

It is manifest, if the act is capable of compensation in damages, that it cannot be justly said to place the plaintiff in a situation which would be a fraud upon him, unless the agreement were specifically enforced, and therefore the only ground of the cognizance of equity in such case fails. Accordingly, it is now established, notwithstanding some early fluctuations of opinion in the English court of chancery, that the mere payment of the *purchase money*, in whole or in part, is not a sufficient act of part-performance; for the money may be repaid with interest, and then the parties, as Lord Redesdale observes, will be just as they were before. (Newl. Contr. 187 '8; *Clinan v. Cooke*, 1 Sch. & Lefr. 41; *Ex parte*, Hooper, 19 Ves. 480; *Jackson v. Cutright*, 5 Munf. 318; *Anthony v. Leftwich*, 3 Rand. 255; *Allen v. Smith*, 1 Leigh, 231; 2 Lom. Dig. 54.) So, for a like reason, if the consideration was not money, but services and labor, if the latter



were capable of being fairly estimated in money, they will not amount to an act of part-performance. (2 Lom. Dig. 34.) Whether the fact that the vendor is *insolvent*, so as to make the recovery of the purchase-money which has been paid impracticable, would be a ground for the interposition of equity, is not known to have been decided; but as, in that event, not to compel the execution of the contract would operate a fraud upon the purchaser, it would seem to come within the principle upon which a court of equity founds its action in such cases. (See 2 Stor. Eq. §§ 760, 761.)

- 3<sup>n</sup>. Where the Parol Agreement, upon a Bill in Equity to Enforce it, is *Confessed*.

It is now the acknowledged doctrine that, if upon a bill in equity to compel the execution of a parol contract, and to which there has been no part-performance, and the defendant by his answer confesses the agreement without insisting on the statute, the court will decree the execution; for there can be no danger in such cases either of fraud or perjury, which it was the object of the statute to prevent (Newl. Contr. 198, 199; Cottington v. Fletcher, 2 Atk. 155; Lacon v. Mertins, 3 Atk. 3); and if the defendant admits the contract in his answer to the original bill, and submits to perform it, he cannot take advantage of the statute afterwards in an answer to an amended bill. (Spurrer v. Fitzgerald, 6 Ves. 548.) But where the defendant by his answer admits the contract as set forth in the bill, but *insists on the statute*, the court cannot withhold the benefit of it from him, the admissions in his answer, however explicit, being deemed immaterial in order to deprive him of the protection of the statute. (Cooth v. Jackson, 6 Ves. 17; Blogden v. Bradbear, 12 Ves. 466; 2 Lom. Dig. 56-7.)

- 4<sup>n</sup>. Where there is a Deposit of Title-Deeds, *as a Security for Money*.

In England the doctrine has prevailed for nearly a century, that the mere deposit of title-deeds *upon an advance of money*, without a *word* passing, much less *any writing*, gives an equitable lien on the land for the money, even as against a purchaser for value, without notice. This very extraordinary nullification, as far as it goes, of the statute-law of the land, was first *established* by the case of Russel v. Russel, 1 Bro. C. C. 269, and has since been often regretted, and as often confirmed. (2 Th. Co. Lit. 36, n. (Z.); Coming, *Ex parte*, 9 Ves. 118, and n. (1) *Ex parte* Haigh, 11 Ves. 403-4; Hiern v. Mills, 13 Ves. 114; *Ex parte* Mountfort, 14 Ves. 606-7; *Ex parte* Langston, 17 Ves. 227, 230-31; *Ex parte* Coombe, 17 Ves. 370-71; *Ex parte* Kensington, 2 Ves. & B. 83.) It seems that the idea ought

to have been effectually repelled by the single observation made by Lord Kenyon, then at the bar, and of counsel against the doctrine: "The claim is against the law of the land; it would be charging land without writing, which is against the fourth clause of the statute of frauds." The doctrine has never been allowed foot-hold in Virginia, our courts holding it to be in absolute conflict with the statute of parol agreements (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840); the statute of conveyances (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413); and the statute of registry (V. C. 1873, ch. 114, § 5; V. C. 1887, ch. 109, § 2463 & seq.); (*Colquhoun v. Atkinson*, 6 Mumf. 566; *McClanahan v. Siter & als.* 2 Grat. 280.)

#### 5<sup>n</sup>. Sales Under a Decree of the Court of Chancery.

In the case of *Atto. Gen. v. Day*, 1 Ves. Sr., 221, Lord Hardwicke was of opinion that the common case of purchasers "*before the master*," or, as we should say, before a commissioner of the court, was certainly out of the statute, the official character of the commissioner, his report to the court, and the subsequent action of the court upon his report in the confirmation thereof, being deemed a sufficient protection against perjury and fraud. (1 Sugd. Vend. 114; Newl. Cont. 204; Fry on Specif. Perform. § 376; Rorer on Judicial Sales, §§ 135-137; 2 Lom. Dig. 43; Brent v. Green, 6 Leigh, 24; Blagden v. Bradbear, 12 Ves. 472; Hutton v. Williams, 35 Ala. 503; Smith v. Arnold, 5 Mason, C. C. 414, 420, 421.) The proposition is sometimes stated as if because confirmation by the court is essential to make the agreement unsigned by the purchaser completely obligatory upon him, that therefore he was, before confirmation, at liberty to repudiate it. This, however, is believed to be a misapprehension, and that, upon the master's report of the sale, and the confirmation thereof by the court, the purchaser is bound by relation as from the sale, in despite of any protest or attempt at repudiation which he may have made before confirmation. And in this sense it is that judicial sales are said to be *not within the statute of frauds*. (*Warfield v. Dorsey*, 39 Md. 299; *Kaufman v. Walker*, 9 Md. 240; *Harrison v. Harrison*, 1 Md. Ch. Dec. 331; *Wood v. Mann*, 3 Sumner, 310, 318.)

The student should observe here, in respect to sales under the decree of a court of chancery, that the practice of *opening biddings* which prevailed formerly in England, where some one offered an advance upon the price for which the property had been sold by the master, notwithstanding the sale was fair, and the price reasonable, after having been often deplored, and as often reluctantly acquiesced in (*White v. Wilson*, 14 Ves. 153; *Thornhill v. Thornhill*, 2 Jac. & W. 347; *Williams v. Attenborough*, 1

Turn. & Rus. (11 Eng. Ch.) 70), was at length abolished in 1867, by 30 and 31 Vict. c. 48. The practice has been eschewed in New York, New Jersey, Maryland, North Carolina, South Carolina, and Tennessee (2 Dan. Ch. Pr. 1516, n. (2),) and by Chancellor Kent is said not to prevail to any great extent in this country. (4 Kent's Com. (12th ed.) 191-'2.)

Lord Eldon's language touching the practice in question is remarkably emphatic. Thus, in *White v. Wilson*, 14 Ves. 153-'4, he says: "My decided opinion is that I could not do a thing more mischievous to the suitors than relax further the binding nature of contracts in the master's office; half the estates that are sold in this court being thrown away upon the speculation that there will be an opportunity of purchasing afterwards by opening biddings." And some years later, still more impressively, in *Williams v. Attenborough*, 1 Turn. & Rus. 70, he utters this warning: "During a period of nearly half a century which I have passed in this court, and in which Lord Apsley, Lord Thurlow, the lords commissioners, with Lord Loughborough at their head, then Lord Loughborough as chancellor, and after him the lords commissioners, with Lord Ch. Baron Eyre at their head, have presided here, I have heard one and all of them lament that the practice of opening biddings was ever introduced."

In Virginia, until of late years, the usage was little known, and is strongly discountenanced by Judge Lomax. (2 Lom. Dig. 535.) "The contract," says he, citing an opinion of Judge Marshall, in the United States circuit court, "is absolute. The purchaser is *entitled* to his purchase, and *cannot recede* from it. The benefit or the loss is legally his, and it requires some impropriety, which vitiates the transaction, to set it aside." More recently, the writer regrets to say, the practice has been regarded with less disfavor. Thus, in *Effinger v. Ralston*, 21 Grat. 437, the court declared, after stating the leading rules regulating the English practice on this subject, that the same practice and rules, substantially, exist in Virginia, but that the case then under consideration *did not admit of their application*. So in *Hudgins v. Lanier*, 23 Grat. 507, n. (8), the court seems to admit that, however fair the sale and adequate the price, yet upon its appearing that some one else is willing to make a considerable advance (say ten per cent.) in excess of the commissioner's sale, the biddings ought to be opened, but the circumstances in that case *did not warrant it*. In *Brock v. Rice*, 27 Grat. 814 & seq., the doctrine is asserted, that in judicial sales the proceedings are *in fieri*, and under the control of the court before confirmation, until which time the accepted bidder's contract

is incomplete ; and that the confirmation by the court must depend in a great measure upon the circumstances of each particular case, although the discretion appealed to ought to be exercised in the interests of fairness, prudence, and with a just regard to the rights of all concerned. Fraud, mistake, and impropriety in the conduct of the sale, constituted the objections to confirmation in that case, and led to the setting aside of the sale, so that there was no occasion to refer to the practice of *opening the biddings*. In *Curtis v. Thompson*, 29 Grat. 478, it is treated as a yet unresolved question whether the biddings ought to be opened, when the sale is fair, and the purchaser has complied, or is ready to comply, with its terms. And lastly, in *Roudabush v. Miller*, 32 Grat. 464-5, it was *determined* that the court had never *decided* how far the English practice in question had been adopted in this commonwealth ; nor that, for mere inadequacy of price, a judicial sale should be set aside ; that in acting upon the commissioner's report of sale, the court does not exercise an arbitrary but a sound discretion in view of all the circumstances, and with a just regard to the rights and interests of all concerned, of the purchaser no less than of others.

"In a proper case," says the court, "where it would be just to all the parties concerned, this court may be understood as having sanctioned a practice in the circuit courts, in the exercise of a sound discretion, of setting aside a sale made by commissioners under a decree, and re-opening the bidding upon the offer of an advanced bid of *substantial amount* deposited or well-secured ; and to that extent the former English practice has been allowed in this state. But it has never been held that it is *imperative* upon the courts to set aside the sale and re-open the bids. It is a question addressed to the sound discretion of the courts, subject to the review of the appellate tribunal, and the propriety of its exercise depends upon the circumstances of each case, and can only be *rightfully* exercised when it can be done with a due regard to the rights and interests of all concerned, the purchaser as well as others. Where the sale has been fair, and for a fair price, it should never be set aside, when there is good reason to believe that the *upset* price has been offered to gratify ill-will or malice towards the purchaser." (*Roudabush v. Miller*, 32 Grat. 465.)

See *Berlin v. Melhorn*, 75 Va. 639 ; *Langyer v. Patterson*, 77 Va. 473 ; *Terry v. Coles*, 80 Va. 702 ; *Hansucker v. Walker*, 76 Va. 753.

#### 4<sup>m</sup>. Doctrine as to the Discharge *by Parol* of a Written Contract for the Sale of Lands.

A written agreement for the sale or lease of lands, under



the statute, supposing it to be not under seal, and perhaps, if it is, may be discharged *verbally*, such subsequent verbal agreement operating to *repel the plaintiff's equity* to enforce the written contract (Newl. Cont. 209; Gorman v. Salisbury, 1 Vern. 240; Legal v. Miller, 2 Ves. Sr., 299, 376); but such written agreement cannot be *altered or contradicted* in particular parts, by parol evidence, for that would be in conflict with the statute, making what the statute requires to be altogether in writing to depend, in part, on verbal evidence. (Newl. Cont. 204 & seq; 2 Lom. Dig. 47; Vance v Walker, 3 H. & M. 288; Wilson v. Spencer, 11 Leigh, 261.)

But it must be remembered, that the doctrine which forbids that a written contract shall be contradicted by parol evidence, does not extend to prevent proof of a mistake or fraud, whereby the writing has been made to hold different language than was intended by the party. A court of equity has always jurisdiction to rectify such mistake or fraud upon *clear proof* of its existence, and to reform the contract according to the true intent and purpose of the parties. (Newl. Cont. 207; Pullen v. Mullen & al. 12 Leigh, 434; Alexander & Co. v. Newton & als. 2 Grat. 266; Shepherd v. Henderson, 3 Grat. 350.)

#### 5<sup>m</sup>. Abstracts of Title.

In England, in consequence of the greater value of lands, the prevalence of more complicated limitations of estates, and the absence of general registry laws, the duty of the conveyancer is more important and more laborious than for the most part it is with us. Indeed, it is only of late years, comparatively, that it has become usual to employ counsel to make abstracts of title, and to advise as to its sufficiency. It is the duty of the vendor's legal adviser to prepare an *abstract* of the title to the land which is the subject of the conveyance, whilst the attorney for the vendee must, on his side, diligently compare the abstract with the assurances referred to; call for evidence of the facts which are stated as relevant to the title; and take care that the abstract contains a correct and faithful statement of all the circumstances disclosed by the deeds, wills, etc., or depending on extrinsic facts, as marriages, births, deaths, descents, disseisins, possession, and the like, which are material to the title.

The abstract thus carefully prepared and revised, and if need be corrected, is in England generally submitted to a conveyancer, or to counsel, to advise as to the sufficiency of the title. With us it is examined with renewed care and caution by the attorneys who prepared it, and if any doubt arises, the advice of some more experienced member of the profession is invoked.

Mr. Preston, himself a distinguished conveyancer, in his noted "Essay on Abstracts of Title," refers in strong terms to the labor and responsibility involved in such inquiries. "No one," says he, "can comprehend the labor which a conveyancer must undergo, unless he has had actual experience or observation of the difficulties to which he is exposed of collecting and combining facts, expounding intention, and applying abstruse rules of law.

"The conveyancer, of all other lawyers, is in a situation to be most oppressed by labor and by difficulty, and ought to be as learned—perhaps, considering his duties, more learned—in the law than the members who are engaged in any of the other departments of the profession." (1 Prest. Abstracts of Title, 1, &c.)

And he then proceeds to set forth, not only the topics to which the abstract should be directed, but the form which it should assume. (1 Prest. Abstracts, 36 & seq., 42 & seq.) And Mr. Atkinson, another London conveyancer of distinction, is yet more particular and detailed in his explanations and forms of Abstracts. (2 Atkinson, Conveyancing, (2d Lond. ed) 458 & seq.)

Our registry-laws in Virginia, render the task of preparing an accurate abstract of title easier and less liable to error than in England.

#### 6<sup>m</sup>. Remedies upon Contracts for the Sale of Lands.

The remedies upon *executory* contracts for the sale of lands are, (1), By action at law; and (2) By suit in equity: W. C.

#### 1<sup>n</sup>. Remedies upon Contracts for the Sale of Lands by *Action in the Courts of Law*.

The *scheme* of the legal remedy for all breaches of contract, whether for lands, or touching any other subject, is to compensate the party injured by the breach of the contract, *in damages*. There does, indeed, seem to have been in use at some period a remedy *at law* to compel the vendor to convey the premises according to his agreement; but the only trace of such a proceeding in modern times is to be found in the collusive suit known as a *fine* (now abolished even in England), whereby titles to lands from the earliest periods of the common law were most effectually assured. The collusive suit in that case was a *writ of covenant*, whereby the sheriff was commanded to require the defendant to perform to the plaintiff the covenant made between them touching the land in question, or to show why he had not done it. (2 Bl. Com. 349 & seq.; Id. 449, App'x.) But no such action for the purpose of compelling specifically the observance of covenants or agreements to convey has been employed in England for several centuries, nor in Virginia at all. If the party com-

plaining of the breach of the contract desires to compel a specific execution of it, he must invoke the aid of a court of equity.

Again, the party complaining must generally have recourse to equity, when he has been so far delinquent, in point of time or otherwise, as to make it impossible for him to aver, as he must do at law, that he has fulfilled the agreement on his side; for equity is content if the complainant has not been guilty of a default *seriously harmful* to the interests of the other party. (Jackson v. Ligon, 3 Leigh, 186.)

And lastly, a resort to equity may be made necessary by the contract not being in writing, or not being signed as the statute requires; for a court of law demands a rigorous compliance with the provisions of the statute, whilst equity, as we have seen, allows the circumstances of part-performance, fraud, etc., to take the case out of its influence.

The action at law may, of course, be instituted by either party, so that the most convenient arrangement of the subject will be to consider, (1), The action by the vendor against the vendee; and (2), The action by the vendee against the vendor;

W. C.

### 1°. Action by Vendor against Vendee.

Under this head the student is asked to consider, (1), The several actions to which the vendor may resort; (2), The circumstances under which the vendor is entitled to maintain an action; and (3), The measure of damages which the vendor may recover;

W. C.

### 1°. The Several Actions to which the Vendor may Resort against the Purchaser.

If the contract is *under seal*, the proper action for the vendor is *covenant*; if not under seal, the proper action for him is *trespass on the case in assumpsit*. (St. Pl. 16, 19; Id. (Tyler), 46, 49; 1 Chit. Pl. 131 & seq., 111 & seq.)

### 2°. The Circumstances under which the Vendor is Entitled to Maintain an Action.

Whatever the form of his action upon the contract of sale and purchase, the vendor must show that he has a good title to the land, *in equity* as well as at law. (2 Sugd. Vend. 203-4 and seq.; Maberley v. Robins, 5 Taunt. 625; Shaw v. Jukeman, 4 East, 201.) Or at least such title as he contracted to convey, although he is not bound to aver an offer to convey, unless his making a conveyance is by the terms of the contract made a condition precedent to the payment of the purchase-money.

In general, however, if there be no stipulation to the contrary, it is understood that the agreement of the purchaser to pay the price, and of the vendor to convey a good title, are mutual and dependent, and the vendor must therefore aver, as a necessary part of his case, not only that he has a good title, but that he has made and tendered a sufficient conveyance, according to the terms of the contract; and *a fortiori* must there be such an averment where the conveyance, by the stipulation of the contract, is to precede the payment of the purchase-money. (1 Sugd. Vend. 373-4; 2 Do. 3; Roach v. Dickinson, 9 Grat. 154; Brockenbrough v. Ward, 4 Rand. 355.) Where, however, it is agreed that the conveyance is not to be made until certain conditions are complied with, such as paying an instalment of the purchase-money, and securing the residue, the vendor need aver no more than that on the day when this was to be done he was in lawful and quiet possession of the land, and was *ready* to give defendant possession, with a proper conveyance. (Moss. v. Stipp, 3 Munf. 159.) On the other hand, wherever the payment of the money is appointed for a day named, which either must, or may come before the conveyance is to be made, the making of the conveyance is not a condition precedent to the recovery of the money, and the vendor need aver in his declaration no tender of a conveyance, but only that *he has* such a title as he stipulated to convey. (Bailey v. Clay, 4 Rand. 346; Thorp v. Thorp, 1 Salk. 171.) And lastly, where (the covenants being dependent) the contract to convey is on the part of the *vendor*,—not of the vendor and *his heirs*,—whilst the contract to pay is on the part of the purchaser and *his heirs*,—and the vendor dies before conveying, a tender of a conveyance by the *vendor's heirs*, is not a sufficient compliance with the stipulation, and will not enable the vendor's representatives to recover against the purchaser, for the latter had a right to contract for a conveyance from the vendor himself in his life-time, and the fact that the covenant did not extend to the *vendor's heirs* is understood to show that that was the intent. (Spindle v. Miller, 6 Munf. 170; Moore v. Fitz-Randolph, 6 Leigh, 175.) It may merit consideration how far this principle is superseded in Virginia, by the provision of the statute, that when a deed uses the words “the said — covenants,” it shall have the same effect as if it was expressed to be by the covenantor for himself, *his heirs, personal representatives and assigns*. (V. C. 1873, ch. 113, § 9; V. C. 1887, ch. 108, § 2445.)

In all cases where, in pursuance of the foregoing prin-



ciples, the vendor is under an obligation to aver the making and tendering of a conveyance, he may be excused therefrom, if by the terms of the agreement the vendee is to *prepare the conveyance*; as in England he is always, if there be no stipulation on the subject, whilst with us the more logical doctrine prevails, that in the absence of stipulation, the party who is to execute the deed is to prepare and tender it. (1 Sugd. Vend. 374-5; *Timney v. Ashley*, 15 Pick. (Mass.) 546; *Wallace v. Shafer*, 12 Leigh, 622.) And so, also, he is excused from the obligation of performance, if the vendee has discharged him therefrom. (1 Chit. Cont. (11th Am. ed.) 424-426; *Jones v. Barkley*, 2 Dougl. 684, *Philips v. Fielding*, 2 Hen. Bl. 123; *Hawkins v. Kemp*, 3 East. 443; *Wilmot v. Wilkinson*, 6 B. & Cr. (13 E. C. L.) 506.)

3<sup>p</sup>. The Measure of the Damages to be Recovered by the Vendor.

The proper measure of damages to be recovered by the vendor is, for the most part, the stipulated price of the property sold; for in general he cannot recover at all, unless he shows himself to have performed, or to be ready and able to perform on his side, which usually supposes the vendee to be without excuse for his default, and entitles the vendor to be paid the purchase-money. (2 Lom. Dig. 60; *Bailey v. Clay*, 4 Rand. 346.)

2<sup>o</sup>. Action at Law by Vendee against Vendor.

The topics will follow the same arrangement as when the vendor was plaintiff; namely, considering (1), The several actions to which the vendee may have recourse; (2), The circumstances under which the vendee is entitled to maintain an action; and (3), The measure of the damages which a vendee may recover.

W. C.

1<sup>p</sup>. The Several Actions to which the Vendee may have Recourse Against the Seller.

If the seller's agreement is by title-bond, the proper action is debt on the bond; if otherwise it is *under seal*, the proper action against him is *covenant*; if *not under seal*, the proper action is *trespass on the case in assumpsit*. (St. Pl. 16, 19; Id. (Tyler) 46, 49; 1 Chit. Pl. 131 & seq.; Id. 111 & seq.)

2<sup>p</sup>. The Circumstances Under which the Vendee is Entitled to Maintain an Action.

The purchaser can maintain no action at law, any more than the vendor, unless he can show that he has performed on his side every condition precedent stipulated for in the contract; and it will be remembered, that in the case of mutual and dependent covenants, they are

looked upon as respectively conditions precedent, so that, if the title is to be conveyed, and the purchase-money paid at the same time, as the vendor cannot on his side, as we have seen, recover the purchase-money without showing that he was at that time able and offered to convey a good title, so the purchaser cannot recover either, unless on his side he is able to show a payment or tender of the purchase-money at that time (unless he has been discharged from so doing by the vendor), and also a demand duly made of a conveyance, with an allowance of a sufficient time afterwards to prepare it. In England, indeed, the rule is, that the purchaser shall also prepare and tender a conveyance for the vendor to execute; but we have seen that a more reasonable doctrine, in the absence of stipulation, prevails with us, namely, that he shall prepare the conveyance whose duty it is to make it. (1 Chit. Cont. (11th Am. ed.) 424, n. (t); 1 Sugd. Vend. 374 & seq.; Fuller v. Hubbard, 6 Cow. (N. Y.) 17 & seq.)

3°. The Measure of the Damages which a Vendee may Recover of the Vendor.

The doctrine upon this subject is, that where the seller does not complete his engagement, so that the contract is unexecuted, the purchaser may at his election affirm the agreement, by bringing an action against the vendor for the non-performance of it, to be compensated by such damages as a jury shall assess; or he may disaffirm the agreement *ab initio*, supposing that the parties can be put *in statu quo*, and bring an action for *whatever money he may have paid on it*, as so much money had and received by the vendor, to his use. In the latter case, the measure of damages is uniformly the same, namely, the *money he has paid* with interest; in the former case it is *ordinarily* the *value of the land* at the time when it ought to have been conveyed (less the amount which *he has not paid*), with interest for the time for which he may be accountable for the profits to the true owner, together with the expenses fairly incurred by the purchaser in investigating the title, which latter, however, he can recover only as special damages, upon a special averment. But nothing can be allowed for the loss of a bargain, even though there may have been an actual increase in the market value of the land, and much less where the loss is of a more purely speculative character, as of profits which he might *perhaps* have realized by advantageous employment of the property, or otherwise. (1 Sugd. Vend. 367 & seq.; 2 Do. 48 & seq.; 2 Lom. Dig. 62 & seq.; 1 Chit. Cont. (11th Am. ed.) 426, n. (x); 2 Do. 1089 & seq.; Moses v. McFerlan, 2 Burr,

1011; Hunt v. Silk, 5 East. 449; Weaver v. Bentley, 1 Cai. R. (N. Y.) 47; Gillet v. Maynard, 5 Johns. (N. Y.), 85, 88; Flureau v. Thornhill, 2 W. Bl. 1078; Walker v. Moore, 10 B. & Cr. (21 E. C. L.) 416; Stout v. Jackson 2 Rand. 132; Threlkeld v. Fitzhugh, 2 Leigh, 451; Mills v. Bell, 3 Call, 320; Thompson v. Guthrie, 9 Leigh, 101; Wilson v. Spencer, 11 Leigh, 261, 277-8; Newbrough v. Walker, 8 Grat. 16; Letcher v. Woodson, 1 Brock. 212; Hopkins v. Lee, 6 Wheat. 109.) And it will be observed that, for the most part, the best standard whereby to determine the value of the land is the *purchase-money*. (Wilson v. Spencer, 11 Leigh, 261, 277-8; Newbrough v. Walker, 8 Grat. 16; Letcher v. Woodson, 1 Brock. 212.)

But whilst *ordinarily* the measure of the damages to be recovered by the purchaser is such as has been described, yet where the vendor's breach of contract results not from his misfortune in proving to be not entitled to land of which he in good faith believed himself to be the owner, but from his misconduct, or from his undue precipitancy; as, for example, where he had subsequently conveyed the land to another person; or where he has entered into a contract to sell before he had himself acquired a legal title to the land. In such cases the rule allows the purchaser to recover not only the value of the land as above stated, but also such damages as may compensate him for the loss he has sustained by the non-completion of his purchase. (2 Lom. Dig. 63 & seq.; Walker v. Moore, 10 B. & Cr. (21 E. C. L.) 416; Hopkins v. Glazebrook, 6 B. & Cr. (13 E. C. L.) 31; Wilson v. Spencer, 11 Leigh, 261.)

## 2<sup>n</sup>. Remedies upon Contracts for the Sale of Lands by Suit in Equity.

The remedy in equity upon contracts for the sale of lands may be either, (1), With a view to enforce their specific execution; or (2), With a view to cancel or rescind them;

W. C.

### 1<sup>o</sup>. Suit in Equity to Enforce Specific Execution of Contracts for the Sale of Lands.

Courts of equity assume to decree the specific performance of contracts upon the ground that the courts of common law afford, under the circumstances, either no redress at all, or an inadequate one. These cases happen in the instances following:

(1), Where the right to bring an action at law has been lost by the default of the party who is proposing to seek relief in equity; as in not performing a condition precedent, or a mutual covenant. To sustain an action at law,

performance, as we have seen, must be averred according to the very terms of the contract. Equity, on the other hand, demands no such rigor, and if, notwithstanding the plaintiff's default, it be *conscientious* that the agreement should be performed, it will be decreed accordingly. (1 Sugd. Vend. 340; Fry on Spec. Perform. § 4; Davis v. Hone, 2 Scho. & Lefr. 341.)

(2), Where the contract has not been reduced to writing and signed, in consequence of fraud practiced on the opposite party. (Cooke v. Marshal, 2 Vern. 200; Douglass v. Vincent, Id. 202; Newl. Contr. 193-'4; Fry on Spec. Perform. §§ 378 & seq.; *Ante*, p. 851.)

(3), Where a parol contract for lands has been partly performed by the party who asks the aid of a court of equity. (Newl. Contr. 181, &c.; Fry on Spec. Perform. §§ 384 & seq.; *Ante*, pp. 851 & seq.)

In the three cases already mentioned, the sole redress is to be found in equity, the courts of law being incapable of affording any remedy.

(4), Where *damages* (the only mode whereby a court of law seeks to redress the injury of a contract broken), would constitute an *inadequate remedy* therefor.

This last is the most usual ground upon which the aid of a court of equity is invoked to enforce specific execution of a contract. It can rarely exist in the case of contracts for chattels; and if it occurs more frequently in the case of contracts for personal services, it is practically so often impossible, in the nature of things, to enforce such engagements, that the attempt is seldom made. On the other hand, the ground is deemed to exist always in contracts for lands, so that incomparably the most frequent instances of application for specific performance are found in cases of such contracts, and of contracts for lands and chattels together, at an aggregate price. (2 Stor. Eq. §§ 716 & seq., 746 & seq.; Fry on Spec. Perform. §§ 10 & seq.; Clarke v. Curtis, 11 Leigh, 559.)

It is often said that applications to a court of equity for the specific enforcement of contracts are addressed to the *discretion of the court*, and so they are; for it is not *every* contract, even for lands, as we shall see, which equity undertakes to carry into effect. But it would be a great mistake to suppose that the *discretion* intended has in it aught of arbitrary *caprice*; it is a regulated and *judicial* discretion, governed by established rules of equity; so that when an agreement, such as the doctrine of specific execution applies to, is entered into by competent parties, and is in its nature and circumstances unobjectionable, it is as much, of course, in a court of equity to decree specific performance, as it is for a court of law



to give damages for a breach. (1 Sugd. Vend. 337; 2 Stor. Eq. § 751; Allen v. Freeland, 3 Rand. 175; Thompson v. Jackson, 3 Rand. 505; Anthony v. Leftwich, 3 Rand. 255; Pigg v. Corder, 12 Leigh, 59; McComas v. Easley, 21 Grat. 29 & seq.; Hale v. Wilkinson, Id. 79.)

As a general rule, specific performance is not to be decreed, unless, (1), The agreement be according to the terms prescribed by law; (2), Between parties able and willing to contract; and (3), Be certain and definite, equal and fair, and founded on adequate consideration. (2 Lom. Dig. 69; 2 Stor. Eq. § 751; 1 Sugd. Vend. 337); W. C.

- 1<sup>o</sup>. The Agreement, in Order to be Specifically Enforced, must be *According to the Terms Prescribed by Law*.

That is, the agreement must be according to the requirements of the statute of *parol agreements*, or to the rule established in admitting exceptions out of the operation of that statute. (2 Lom. Dig. 69; 2 Stor. Eq. §§ 751-2 & seq.; Fry on Spec. Perform. §§ 329 & seq.; (*Ante*, pp. 851 & seq.)

- 2<sup>o</sup>. Competency of the Parties to Contract.

See Fry on Spec. Perform. §§ 154 & seq.

We have already seen what persons are incompetent to *convey* lands (*Ante*, pp. 642 & seq.), and the same are in like manner incompetent to *contract* either to sell or to buy, the courts of equity being governed on that subject by the same rules as the courts of law. The court will never enforce specific performance against a person who is not *sui juris*, whether the disability arise from infancy, coverture, insanity, or any other cause. And as agreements must be *mutual*, if the agreement be not merely *voidable*, but *actually void*, as in the case of a married woman, the contract can no more be enforced on her part than against her. (Watts v. Kinney & ux. 3 Leigh, 290.) A similar doctrine is said to be applicable to the contract of an infant (1 Sugd. Vend. 335; 2 Lom. Dig. 69; Flight v. Bolland, 4 Russ. 298); but that seems to be tantamount to the avoidance of an infant's contract *by the opposite party*, which is anomalous. Marriage and insanity occurring after the contract is made constitute no bar to the enforcement of the performance of it, at the suit of the purchaser, he being willing to take such title as the party may be able to convey; but as neither the *feme covert*, nor the insane person can bind themselves by any covenants of title which might be inserted in the conveyance, the contract will not be enforced at the suit of such party against the purchaser. And if the vendor dies before completing the conveyance, leaving the inheritance to descend upon

his infant heirs, that constitutes no objection to the *purchaser's* demand for specific performance, although the purchaser might not, on his side, be compellable to complete the contract, because he has lost the benefit of the covenants of title; for although the court can and does decree the title which the infant possesses to be conveyed immediately by a commissioner (V. C. 1873, ch. 174, § 7; V. C. 1887, ch. 167, § 3418), it cannot bind the infant by any obligation to defend such title.

As the acts of a married woman, touching her estate (other than her *separate estate*), are void, unless they are of the nature, and are executed in the manner prescribed by statute (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502), no agreement by her and her husband can be enforced against *her*, either during coverture or afterwards, because it is *void* as to her; nor can it be enforced against her husband, so far as his interest in the property goes, because any constraint applied to him would operate morally, a constraint upon her (McCann v. James, 1 Rob. 256; Martin v. Mitchell, 2 Jac. & Walk. 425); but doubtless an action at law might be brought against her husband, and such damages recovered as might be proper for his breach of contract. It is said that a married woman's contract to convey even her *separate estate* is not enforceable (2 Lom. Dig. 70); but that would seem to depend upon the power of disposal conferred upon her along with the property. If she has power to dispose of it as if she were *sole* (a power which, in prudence, ought seldom or never to be bestowed), it can hardly be doubted that her contract touching it would be enforced against her. (Williamson v. Beckham, 8 Leigh, 20; Woodson v. Perkins, 5 Grat. 345; Hume v. Hord, 5 Grat. 374; Penn v. Whitehead, 17 Grat. 503; Muller v. Bayly, 21 Grat. 521.)

The Married Woman's Law of 4th April, 1877, as modified by the Code of 1887, provides that a married woman shall have, as her *separate estate*, all real and personal property which she owns at the time of her marriage, or shall acquire afterwards, and that she shall "have power to contract in relation thereto, or for the disposal thereof, and may sue and be sued as if she were a *feme sole* (V. C. 1887, ch. 103, §§ 2286, 2288, 2289.)

It must be remembered, also, that although a married woman can never at common law charge her *person* by any contract whatever, she may yet bind her *separate estate*, and a court of equity will enforce the remedy against it. (Fry, Spec. Perf. §§ 156 & seq.; Francis v. Wigzell, 1 Madd. 258; Aylett v. Ashton, 1 My. & Cr.

(13 Eng. Ch. R.) 105; Meth. Ch. v. Jacques, 3 Johns. C. R. 77; Demorest v. Wynekoop, 3 Johns. C. R. 129; Woodson v. Perkins, 5 Grat. 345; Penn v. Whitehead, 17 Grat. 503; 1 Min. Insts. 355-'6.) And under the married woman's law, she may charge her *person* as well as her separate estate, by any contract touching any trade or business in which she may be engaged, and touching her said separate estate, as if she were a *feme sole*. The language of the statute, which will strike the student as a little inconsistent, is as follows:

§ 2288. "She can make contracts as if sole, in respect to such trade, business, labor, services, and her said separate estate, or upon the faith and credit thereof; and upon such contracts and as to all matters connected with, relating to, or affecting such trade, business, labor, services or separate estate; and upon contracts and liabilities made or incurred before her marriage, she may *sue and be sued* in the same manner, and there *shall be the same remedies* in respect thereof, *for and against her and her said estate*, as if she were unmarried."

§ 2289. "In any case in which a married woman may sue or be sued under the provisions of the preceding section, a *personal judgment or decree may be rendered for or against her*; and when against her, the same may be *enforced against her, and any separate estate she has or may subsequently acquire (but only against such estate)*, in the same manner as if she were unmarried.

3<sup>d</sup>. The Agreement, in Order to be Enforced Specifically, must be *Certain and Definite, Equal and Fair*, and *Founded on Adequate Consideration*.

Not only must the agreement sought to be enforced be *proved clearly*, but it must be *certain and definite* in all its parts. (Fry, Spec. Perf. §§ 203 & seq.; Buxton v. Lister, 3 Atk. 386; Ld. Walpole v. Ld. Orford, 3 Ves. Jr. 420.) Its terms must be so precise as to obviate any reasonable misunderstanding of its import; and if the terms be vague and uncertain, or the evidence to establish the contract be insufficient, a court of equity will decline to interpose in order to enforce it, and will leave the party to his legal remedy, if there be any. (Anthony v. Leftwich, 3 Rand. 245; Pigg v. Corder, 12 Leigh, 69; 2 Lom. Dig. 71.) Thus, a promise by a father, in consideration of the marriage of his daughter, to pay her "*a fortune*," not saying how much; and an agreement to buy land at a price to be *fixed afterwards*, but which was never fixed, and the vendor died, were justly held too vague to be enforced. (Graham v. Call, 5 Munf. 396; Colson v. Thompson, 2 Wheat. 336.) But here, as in other cases, that is certain which is *capable of being*

*made certain*, and therefore an agreement to sell at a *fair valuation*, or upon terms to be *adjusted by chosen friends*, who make the adjustment accordingly, will be enforced. (2 Lom. Dig. 72; *Boyd's Heirs v. Magruder*, 2 Rob. 761.) But if no award be made by the friends selected, the court will not compel either party to submit to any other adjustment, and the agreement cannot be enforced. (*Smallwood v. Mercer*, 1 Wash. 290; *Dandridge v. Harris*, Id. 326; *Jones v. Hubbard*, 6 Munf. 261.)

Again, the agreement, in order to be enforced, must be *equal and fair*, and founded on an *adequate consideration*.

It is in respect to this matter particularly that the *discretion* of a court of equity is exercised. That court will not call forth its extraordinary jurisdiction in order to enforce an agreement which, for any cause, it is unjust or unreasonable in point of conscience to enforce. And it is established that specific performance will be denied whenever the agreement is liable to any of the objections following, viz.: (1), A want of *mutuality*; (2), Any taint of *fraud*; (3), Any *misrepresentation* of the estate sold, going to the value of the whole; (4), In case of the employment of puffers at an auction; (5), Any *mistake or surprise* materially affecting the substance and character of the transaction; (6), The want of a valuable *consideration*, or an *inadequate one*; (7), *Illegality of the contract* binding the party to do what he may not lawfully do; and (8), *Unreasonable delay* on the side of the party seeking the aid of the court. (2 Lom. Dig. 74);

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1<sup>o</sup>. Where there is a *Want of Mutuality* of Obligation or of Remedy.

Mutuality of *obligation* is so essential a feature in all contracts, both at law and in equity, that without it there is no contract at all. A married woman's contract is no more binding upon the opposite party than upon herself; and so where an infant's contract is *void*, it is void as to both parties, the adult no less than the infant. But mutuality of *remedy* is not invariably insisted on in the courts of law, as, for example, in the case of infant's *voidable* contracts, where the privilege of renouncing them belongs to the infant only, and the adult is bound. It is said, as we have seen, that a court of equity will not decree specific execution in *favor of an infant* generally, because the infant might, on his side, repudiate the contract if *he pleased*. (1 Sugd. Vend. 335; 2 Lom. Dig. 75; Fry, Spec. Perform.



§§ 286 & seq.; *Flight v. Bollard*, 4 Russ. 298.) But it is submitted that this seems to involve an unnecessary departure from the general principles regulating infant's contracts, hardly justified by the *discretion* which equity professes to exercise in cases of specific execution; especially when it is considered that where the infant files his bill after age, he thereby solemnly confirms the contract, and thus establishes its mutuality. (See *Goddin v. Vaughan*, 14 Grat. 102.) A parallel case is where a person who has signed a contract in writing is compelled to perform it, whilst he could not oblige the other party who has not signed it to do the same thing. It will be remembered that Lord Redesdale deemed this case also one where mutuality of remedy was wanting, and consequently that no decree for specific execution could be made. (*Lawrenson v. Butler*, 1 Sch. & Lefr. 13, 19.) His opinion, however, has always been overruled, both in England and in America, partly from the consideration that the law, from motives of policy, has created a diversity between the parties, prohibiting the enforcement in one case and not in the other; and partly because the other party, by asking for performance, has in writing ratified the contract, and so established a mutuality of remedy. (*Newl. Contr.* 155; *Seton v. Slade*, 7 Ves. 275.) So also, as we have seen (*Ante*, p. 868), a purchaser is enabled to maintain a suit for specific performance against the *vendor's heirs*, or against a woman who, since the contract was made, has married, or against a person who, since the contract, has become insane, if he is willing to take such title as the parties on the other side can respectively convey; whilst the contract cannot be enforced on that other side as against the purchaser. And lastly, where one party has committed a fraud upon the other, this latter may enforce the contract, if he pleases, against the former, whilst he who has committed the fraud can have no mutual remedy against the innocent party.

These several instances seem to establish that it is not every want of mutuality of *remedy* which will induce a court of equity to abstain from exercising its authority in decreeing performance; and that the court does not deny its aid where, the contract being not void, but voidable only, the policy of the law has created a diversity between the parties, allowing one the option of insisting on the contract or not, while it permits no such choice to the other.

It is sufficient, if there be mutuality of remedy at the time the contract is entered into, and if by a subse-

quent contingency that mutuality is destroyed, it is in general no barrier to a decree for specific performance on the side of the party not affected by the contingency. Thus, when a vendor covenants for himself, but *not naming his heirs*, to convey with good title (which, of course, binds him to convey with his own general warranty), and he dies before conveyance, whereby such general warranty becomes impossible, it was held that the vendor's heirs are thereby precluded from demanding specific performance against the purchaser; but that the purchaser might, notwithstanding, require it of them. (Newl. Contr. 157; Stapilton v. Stapilton, 1 Atk. 110; Moore v. Fitz Randolph, 6 Leigh, 186.)

It is this principle of *mutuality* which enables a *vendor* to compel in equity the fulfilment of the contract on the part of the purchaser, by a decree for the payment of the purchase-money, although it might often be as well accomplished by an action at law; for equity, having assumed jurisdiction in order to compel the *vendor* to perform the contract, found itself constrained by its own principle of mutuality to take cognizance of the case where the purchaser refused to fulfil the agreement, and the application was on the part of the vendor (2 Lom. Dig. 76); a cognizance which has even been extended to an assignee for value of a bond given for the purchase-money of land, and, been allowed to embrace at once the assignor and the vendee. (Hanna v. Wilson, 3 Grat. 243.)

## 2<sup>a</sup>. Where the Contract is Tainted with Fraud.

Fraud, whether it be effected by actual misrepresentation or by diligent concealment, which are alike condemned, is an insuperable objection in a court of equity to decreeing specific execution of a contract on the side of that party who was guilty of the fraud. But there is a marked distinction between the degree of deception which will lead to a denial of specific performance, and the much grosser fraud which is requisite in order to induce the court to *rescind* the contract. (2 Lom. Dig. 76; Fry on Spec. Perform. § 233 & seq.; Gibbons v. Jackson, 10 Leigh, 364; Rossett v. Fisher & al. 11 Grat. 492.) Nay, further, it requires much less strength of case on the part of the defendant to resist a bill to perform a contract than it does on the part of the plaintiff to maintain a bill to enforce a specific performance; for as we have seen in the latter case, the agreement must be *certain, fair and just in all its parts*. (2 Stor. Eq. § 769; Grimes v. Sanders, 3 Otto (93 U. S.) 55; Graham v. Pancoast, 6 Casey (30 Penn.) 89; Stearns v. Beckham, 31 Grat. 417.)

Fraud, of course, assumes an infinite variety of shapes; and whilst sometimes palpable and gross, it may in other instances have only a barely discernible flavor of deception and wrongful advantage. Thus, an agreement having been made for an estate lying on the Thames, which was represented to be worth £90 a year *net*, upon a bill by the *vendor* to enforce specific performance against the purchaser, it appeared that there had been an *industrious concealment* of the fact that there was an annual expenditure of £50 required upon the needful repairs of a wall to keep out the river; and thereupon the bill was dismissed, but *without costs*. (*Shirly v. Stratton*, 1 Bro. C. C. 440.) And a lease of a tenement in Petersburg having been agreed to be assigned, without acquainting the assignee with a stipulation in the lease, that if the premises should be destroyed by fire, lightning, or tempest, the *term should cease*, but the rent be paid up to the time of such destruction; and the premises having been the very next day, and the day before the assignee was to have been put in possession, consumed by a memorable conflagration which laid a considerable part of the town in ruins, upon a bill filed by the *purchaser* he was relieved from the agreement, and certain negotiable notes which he had executed for the purchase-money of the lease were decreed to be given up to be cancelled. (*Snelson v. Franklin*, 6 Munt. 210; *McNeil & al. v. Baird*, Id. 316.) So where a party has made a contract in ignorance or misapprehension, arising from the declarations and conduct of the other contracting party during the negotiation, the contract will not be enforced on that side. (*Gibbons v. Jackson*, 10 Leigh, 364.)

The purchaser who has been deceived by the misrepresentation or other fraud of the vendor must repudiate the transaction as soon as he becomes cognizant of the deceit. If he omits to do so, and continues in possession, speculating upon the chance of at length getting a satisfactory title, he is presumed to have meant to waive his right to annul the bargain, or to have made a new one, and will be compelled to proceed with the contract; but he may still claim an abatement of the purchase-money, so far as the title proves defective; nor is he bound in any case to accept, in lieu of such abatement, any *indemnity* whatsoever. (*Pollard v. Rogers*, 4 Call, 239; *Goddin v. Vaughan*, 14 Grat. 124, 125, & seq.)

The man who calls for specific performance of a contract must be able to show that his conduct has been clear, honorable and fair. It is a principle in equity

that the court must be satisfied as to the integrity and good faith of the party seeking its interference. And hence there are few cases which require more the exercise of a sound and reasonable judicial discretion than the cases of such applications; where the court must indeed govern itself, as far as it may, by general rules and principles, but must at the same time grant or withhold relief when these rules and principles fail to furnish an exact measure of justice between the parties, according to the circumstances of each particular case. (2 Stor. Eq. § 742; Id. 693; Kerr on Fraud and Mistake, 357; King v. Hamilton, 4 Pet. 311; Willard v. Tayloe, 8 Wal. 557; Miss. & Mo. R. R. Co. v. Cromwell, 1 Otto (91 U. S.) 643; Stearns v. Beckham, 31 Grat. 388-9.)

It should be observed, that although specific performance be refused, yet in *many*, perhaps it may be said in *most* cases, equity will not turn the purchaser who has paid the purchase-money, in whole or in part, and made improvements on the premises, round to an action at law to recover damages for the breach of contract, but having properly acquired jurisdiction of the subject, will proceed to do final and complete justice between the parties, by adjusting the accounts through the medium of a master-commissioner, ascertaining the payments made, the rents with which the purchaser should be charged, together with the waste or deterioration for which he may be accountable, and the value of the improvements of a permanent character, to be allowed him; and having ascertained the balance due, the court will make a decree that the same shall be paid, and in favor of the purchaser will *charge the amount upon the land*. (2 Stor. Eq. §§ 798-9, and n.; Fry, Spec. Perform. § 795 and n. [2]; Anthony v. Leftwich, 3 Rand. 238; Payne v. Graves, 5 Leigh, 561; Bowles v. Woodson, 6 Grat. 78; McComas v. Easley, 21 Grat. 23; Nagle v. Newton, 22 Grat. 814; Hendricks, v. Gillespie, 25 Grat. 181; Stearns v. Beckham, 31 Grat. 420 & seq.; Watts v. Waddle, 6 Pet. 389; Holt v. Rogers, 8 Pet. 420-434; King v. Thompson, 9 Pet. 204; Aday v. Echols, 18 Ala. 357; Parkhurst v. Van Cortlandt, 1 Johns. Ch. R. (N. Y.) 273.)

- 3<sup>d</sup>. Where there is a *Misrepresentation or Misdescription* of the Estate Sold, in Respect of Situation, Quality, Quantity, or Title, &c.

The supposition here is that there has been no fraudulent intent (which would belong to the preceding head), but only a want of due care or knowledge on the part of the vendor in describing or representing the property. And it is assumed, also, that the misrepresentation or



misdescription goes to the whole estate, or at least to so material a part of it that the purchaser's views and objects in his purchase are either frustrated or essentially impaired, and that the mistake was unknown to him. These circumstances will occasion a court of equity to decline to enforce the contract. (2 Lom. Dig. 79; Fry, Spec. Perf. §§ 425 & seq.)

The remedy at law, in such a case, would frequently be arrested, although the misdescription were comparatively trivial, by the necessity that the vendor, in an action at law, should aver in his declaration, and should prove at the trial, a performance on his part of the contract as it was made, which, of course, he cannot do if the contract contains a misrepresentation touching the subject-matter. On the contrary, the purchaser, upon the vendor's default, may abandon the contract, and recover whatever money he has paid or deposited on account of it. In equity, however, if the purchaser can get *substantially* what he contracted for, the agreement is generally enforced at the suit of the vendor, and always at the suit of the purchaser, allowing in either case compensation for deficiencies in quantity. (2 Lom. Dig. 79; Evans v. Kingsbury, 2 Rand. 131; Jackson v. Lyon, 3 Leigh, 161; McKee v. Barley, 11 Grat. 340.) A vendor, in the absence of any stipulation to the contrary, is always bound to make a *good title*, free from incumbrance of every description which may embarrass the full and quiet enjoyment of the premises by the purchaser. (Garnett v. Macon, 6 Call, 309, 367; Christian v. Cabell, 22 Grat. 102); and supposing the vendor thus bound, either impliedly or by express agreement, the purchaser is not obliged, and will not be required, to accept any other or inferior title, even though he knew at the time of the contract that the vendor's title was defective (Jackson v. Ligon, 3 Leigh, 186; Goddin v. Vaughn, 4 Grat. 117, 124; Griffin v. Cunningham, 19 Grat. 571); but if, after becoming aware of the defect of title, he does not forthwith abandon the contract, he is understood thereby to waive the objection, and to consent to take such title as the vendor can make. (Goddin v. Vaughn, 14 Grat. 124 & seq.; Daniel & al. v. Leitch, 13 Grat. 195, 212; Christian v. Cabell, 22 Grat. 99.) On the other hand, if the vendor does not affect to have a perfect title, and expressly sells only such as he has, without warranty, he is entitled to specific execution without being required, as a preliminary, to show or to convey a clear title. (Bailey v. James, 11 Grat. 468; Goddin v. Vaughn, 14 Grat. 124-5; Vail v. Nelson, 4 Rand. 478, 481; Sutton v. Sutton, 7 Grat. 234.)

In respect to the *quantity of estate*, equity will not compel specific execution where the vendor is not possessed of as large an interest as he has contracted to convey. Thus, if the estate is described as a *freehold*, the purchaser will not be compelled to take a *leasehold*, however long the term; nor, if he contracts for a *lease*, will he be required to take an *under-lease*, nor a shorter term instead of a considerably longer one; although any slight deficiency in any of these cases may be made up by compensation. (2 Lom. Dig. 81.)

It is expedient here to call the student's attention again to the principle, that when, in consequence of the title failing as to too considerable a part of the property to be the subject of compensation, the vendor is unable to compel performance of the contract, the vendee may yet compel it on his side, if he is willing to take so much as the vendor can convey. Thus, where two parcels of land are embraced in the contract, each at a specific price, and the vendor proves unable to make a valid title to but one, whilst he is in consequence precluded from enforcing performance against the purchaser, the purchaser, on his side, if he thinks fit, may take the parcel to which a good title can be made, and compel the vendor to convey it to him (*White v. Dobson*, 17 Grat. 262); and where a wife and two other joint owners of land, together with the wife's husband, contracted to convey the land, it was determined that, whilst the husband and wife could not be compelled to perform the contract, nor the husband to convey his interest, and so the purchaser could not have been compelled to take the land specifically, yet the purchaser might compel the other two joint owners to convey their respective portions, the purchase-money being abated in proportion. (*Clarke v. Reins*, 12 Grat. 98.)

The most frequent misdescription is as to the *quantity of the land*; in respect to which the doctrine depends on whether the contract is, (1), For an *estimated quantity*; or (2), For a *specified number of acres*; or (3), For a tract or parcel *in gross*.

(1), Where the contract is for an *estimated quantity*, as for a tract of land containing, *by estimation*, one hundred acres, be the same *more or less*, an acre or two in the one hundred acres, more or less, would be no ground for denying specific execution, nor ground even for compensation. But if the deficiency be very considerable, as one-third, or even *one-sixteenth*, where the land is of much value, the words "*more or less*," or even a stipulation that the parties should not be

liable respectively for an excess or a deficiency, will not preclude the purchaser from resisting the vendor's application for specific performance; and if the vendor *knew the true quantity*, although he may, perhaps, compel the purchaser to take the land, the latter is, at all events, entitled to an abatement of the purchase-money, even, it seems, for a small difference. (2 Lom. Dig. 82-'3, *Triplett v. Allen*, 26 Grat. 722.)

(2), Where the contract is for a *specified number of acres*, at a named price per acre (as for a tract of five thousand one hundred and thirty acres, more or less, at thirty shillings per acre), the parties are construed to have reference to the supposed quantity, and if there prove to be an excess or deficiency greater than can be imputed to variation in instruments and small errors in surveys (say from one to two acres in the hundred), compensation is to be made by abating or increasing the purchase-money, according as there is a deficiency or excess. (*Jolliffe v. Hite*; 1 Call, 301; *Nelson v. Carrington*, 4 Munf. 332; *Nelson v. Matthews*, 2 H. & M. 164; *Keyton v. Brawford*, 5 Leigh, 39; *Weaver v. Carter*, 10 Leigh, 37; *Neal v. Logan*, 1 Grat. 14; *Jones v. Tatum*, 19 Grat. 735; *Caldwell v. Craig*, 21 Grat. 137 & seq.)

It follows, as a corollary, from the construction assigned to such contracts (namely, that they are supposed to have reference to the *actual quantity* of land), that there is a *right of survey* on both sides, which, if no particular time be limited for its exercise, continues until the whole business is closed. (*Nelson v. Carrington*, 4 Munf. 332; *Carter v. Campbell*, Gilm. 170; *Crawford v. McDaniel*, 1 Rob. 448; *Neal v. Logan*, 1 Grat. 14.) On the other hand, that a right to survey the land is expressly reserved, or, if not reserved, is claimed by one party and acquiesced in by the other, is justly considered as strong, and generally satisfactory proof that a sale *by the acre*, and not in gross, was contemplated. (*Nelson v. Carrington*, 4 Munf. 340; *Beirne v. Erskine*, 5 Leigh, 59.)

(3), Where the contract is for a tract or parcel of land *in gross*, without reference to its quantity.

Whatever the deficiency or excess in this case, specific performance is to be decreed, without allowance therefor, to either party (*Keyton v. Brawford*, 5 Leigh, 39; *Jolliffe, &c. v. Hite*, 1 Call, 301; *Tucker v. Cocke*, 5 Rand. 51; *Caldwell v. Craig*, 21 Grat. 132); but the question whether a sale *in gross* or *by the acre*, was designed, is often a perplexing one, as questions of *intention* generally are. The inclination of the courts is to

construe all sales as made *by the acre*, because that is the fairest and most equal mode of adjustment, and avoids the element of *hazard*, which is deprecated: so that if a contract *in gross*, or *of hazard*, as to the quantity is alleged, it must be made apparent by the terms of the contract, interpreted in the light of surrounding circumstances. (Blessing's Adm'r v. Beatty, 1 Rob. 287; Crawford v. McDaniel, 1 Rob. 448; Quesnel v. Woodlief, 6 Call, 238.) Thus, where the terms of the agreement were for the sale of "*a certain tract of land known by the name of Crab-bottom, said to contain 870 acres, be it more or less, etc., to wit, all that tract left him (the vendor) by his father,*" it was considered to be a sale *in gross*, and not by the acre. (Hull v. Cunningham, 1 Munf. 330.) So an agreement to sell "1,100 acres of land, more or less, to the vendee, adjoining the vendee's land, for the sum of £330," was determined to be a sale *in gross*. (Pendleton v. Stewart, 5 Call, 1.) So it also is when the contract is expressly for certain *metes and bounds* (Grantland v. Wight, 2 Munf. 179; Foley v. McKeown, 4 Leigh, 627; Scammonds v. McGinnis, 3 Grat. 319); and where the agreement is for a *tract of land*, "bounded as expressed in the survey made by C. K., and estimated by the said C. K. at 1,022 $\frac{3}{4}$  acres," although the purchase-money was an equi-multiple of the number of acres. (Weaver v. Carter, 10 Leigh, 37. See Russell v. Keenan, 8 Leigh, 9; Jones v. Tatum, 19 Grat. 735; Caldwell v. Craig, 21 Grat. 137 & seq.)

It is regarded as a circumstance tending to indicate a sale to be *by the acre* that the purchase-money is an equi-multiple of the number of acres (Pendleton, Pres. Jolliffe & al. v. Hite, 1 Call, 324; Quesnel v. Woodlief, 6 Call, 238; Tucker Pres. Keyton v. Brawford, 5 Leigh, 49); yet it did not prevail over other circumstances in Weaver v. Carter, 10 Leigh, 37; and the converse, although persuasive, is perhaps still less conclusive, namely, that the sale is *in gross* because the purchase-money is *not an equi-multiple* of the number of acres. (Blessing v. Beatty, 1 Rob. 207; Crawford v. McDaniel, 1 Rob. 448.)

It may be observed, that even if the sale were by the acre, if the purchaser agree to take it *by previous surveys*, without any fraud, misrepresentation, or concealment by the vendor, he takes upon himself the risk of deficiency in quantity, and is entitled to no abatement of price, if there be such deficiency. (Fleet v. Hawkins, 6 Munf. 188; Tucker v. Cocke, 2 Rand. 57.)

But whilst misdescription in *quantity* is the most fre-



quent, it is by no means the only misdescription which occurs in practice. Thus, if the premises are described as possessed of any special advantage which they do not possess, the purchaser will be entitled to compensation, if in the nature of things the disappointment be susceptible of compensation, or if not, to a rescission of the contract. Thus, if the land be represented to be in close proximity to a town, and turns out to be three or four miles off; or if a house wanted *immediately* as a residence, be represented to be in repair when it is uninhabitable, there being no principle in either case on which compensation can be estimated, the only relief which can be administered is to *rescind the contract*. But if, in the latter case, the house were not *immediately* required for use, compensation could be easily made, and would be decreed accordingly, viz.: *the cost of the repairs*. Where, however, the purchaser *knows* the description to be false, or it is so patent and obvious that it could not have escaped his observation, he cannot pretend to have been deceived, and may not, on that ground, resist the specific execution of the agreement. (2 Lom. Dig. 88-9.)

Equity having jurisdiction to decree specific performance, has, as *auxiliary and incidental thereto*, power in a proper case to decree *compensation*, which may be ascertained either by a commissioner of the court, or by a jury impanelled at the bar of the court, upon an issue of *quantum damnificatus*. But equity has no independent power to inquire into and decree compensation in damages to either party. (2 Story Eq. §§ 798-9; Robertson v. Hogsheads, 3 Leigh, 723; Nagle v. Newton, 22 Grat. 821.)

4<sup>a</sup>. Doctrine as to the Employment of *Puffers at an Auction*.

The employment, *privately*, of puffers at an auction tends to operate as a fraud upon *bona fide* bidders, who may be, and generally are, thereby led to give more for the property than otherwise they would have done. This doctrine, however, does not prevent the seller from reserving *publicly* a right to make *one bid*, in order to prevent a sacrifice of his property. (1 Stor. Eq. § 293; 1 Chit. Cont. (11th Am. ed.) 406 & seq.; Baxwell v. Christie, Cowp. 496-97; Howard v. Castle, 6 T. R. 644-5; Bramley v. Alt, 3 Ves. Jr. 623; Rex v. Marsh, 2 Yo. & Jerv. 332; Thornett v. Haynes, 15 M. & W. 371; Veazie v. Williams, 8 How. 153 & seq.; Slater v. Maxwell, 6 Wal. 276; Cocks v. Izard, 7 Wal. 561.) And so, upon a like principle, where a sale is advertised to be *without reserve*, it is a fraud upon the

purchaser for the seller, by his own act, or by collusion with others, so to interpose as to enhance the price. (1 Chit. Cont. (11th Am. ed.) 409; *Meadows v. Tanner*, 5 Madd. (Am. ed.) 31.) On the other hand, for parties to agree not to bid the one against the other at an auction, or that one should bid for the benefit of himself and others, or by any device to contrive that there shall not be a free competition at a sale, is a fraud on the vendor, contrary to public policy, and invalidates any contract of purchase made under the influence of the arrangement. (*Jones v. Caswell*, 3 Johns. Cas. (N. Y.) 29; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *Slater v. Maxwell*, 6 Wal. 276; *Cocks v. Izard*, 7 Wal. 567.)

5<sup>a</sup>. Where the Contract is Entered into Under Circumstances of *Plain Mistake or Surprise*.

In order that mistake or surprise should be a bar to the specific execution of a contract for the sale of lands, it must clearly appear that such mistake or surprise really existed, and that it is such as materially to affect the *substance of the agreement*. If it is not of that character, and there has been entire good faith on the part of him who seeks the specific performance, it will be decreed. In declining to interpose, the court proceeds upon the principle that it may exercise a discretion in its action, and that it will never act when to do so is against *conscience and justice*. (*Fry*, Spec. Perf. §§ 475 & seq.) The mistake may relate to the *identity or situation* of the land contracted for (*Graham v. Hendren*, 5 Munf. 185; *Chamberlaine v. Marsh*, 6 Munf. 283); to the *quantity or bounds* of it (*Quesnel v. Woodlief*, 6 Call, 238; *Lea v. Eidson*, 9 Grat. 277); to the *quantity of estate* sold and bought (*Irick v. Fulton*, 3 Grat. 184); to *any circumstances* which materially affect the price to be paid (*French v. Townes*, 13 Grat. 513); to any embarrassments touching the title, which would make a chancery suit needful to clear it up, etc. (*Goddin v. Vaughn*, 14 Grat. 192; *Christian v. Cabell*, 22 Grat. 102 & seq.; *Thompson v. Jackson*, 3 Rand. 504; *Glassell v. Thomas*, 3 Leigh, 113); or to any other circumstance which, being unknown to both parties, materially affects the value of the subject. (*Bailey v. James*, 11 Grat. 468.)

In general, in case of such mistake as has just been described, the contract ought to be rescinded; and in all cases, supposing it to be *entire*, it seems, it must be either wholly annulled or *fully enforced*. (*Glassell v. Thomas*, 3 Leigh, 113, 125; *Bailey v. James* 11 Grat. 468.)

The mistake which thus justifies the rescission of a contract, even though it may have been executed, it will be remembered, is always a *mistake of fact*, and must not be merely a *mistake of law*. (Brown v. Armistead, 6 Rand. 594; Zollman v. Moore, 21 Grat. 313.)

6<sup>a</sup>. Where there is *no Consideration*, or an *Inadequate One*.

Without an actual valuable, or at least *meritorious* consideration, equity will never interpose to decree specific performance of a contract for the sale of lands. Where the contract is *under seal*, the seal imports at law a valuable consideration; but the jurisdiction in the courts of equity to compel the execution of agreements being one which it is *discretionary* with them to exercise, they pay no regard in such cases to that implication, but require proof of an *actual* consideration, valuable or meritorious, in order to call forth their interposition. (2 Lom. Dig. 90.) Thus, if one should enter into a *voluntary* agreement to transfer stock to another, or to convey to him certain real estate, a court of equity would not enforce the agreement, either against the party who made it, or against his representatives, for the complainant is a mere volunteer. The same rule is applied to imperfect gifts *inter vivos* (not by will), to imperfect voluntary assignments of debts and other property, to voluntary executory trusts, and to voluntary defective conveyances. (2 Stor. Eq. § 793 a; Colman v. Sarel, 3 Bro. C. C. 22, 14, & notes; S. C. 1 Ves. Jr. 55, 56, & n. 2; Willan v. Willan, 16 Ves. 82; Antrobus v. Smith, 12 Ves. 45 & seq.; Curtis v. Perry, 6 Ves. 739.)

The provision for children by parents, or for a wife by her husband, constitutes one of the most frequent instances of a *meritorious* consideration, which, though not valuable, is yet deemed sufficient to call forth the powers of a court of equity, at least to aid a defective conveyance. (Newland's Cont. 69, &c.; 2 Stor. Eq. § 8. 793, b. 987; 1 Do. § 433; Husband v. Pollard, 2 P. Wms. 467; King v. Cotton, Id. 357; Young v. Nash, 3 Atk. 185.) Thus, in Ward v. Webber, 1 Wash. 279, legal defects in a prior voluntary gift by a parent to a young child otherwise unprovided for, were supplied against a subsequent voluntary donee; and in Beard v. Nuthall, 1 Vern. 427, an agreement in favor of a wife, though made after marriage, was carried into effect as against the *husband*, although, of course, such gifts can never avail against the donor's creditors. But where the agreement is made with a son-in-law, by reason of the *affinity*, and the wife (the donor's daughter) dies

before the conveyance is made, equity will not enforce the agreement, the inducing motive having ceased. (Darlington v. McCoole, 1 Leigh, 36; Pigg v. Corder, 12 Leigh, 69.) Agreements to make provision for *collateral relations*, do not come within this principle, and in general equity will not enforce them unless there is some other consideration besides. (Newl. Contr. 71. &c.; Osgood v. Strode, 2 P. Wms. 245; Stephens v. True-man, 1 Ves. Sr. 73; Reed v. Vammorsdale, 2 Leigh, 569.) The case of Reed v. Vammorsdale affords a good illustration of this doctrine. A rich and childless man proposed to his brother, who was poor, with a large family, to forego his intention of going to the west and to settle upon a tract of land belonging to him, and near his residence, which he proposed to *give him*. Induced by this promise, the impoverished brother accepted the proposal, and took possession of the land, but incurred, it is said, *no loss or expense* in so doing; and the promisor having died without making a conveyance, it was determined, upon a bill filed against his heirs, that there was neither a valuable nor meritorious consideration, and that specific execution must be denied.

The student must observe, however, that there is a conflict of authority, whether a *merely meritorious* consideration will in any case justify the interposition of the court to give effect to the transaction, even to aid a defective conveyance in favor of a wife or children, although the writer conceives that the weight of authority and of reason is in favor of such interposition in such cases. See Keffer v. Grayson, 76 Va. 524.

There are also other considerations besides those in favor of a child or a wife, which, hovering between valuable and meritorious, are deemed sufficient to induce the interposition of a court of equity. Thus, the compromise of a *doubtful right* is such a consideration, (valuable, rather than merely meritorious); nor does it prevent the enforcement of the agreement of compromise that it has subsequently appeared that the right is really on the other side. (2 Lom. Dig. 91; Penn v. Ld. Baltimore, 1 Ves. Sr. 444; Moore v. Fitzwater, 2 Rand. 442, 444; Zane's Dev'ees v. Zane, 6 Munf. 406, 412; Williams v. Lewis, 5 Leigh, 686; Lucketts v. Lucketts, 10 Leigh, 56; Shugart v. Thompson's v. Adm'r, 10 Leigh, 434.) If, however, the compromise was made in ignorance of important or material facts, and not upon the basis of facts assumed to be doubtful, the agreement founded upon it is not enforced, and the compromise itself even may be rescinded.



(2 Lom. Dig. 92; Ross v. McLaughlan, 7 Grat. 86.) Compromises, whose design is to preserve the honor of a father and his family, and to avoid family disputes, are regarded with peculiar favor, and for the most part will be enforced according to their terms. (2 Lom. Dig. 92; Stapilton v. Stapilton, 1 Atk. 1; Luckett v. Luckett, 10 Leigh, 50.) We have in Penn v. Ld. Baltimore, 1 Ves. Sr. 444, 450, a noteworthy instance of the enforcement in equity, of an agreement for the compromise of rights and adjustment of boundaries, not touching *states* merely, but *provinces*. The agreement in that case was between the representatives of William Penn and of Lord Baltimore, relative to the boundary between Maryland and the "three lower counties," as what is now the State of Delaware (then belonging to Pennsylvania), was styled, and also for determining the northern limits of Delaware, and was ordered by Lord Chancellor Hardwicke to be carried specifically into effect.

As to *inadequacy of consideration*, the rule is, that inadequacy of price in contracts for the purchase of interests *in possession* is not, *by itself*, a ground for refusing performance of a contract for the sale of lands, unless its grossness is such as to be demonstrative of fraud; that is, so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. (1 Stor. Eq. §§ 246 & seq.; Fry, Spec. Perform. §§ 281 & seq.; Coles v. Trecothick, 9 Ves. 246; Hincksman v. Smith, 3 Rus. (3 Eng. Ch.) 435, n. (1); Hale v. Wilkinson, 21 Grat. 75; White v. McGannon, 29 Grat. 515; Stearns v. Beckham, 31 Grat. 390-91.) Inadequacy in such contracts is only an ingredient in evidence tending to prove imposition or oppression. Hence, sales made fairly for Confederate currency during the late civil war, the money having been paid and the possession delivered, have been uniformly enforced against the vendor, without regard to the steady and rapid depreciation of that currency. (Ambrouse v. Keller, 22 Grat. 769; Talley v. Robinson, Id. 888; Hale v. Wilkinson, 21 Grat. 78; Thorington v. Smith, 8 Wal. 1.) But whilst thus mere inadequacy of consideration does not, *standing alone*, deter a court of equity from decreeing specific execution of a contract for the purchase of vested *interests*, that court is more scrupulous with respect to sales of expectant *interests*, such as the interests of heirs in the inheritance, during the life of the ancestor. In this latter class of cases, and also in cases where the parties stand in such a relation as to give one an influence over the other, the party

purchasing the expectant interest, or possessing the influence, can obtain the aid of the court only by satisfactorily removing every, even the slightest, doubt, about the adequacy of the price and the fairness of the transaction. (2 Lom. Dig. 93; Fry, Specif. Perform. §§ 270, 285; Peacock v. Evans, 16 Ves. 517; Hinckman v. Smith, 3 Russ. (3 Eng. Ch. R.) 433, 435, and n. (1); Edwards v. Browne, 2 Call, 104; George v. Richardson, Gilm. 230.)

See *Ante*, pp. 698 & seq.; Cribbins v. Markwood, 13 Grat. 507; Halsy v. Wilkinson, 21 Grat. 85 '6; Griffith v. Spratley, 1 Cox. Cas. 384.)

An accidental subsequent loss or disadvantage, not arising from the conduct or default of the applicant for relief, constitutes no objection to decreeing the specific execution of an agreement. The transaction must be viewed as it originally stood, and stand or fall accordingly. Thus, in Brachan v. Griffin, 3 Call, 436, Griffin, in consideration of £25,000 of *paper money*, paid him by Willis in 1780 and 1781, bound himself to pay Willis £2,500 in specie in 1790; and it was held that Griffin was not entitled to be relieved from the payment of the £2,500, as against Brachan, Willis's assignee, notwithstanding it happened casually, but without any default on the part of Willis or Brachan, that it turned out in the result to be a losing speculation to Griffin, beyond what he had anticipated. But where there is *laches* on the part of the applicant, and meanwhile such an alteration in the property that it cannot be enjoyed in accordance with the stipulations of the agreement, a specific performance must be denied. (City of London v. Mitford, 14 Ves. 41; Booton v. Scheffer, 21 Grat. 474.) And, indeed, in all cases the application for the specific execution of a contract is addressed, as we have seen, to the sound discretion of the court; and it will not be granted unless the applicant has shown himself prompt and willing to comply with the contract on his part; nor if it would be inequitable in respect to the other party. (Bowles v. Woodson, 6 Grat. 78; Willard v. Tayloe, 8 Wal. 565 & seq.)

7<sup>a</sup>. Where the *Contract is Illegal*, Binding the Party to Do what he may not Lawfully Do.

It is manifest that no court ought to permit itself so to trifle with the obligations due to the state and to society as to compel a person either to pay anything for the breach of an illegal contract, or to do specifically what is adverse to the *policy of the law*. (*Ex parte* Dyster, 1 Meriv. 172; Fry, Spec. Perf. §§ 307 & seq.; 1 Stor. Eq. §§ 259 & seq., 294 & seq.) Thus, an

agreement to have part of an estate, to be recovered by the agency and *at the charges* of the applicant for the aid of the court, being tainted with the offence of *champerty*, cannot be enforced in equity. (*Powell v. Knowler*, 2 Atk. 227.) Nor can an agreement entered into *in fraud of a power*, or where the performance would be a breach of trust, or would produce a forfeiture. (1 *Mad. Ch.* 410, 411.) So, upon similar reasoning, a husband is not to be compelled to obtain a conveyance from his wife, nor a parent from his child, which the wife or child is unwilling to make, notwithstanding the husband or parent may have stipulated so to do; because for the court to attempt it would lead either to an illegal attempt at coercion on his part, or to a cruel moral constraint on the wife or child, to do what was repugnant to their will in order to relieve a husband or parent from the duration imposed by the court. (*Emery v. Wase & als.* 8 Ves. 514 & seq.; *Davis v. Jones*, 1 Bos. & Pul. N. R. 267; *Mortlock v. Buller*, 10 Ves. 305; *Innis v. Jackson*, 16 Ves. 367; 2 *Stor. Eq.* §§ 732 & seq.) The only recourse of the complainant in such case is to sue the husband or father *in a court of law*, and recover such damages for the breach of his agreement as a jury may allow. (2 *Stor. Eq.* § 734, & n. (1); *Emery v. Wase*, 8 Ves. 514-'15.) Nor is this doctrine, in its essence, confined to the case of a husband or parent, although some reasons apply in those cases which are wanting in others. But it may be stated, in general, that in all applications for specific performance, it must appear that the defendant is not called upon to do what he is not lawfully competent to do, whereby he would either himself be exposed to an action for damages, on the part of some one injured by the act, or by conveying a title, even though unquestionably bad, might possibly expose a third person to be damaged by creating an adverse claim with which he may have to contend. (2 *Lom. Dig.* 94; *Harnett v. Yielding*, 2 *Sch. & Lefr.* 554; *McCann v. James*, 1 *Rob.* 261, note.)

It must be further observed, however, that if one having only partial interests in an estate chooses to represent it as his own, and to enter into a contract to sell it as his own, it is not competent to him afterwards to say that he has *not the entirety*, and therefore the purchaser shall not have the benefit of his contract as far as it is in his power to confer it. If the purchaser elects to take *as much as the vendor can convey*, he has a right to that, and to an abatement of the purchase-money as to the residue; and the court will give no heed to the objection coming from the vendor, that the

purchaser cannot get all that he contracted for. (*Mortlock v. Buller*, 10 Ves. 316; *Mestaer v. Gillespie*, 11 Ves. 640; *Milligan v. Cooke*, 16 Ves. 1; *Todd v. Gee*, 17 Ves. 274; *Wood v. Griffith*, 1 Swanst. 54.) Nor, on the other hand, is it allowable for the purchaser to compel the vendor thus to convey to him as much as he has, and can convey, and also to proceed *at law* to recover damages for that which he cannot convey; for it is a principle of courts of equity to make a full end of whatever litigation comes before them, and every decree of those courts is always in complete satisfaction of the claims of the parties touching the subject. (*McCann v. Janes*, 1 Rob. 260, 262, note.)

Upon this principle, that equity will not enforce an illegal contract, it used to be held that specific performance of an agreement for the conveyance of a *pretensed title* (when the conveyance of such interests was prohibited, *Ante*, pp. 640<sup>4</sup>, 41) would not be decreed (*Hitchins v. Landor*, Coop. 34; *Allen v. Smith*, 1 Leigh, 254; *Ruffners v. Lewis*, 7 Leigh, 740); but this doctrine was never understood to apply to the sale and purchase of *equitable rights* generally, which are very distinguishable from *pretensed titles*. Thus, Lord Eldon observes, in *Wood v. Griffith*, 1 Swanst. 43, that "it is extremely clear that an equitable interest (arising) under a *contract of purchase*, may be the subject of sale;" and especially does not the doctrine apply where the conveyance of the equitable interest is in order merely to subject it for the purpose of securing a debt due to the *quasi* purchaser. (*Allen v. Smith*, 1 Leigh, 231; *Ruffners v. Lewis*, 7 Leigh, 741; *Hartley v. Russell*, 2 Sim. & Stu. (1 Eng. Ch.) 439.)

The case of *Nelson v. Nelson*, 1 Wash. 136, presents a remarkable question of the *legality* of an agreement, with reference to its being specifically enforced. It was the case of an agreement between the children of a family, in the life-time of their father, to divide his estate equally between them at his death, whatever distribution he might think proper to make of it by his will. The father by his will gave a very small and unequal portion of his property to his eldest son, who thereupon filed his bill against the other children to carry into effect the agreement in question. It was insisted in opposition to the application, that such an agreement is at war with social policy, tending to encourage irreverence for parents, and operating something like a fraud upon the decedent, by defeating that disposition of his property which he has a right to make, and which he has plainly declared; and that it ought not,



therefore, to be countenanced in a court of equity. The court, however, whilst it declined to enforce the agreement in that instance, because it was insufficiently proved, yet expressed the opinion that such arrangements might under circumstances tend to promote the peace of families, and be free from reasonable objection, and could not with propriety be denounced as inherently and invariably vicious and inadmissible. And the general principle that an agreement of this character between children in their father's life-time, notwithstanding it might tend to frustrate the scheme of his testamentary dispositions, was not intrinsically *contra bonos mores*, and if duly proved might be enforced specifically in equity, was recognized and approved in *Lewis v. Madisons*, 1 Munf. 803. And a similar doctrine is established by the case of *Wethered v. Wethered*, 2 Sim. 191; *Harwood v. Tooke*, Id. 192 (2 Eng. Ch. R.); *Hyde v. White*, 5 Sim. (9 Eng. Ch. R.) 524.

8<sup>a</sup>. Where there has been *Unreasonable Delay* on the Side of the Party Seeking the Aid of the Court of Equity.

In a court of law, if a party has not complied fully with the stipulations precedent on his side, including the *time* of performance, as well as other particulars, he can, as we have seen, maintain for the most part no action against his adversary for *his* default in respect to covenants which are dependent the one on the other. (Fry, Spec. Perf. §§ 709 & seq.) Equity, however, whose constant boast it is that it regards the *substance* more than the *mere terms* of the contract, attaches usually much less importance to the matter of *time*, which in general it holds to be, as the phrase is, *not of the essence*, that is, not a material element of the contract. And that construction commonly accords with the true intent of the parties, who, although a day may be named for the payment of the purchase-money, or the conveyance of the land, seldom in their minds regard the precise day as of any importance, but would find their substantial purposes as well subserved by the completion of the contract within a reasonable period after that day as upon the very day itself. (*Seton v. Slade*, 7 Ves. 273 & seq.; Id. 279, n. 3; *Eaton v. Lyon*, 3 Ves. 696, n. 2; *Jackson v. Ligon*, 3 Leigh, 187.)

But it would be very rash to conclude, as has sometimes been done, that equity pays *no regard* to the stipulations of the parties *as to the time* for the performance of contract. That would be to *make* contracts instead of merely to construe and enforce them

according to their true intent and purpose. The equitable doctrine amounts only to this: that the mere appointment of a day for the payment of the money, or the delivery of a conveyance, is not of itself a sufficient indication that time is of the essence of the contract. But the parties, if they please, may make it a more or less material ingredient (where it is neither unreasonable nor inequitable), either by express stipulation, by the avowed object of either party, or from the nature and character of the transaction, where it is such as to demand promptness and punctuality of performance, in order that its purpose may not be frustrated. (2 Stor. Eq. § 775, and n. 1; Fry, Spec. Perf. §§ 710 & seq.; 1 Sugd. Vend. (6 Am. ed.) 301; Newman v. Rogers, 4 Bro. C. C. 391; Doloret v. Rothschild, 1 Sim. & Stu. (1 Eng. Ch.) 598, and n. (2); Taylor v. Longworth, 14 Pet. 174.) And so, although time may not have been *at first* a material element in the contract, either party may notify the other of his intention to insist on a punctual fulfilment of its stipulations, and to rescind and abandon it if they are not fulfilled; and if after that, he himself being in no default, the other party is delinquent in his performance, it is at least a *prima facie*, and, for the most part, a conclusive bar to a specific execution. (Brashear v. Gratz, 6 Wheat. 528; Hatch v. Cobb, 4 Johns. Ch. (N. Y.) 559; Bowles v. Woodson, 6 Grat. 78; Booton v. Scheffer, 21 Grat. 474, 491.) And on the other hand, specific performance of a contract to purchase lands may be decreed, after a delay too considerable to be otherwise disregarded, if the vendee has manifested meanwhile no determination not to proceed with the purchase, but has appeared to treat the agreement as still subsisting and on foot. (Pincke v. Curteis, 4 Bro. C. C. 329, and n. (1).)

It is a well established and a very important principle, which has been repeatedly reiterated, and must not be lost sight of, that specific performance is not a matter of course, *ex debito justitiæ*, but rests entirely in the judicial discretion of the court, upon a view of all the circumstances of the case. (Joynes v. Statham, 3 Atk. 388; Underwood v. Hitchcock, 1 Ves. Sr. 279; Seymour v. Delancey, 6 Johns. Ch. (N. Y.) 222; Wilbard v. Tayloe, 8 Wal. 565 & seq.; Thompson v. Jackson, 3 Rand. 505; Booton v. Scheffer, 21 Grat. 496.) And hence, it has come to be reckoned as another settled doctrine, that the party seeking specific performance must have shown himself *ready, prompt and willing* to perform the stipulations on his part, or else his application must be denied. (Brashear v. Gratz, 6

Wheat. 528 ; Benedict v. Lynch, 1 Johns. Ch. (N. Y.) 370 ; Bowles v. Woodson, 6 Grat. 78, 88 ; Booton v. Scheffer, 21 Grat. 491.) Not that the mere omission to perform the contract at the time stipulated, where time, in the view of a court of equity, is not an essential element in the transaction, will of itself suffice to prevent a specific execution from being decreed, but it does devolve on the party applying for the aid of the court the burden of accounting in a satisfactory manner for his delay, and also to show that the relief he asks is just and equitable. (2 Stor. Eq. § 776, and n. 1 ; Taylor v. Longworth & al. 14 Pet. 174 ; Heaphy v. Hill, 2 Sim. & Stu. (1 Eng. Ch.) 30, and n. (1).) Supposing, however, that a specific execution is not otherwise inequitable, a vendor may enforce the fulfilment of a contract of sale, even where he had not the power to make a good title at the time of the filing of the bill, if he can cure the defect before the final decree, so that he can then make a valid conveyance, free from just objection. (Hepburn & al. v. Auld, 5 Cr. 262 ; Hepburn & al. v. Dunlop & Co., 1 Wheat. 179 ; Mays v. Swope, 8 Grat. 46 ; Taylor v. Longworth, 14 Pet. 172.) But it is for him (the vendor) to *show* that his title is then good ; and if at the time of the decree he fails to make that clear, specific performance must be refused ; and that refusal it is proper to persist in, notwithstanding the title be soon afterwards ascertained to have been then good, if meanwhile the property has materially depreciated in value. (Griffin's Ex'or v. Cunningham, 19 Grat. 587 & seq. ; S. C. 20 Grat. 31.)

Where the subject-matter of the contract is in its nature exposed to daily variations, time must necessarily form a very material element therein, as is well illustrated by the case of *Coslake v. Till*, 1 Russ. (1 Eng. Ch.) 379. In that case Till agreed to assign to Coslake the possession and good-will of a public house, of which he was *tenant at will*, and to transfer the liquors on hand, the transfer of the possession, liquors, etc., to be made and the money paid on the 26th of March, 1824. Till acquainted Coslake that he should insist on the rigorous performance of the contract ; yet, notwithstanding, neither Coslake nor his appraiser was present on the 26th of March, to make the valuation, although the appraiser did attend on the 27th, when Till refused to allow him to proceed with it, because the day appointed was past. Coslake thereupon applied for a specific execution, which was denied, because Till, being only *tenant at will* of the premises, (which seems to have been assumed to be the same thing as a *tenant from*

*year to year*), it was important to him that Coslake should take possession on the very day stipulated; for if he himself retained possession after that day, he might perhaps have become tenant for the succeeding year, and have thereby incurred fresh liabilities; and he could not, meanwhile, have shut up the house even for a day, because its value as a public house would have been seriously impaired. And because, furthermore, the stock of liquors was necessarily fluctuating from day to day. Upon like principles time was deemed essential in a contract for the purchase of *government stock*, the value of which is not fixed, but dependent on speculative considerations. (*Doloret v. Rothschild*, 1 Sim. & Stu. (1 Eng. Ch.) 598-'9.) And similar views have materially controlled the question of specific performance of contracts for land where the payments were to be made in the late Confederate currency.\* (*Booton v. Scheffer*, 21 Grat. 474, 499.)

It is to be observed, that even in those cases where time is not of the essence of the contract, yet, where there has been great and unreasonable delay on one side, it may be terminated, as we have seen, by the other party's fixing a reasonable period within which the contract must be completed; and if that time be not conformed to, it precludes specific performance, and leaves the parties to their remedies at law. (*Brash-ear v. Gratz*, 6 Wheat. 528; *Heaphy v. Hill*, 2 Sim. & Stu. (1 Eng. Ch.) 30; *Taylor v. Brown*, 2 Beav. (17 Eng. Ch.) 183 and n. (1); *Watson v. Reid*, 1 Russ. & My. (5 Eng. Ch.) 236-'7, and n. (1); *Walker v. Jeffreys*, 1 Hare, (23 Eng. Ch.) 348; *Berry v. Armistead*, 2 Keen. (13 Eng. Ch.) 227, and n. (1); *Carter v. Dean of Ely*, 7 Sim. (10 Eng. Ch.) 211; *Bowles v. Woodson*, 6 Grat. 78; *Booton v. Scheffer*, 21 Grat. 474.) And so, in like manner, where one party notifies the other that he will no longer be bound by the contract, if the latter does not promptly assert his rights, he will in equity be considered as acquiescing in the notice and concurring in the abandonment of the agreement. (*Lloyd v. Collett*, 4 Bro. C. C. 469, and n. (1); *Walker v. Jeffreys*, 1

\*NOTE.—The fluctuations of Confederate currency from 1862 to 1865 illustrate the importance of these considerations when the contract was to be liquidated in that currency.

One dollar *in gold* was the equivalent the several amounts in currency at the respective periods indicated in the table annexed.

	1862.	1863.	1864.	1865.
January, . . .	\$1.20 to 1.25.	\$3.00.	\$20.00 to 21.00.	\$45.00 to 60.00.
July, . . . . .	1.50.	9.00.	20.00 to 23.00.	
December, . . .	2.00 to 3.00.	18.00 to 20.00.	34.00 to 49.00.	



Hare (23 Eng. Ch.) 348; Watson v. Reid, 1 Russ. & My. (5 Eng. Ch.) 236-'7, and n. (1); Jackson v. Ligon, 3 Leigh, 161.)

In *Garnett v. Macon*, 6 Call, 333-'4 (S. C. 2 Brock. 210-'11), such notice was given and the plaintiff (the vendor) *issued* his subpoena, instituting his suit in chancery, within ten days thereafter, but did not file his bill for near six months afterwards, nor cause the subpoena to be executed until about six months after filing the bill; but it was held by C. J. Marshall (whilst specific performance was denied on another ground), that the presumption of acquiescence and of abandonment of the contract was repelled by the speedy commencement of the suit.

Even without any notification from the other party, a long omission to insist upon the contract, as even for six months, will in general justify a presumption of abandonment, and preclude a specific performance at the suit of the party in default. (2 Lom. Dig. 100; *Richardson v. Baker*, 5 Call, 514; *Cringan & al. v. Nicolson's Ex'ors*, 1 H. & M. 429; *Alley v. Deschampe*, 13 Ves. 225.) And this presumption is much helped, if, meanwhile, such a change of circumstances has occurred as to make it harsh and inequitable to proceed with the contract, such as a material alteration in the value of the land, or in the situation and relations of the parties. (*Pigg v. Corder*, 12 Leigh, 69; *Anthony v. Leftwich*, 3 Rand. 245; *Bryan v. Loftus*, 1 Rob. 12; *Pratt & als. v. Carroll*, 8 Cr. 471; *Bowles v. Woodson*, 6 Grat. 79.)

It is not irrelevant to observe just here, that after the vendee has, in an action at law, recovered a judgment for damages against the vendor for the latter's breach of contract in not conveying, or indeed, it seems after the vendee has *instituted* such an action, a bill in equity for specific performance by the vendor will not lie. (2 Lom. Dig. 103; *Long v. Colston*, 1 H. & M. 110; *Moore v. Fitz-Randolph*, 6 Leigh, 175; *McCann v. Janes*, 1 Rob. 260, 262, *note*.)

Where the vendee is in the actual possession of the *equitable* estate, it is no *laches* for him to forbear for ever so long a time to demand the conveyance of the legal title. Thus, if a party under an agreement for a conveyance of land holds the possession, time will be no bar to his claim for specific performance. Of this principle the case of *Zane's Devisees v. Zane*, 6 Munf. 406, 413 & seq., affords a good illustration. Jonathan Zane in 1775 made a settlement on the upper end of what has since been known as Wheeling island, in the Ohio river,

opposite the city of Wheeling, and in 1777 his brother, Ebenezer Zane, made a like settlement on the lower part of the same island. In 1784 the island was divided between them by a designated line, and it was agreed *verbally*, that Ebenezer should procure a patent from the commonwealth for the whole, and convey to Jonathan his part. Ebenezer obtained the patent accordingly, but after the lapse of many years died, without fulfilling the agreement, by his will devising the whole island to his sons, Noah and Daniel, against whom, in 1815, Jonathan Zane (whose possession had continued without interruption from the time of his first settlement in 1775) filed his bill for a specific execution of the contract with his brother, demanding that Noah and Daniel Zane, the devisees of Ebenezer, should be required to convey to him the *legal title* to his part of the island; and it was decreed accordingly.

We have seen (*Ante*, pp. 874-'6), that a vendor is always bound, in the absence of any stipulation to the contrary, to make a good title, free from incumbrance of every description which may embarrass the full and quiet enjoyment of the premises by the purchaser; and that supposing the vendor to be thus bound, the purchaser will not be required to accept any other inferior title, even though he knew at the time of the contract that the vendor's title was defective, unless he appears to have waived the objection. It remains now to observe, that it is a bar to specific performance, that the vendor's title is clouded with any *actual doubt*, or if it be merely equitable; although a bare *possibility* of defect in the title will not be regarded, nor will the non-production of deeds, or their non-registry, if the lapse of time or other circumstances shall negative any reasonable apprehension of their involving trouble to the purchaser, who is in no case obliged to buy a probable lawsuit. (2 Lom. Dig. 104-'5; *Lyddal v. Weston*, 2 Atk. 19; *Marlow v. Smith*, 2 P. Wms. 198; *Cooper v. Denme*, 1 Ves. Jr. 565, and notes; *Hillary v. Waller*, 12 Ves. 250 & seq.; 265 & seq.; *Buckle v. Mitchell*, 18 Ves. 111 & seq.; *Wood v. Bernal*, 19 Ves. 220 and notes; *Edwards v. Van Bibber*, 1 Leigh, 183; *Wade's Heirs v. Greenwood*, 2 Rob. 474; *Griffin v. Cunningham*, 19 Grat. 586 to 588; S. C. 20 Grat. 31.) And if the cloud over the title has been such as to justify the vendee in declining to take a conveyance from the vendor, and that cloud is not removed until a material change in circumstances, as *e. g.*, in the value of the property, "has" occurred which would make it a hardship upon the vendee to be obliged to complete the

purchase, specific performance ought to be denied. (Garnett v. Macon, 6 Call, 335, 336; S. C. 2 Brock. 212.)

It seems that the court will not compel the purchaser to take *an indemnity* (unless it be to retain part of the purchase-money), nor the vendor to give it; but compensation for small and unsubstantial variations is not unfrequently decreed, upon the principle that equity does not permit *forms of law* to be made instruments of injustice, and will interpose to prevent advantage being taken of a circumstance that does not admit of a strict performance of the contract in its literal terms (as in respect to the precise quantity of land, etc.), but yet does not affect the substance of the transaction. (Balmanno v. Lumley, 1 Ves. & B. 225; Fordyce v. Ford, 4 Bro. C. C. 494; Drewe v. Harison, 6 Ves. 675; Drewe v. Corp., 9 Ves. 368; Halsey v. Grant, 13 Ves. 76-7; Wood v. Bernal, 19 Ves. 221, and notes; Aylett v. Ashton, 1 My. & Cr. (13 Eng. Ch.) 114; Pollard v. Rogers, 4 Call, 239.)

Whether the court will thus decree compensation, or leave the parties to their remedies at law, or will take the much more decisive step of *rescinding* the contract, depends on the exercise of a fair discretion as to which of those three courses will best attain the justice of the case. The instances of such compensation with us have grown out of deficiency or excess *in the quantity* of lands sold; the principles applicable to which have been already stated. (See *Ante*, pp. 874 & seq.)

Where any doubt arises as to the title, the practice in England is to refer it to a master-commissioner to enquire and report upon its sufficiency. In Virginia, the practice *tends* in the same direction, and very judiciously; for the inquiry made by the master is likely to be more searching than that of a private person, and will aid the court materially in arriving at an accurate apprehension of the true state of the title. Such an inquiry was directed in *Beverley v. Lawson's Heirs*, 3 Munf. 337-8; and in *Griffin v. Cunningham*, 19 Grat. 579. And although in *Stovall v. Loudon*, 5 Munf. 299, and in *Legrand v. Hampden Sid. Col.* 5 Munf. 427 to 329, 332, a decree was rendered without a reference; yet in those cases there seems to have been no special occasion for the interposition of a master, and nothing was said by the court in either, indicative of any disapproval of the practice.

2°. Suit in Equity to *Cancel or Rescind* Contracts for the Sale of Lands.

The application to a court of equity to rescind or cancel

contracts for lands, like that for their specific execution, is addressed to the sound judicial discretion of the court; and in the exercise of that discretion the court not unfrequently refuses to rescind, when it would also refuse to decree the contract to be performed, thus leaving the parties to their remedies at law. And so, also, where the court thinks fit to grant the relief desired, whether to rescind or to compel specific performance, it may impose such terms upon the applicant as it deems the justice of the case to require; and if he refuses to comply with such terms his bill will be dismissed. The maxim here is emphatically applied, *he who seeks equity must do equity*. (2 Stor. Eq. § 693; Thompson v. Jackson, 3 Rand. 504.) And it is a general rule that rescission will not be decreed unless the parties can be placed in *statu quo*. (Ferry v. Clarke, 77 Va. 397, 409; King v. Hamlet (2 My. & Keene, 456), 8 Eng. ch. 92.)

The ground on which equity exerts this jurisdiction rests upon the propriety of administering a protective or preventive justice, under the guidance of the principle technically called *quia timet*; that is, the *fear* that such agreements or other instruments may be vexatiously or injuriously used against the plaintiff when the evidence to impeach them may be lost; or that they may now throw a cloud of suspicion over his title or interest. (2 Stor. Eq. § 694.)

The cases in which rescission should take place seem to be limited to those where there is either a palpable and material mistake in the substance of the thing contracted for, or a fraud perpetrated upon the applicant for the aid of the court; as by imposition, fraudulent misrepresentation, or constructively, by the mere making of a contract with one wanting in understanding. (Thompson v. Jackson, 3 Rand. 504; Lamb v. Smith, 6 Rand. 552; Brown v. Armistead, 6 Rand. 594; Glassell v. Thomas, 3 Leigh, 113; Beal v. Seiveley, 8 Leigh, 658; Breckenridge v. Auld, 1 Rob. 148; Irick v. Fulton, 3 Grat. 193; Purcell v. McCleary, 10 Grat. 246; Bailey v. James, 11 Grat. 468; Rossett v. Fisher, 11 Grat. 492; Beckham v. Stearns, 31 Grat. 385-'6.) And it should be observed that the rescission *cannot be partial*. If decreed at all, it must be complete and entire. (Glassell v. Thomas, 3 Leigh, 113; Bailey v. James, 11 Grat. 468, 475; Ferry v. Clark, 77 Va. 397-'98.)

The instances of *mistake* occur principally in connection with the quantity of the land, or the estate or interest therein which was the subject of the transaction; there having been an essential mistake in the thing contracted for, without fraud or special default on either side. (Gra-



ham v. Hendren, 5 Munf. 185; Chamberlaine v. Marsh, 6 Munf. 283; Tucker v. Coker, 2 Rand. 66; Thompson v. Jackson, 3 Rand. 504; Glassell v. Thomas, 3 Leigh, 125, 129; Irick & al. v. Fulton, 3 Grat. 193.) A mistake *in law*, however, where there is neither fraud, concealment, nor mistake *in fact*, constitutes no ground for rescinding a contract. (Brown v. Armistead, 6 Rand. 604; Thompson v. Jackson, 3 Rand. 504; Ross v. McLaughlin, 7 Grat. 86; Jennings v. Palmer, 8 Grat. 70; Zollman v. Moore, 21 Grat. 313; *Ante*, pp. 699 & seq.)

*Fraud*, as a ground of rescission, has a wider range. The cases are judiciously classed by Mr. J. Story (2 Stor. Eq. § 695) under the heads following:

- (1), Where there is *actual fraud* in the party defendant, in which the party plaintiff *has not participated*;
- (2), Where there is a *constructive fraud* against public policy, and the party plaintiff *has not participated therein*;
- (3), Where there is a fraud *against public policy*, and the party plaintiff *has participated therein*, but public policy *would be defeated* by allowing it to stand; and
- (4), Where there is a constructive fraud, shared in *by both parties*; but they are not *in pari delicto*.

It will repay the pains to take a heedful but brief survey of each of these classes.

- (1), Where there is an *actual fraud* in the party defendant, in which the complainant *has not participated*.

It is a plain dictate of natural justice and reason that a party ought not to be permitted to avail himself of, or to receive any benefit from any instrument or transaction procured by his own actual or constructive fraud, or by his own violation of legal duty or public policy to the prejudice of an innocent person. (2 Stor. Eq. § 695 a.) Thus, a conveyance obtained for a grossly inadequate price, from persons of advanced age, and verging upon imbecility, whom the grantee had plied with ardent spirits to intoxication before the business was completed, was ordered to be given up to be cancelled, and a re-conveyance of the land directed, because of the fraud practiced by the grantee. (Harvey v. Pecks, 1 Munf. 518, 526; Beckham v. Stearns, 31 Grat. 385-'6. See Samuel v. Marshall, 3 Leigh, 567.) So it is well settled, at least in the United States, that a false representation of a material fact, constituting an inducement to the contract, on which the purchaser had the right to rely, is a ground for the rescission of the transaction by a court of equity, although the party making the representation was ignorant whether it was true or false; and the real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was

misled by it in entering into the contract. For in such a case, whether the false representation was innocently or knowingly made, the effect upon the purchaser is the same. (1 Min. Insts. 248 '9.) And although, in general, the false representation must be of a *fact*, as distinguished from a *mere opinion*, which ordinarily is presumed not to mislead or deceive, yet where one party has better means of information than the other, so that the latter confides in the former's expression of a mere opinion, it is a ground for rescinding the contract, if the opinion turns out to be unfounded. And if it be alleged that the party complaining did not act upon the representation of fact or opinion made to him, but upon information obtained elsewhere, the evidence to show that must be of the clearest and most satisfactory character. (1 Stor. Eq. § 193, note; 2 Pars. Cont. 271; Crump v. U. S. Mining Co. 7 Grat. 352; Grim v. Byrd, 32 Grat. 300 302; Smith v. Richards, 13 Pet. 26; Linhart v. Foreman, 77 Va. 544; Lowe v. Trundle, 78 Va. 67.)

(2), Where there is a *constructive fraud against public policy*, and the complainant *has not participated therein*.

Similar observations apply here as under the preceding head. It can never be permitted a party to avail himself of a transaction condemned by the public policy of the country as inimical to its interests. Of this class of cases, one of the most obvious illustrations is a contract (commonly called a *marriage-brochage* contract), whereby a party engages to give to another a compensation for negotiating an advantageous marriage for him. Such agreements tend to pervert and degrade the relation of marriage, which is of the deepest importance to the well-being of society, and they are unhesitatingly rescinded in equity, even though they be not entered into until the marriage is consummated. Indeed, with such disapproval are they regarded, that if any money has been paid under them, the court will decree it to be refunded. (1 Stor. Eq. 260, 261, 263, 264; Hall & al. v. Potter, 3 Lev. 412; Drury v. Hooke, 1 Vern. 412; Smith v. Brening, 2 Vern. 392.)

(3), Where there is a fraud against *public policy*, and the party plaintiff *has participated therein*, but *public policy would be defeated by allowing it to stand*.

This class of frauds is illustrated by the case of a *gaming security*, which will be decreed to be given up to be cancelled, notwithstanding both parties have concurred in the violation of the law; because public policy, which is much concerned in the suppression of the pernicious practice of gaming, is best subserved by adopting that course. (2 Stor. Eq. § 695 a; 1 Id. § 302; Rawden v. Shadwell, 1 Ambl. 268; Baker v. Williams, S. C. note (5);

Wynne v. Callander, 1 Russ. (1<sup>st</sup> Eng. Ch.) 293; Woodson v. Barrett & Co. 2 H. & M. 80; Skipwith v. Strother, 3 Rand, 215-'16.)

(4), Where there is a constructive fraud shared in *by both parties*, but they are not *in pari delicto*.

In general, when parties are concerned in illegal transactions, courts of equity, following the rule of law as to participants in a common crime, will not interpose to grant any relief, but will leave them where it finds them, acting therein upon the known maxim, *in pari delicto potior est conditio defendentis et possidentis*. (1 Stor. Eq. § 298.) But it does not always follow that parties who participate in an illegal act stand *in pari delicto*, for there may be, and often are, very different degrees in their guilt: and if he who seeks relief has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of age or condition, his blameworthiness, in a legal as well as in a moral aspect, being deemed appreciably less in character and degree than that of his associate, the contract must be rescinded. (1 Stor. Eq. § 300; 2 Id. § 695 a.)

Lord Mansfield lays down the doctrine thus: "If the act be in itself immoral, or a violation of the general laws of public policy, both parties are *in pari delicto*; but where the law violated is intended for the protection of the subject against oppression, extortion, and deceit, and the defendant takes advantage of the plaintiff's condition, or situation, then the plaintiff shall recover." (Smith v. Bromley, 2 Dougl. 696, note. See Thomas v. City of Richmond, 12 Wal. 355; Hanauer v. Doane, 12 Wal. 342, 349; Harris v. Harris, 23 Grat. 755.)

Thus, equity will decree money over-paid in pursuance of an usurious contract to be refunded, and the securities for it to be given up to be cancelled, notwithstanding the express agreement of the oppressed party to pay, and his subsequent ratification thereof by the actual payment of part or all; for although both parties are *in delicto*, having united in violating the law, they are by no means *in pari delicto*. Indeed, in strictness, the oppressed debtor is not *particeps criminis* at all; for it is the hardship under which he labored which constrained him to submit to the oppression imposed upon him by the other party, which makes the crime. (Bosanquett v. Dashwood, Cas. Temp. Talbot, 38, 41.) So, when a father, in pursuance of an agreement with his son, in violation of law, and of the rules of that branch of the public service to which they both belonged, had received considerable sums of money from the son, the money was decreed to be refunded, at the instance of the son's executors and the

agreement to be virtually cancelled, in adjusting the account between the parties. (Osborne v. Williams, 18 Ves. 382.)

But even when the instrument or transaction is declared to be void, courts of equity will impose terms upon the party asking their aid where the circumstances require it. Thus, in cases of usury, equity does not, for the most part, interpose in favor of the debtor, except upon the payment or allowance of the debt which is fairly due; and, in general, however indefensible may have been the adversary's conduct, if he has an equitable right to compensation, the appellant must make it in order to obtain redress. He who asks equity must do equity. (2 Stor. Eq. § 696; Bank of Washington v. Arthur, 3 Grat. 173.)

On the other hand, where the complainant is the sole guilty party; or where he has participated equally and deliberately in the fraud or illegality; or where the agreement which he seeks to rescind and cancel is founded in illegality, or in immoral conduct on his part, equity will leave him to the consequences of his own iniquity, and will decline to assist him to escape from the toils wherein he has sought to entrap others, or in which he has been involved by attempting to violate the interests or morals of social life. (2 Stor. Eq. § 697.) The most frequent illustration of this doctrine occurs in connection with conveyances made with intent to hinder and delay creditors. Thus, where a party, with that view, fraudulently conveys his property under pretence of securing debts falsely stated to be due from him, the general doctrine is, that he cannot maintain a suit in equity to rescind the conveyance, but as to him it will be good and binding. (Stärke's Ex'or v. Littlepage, 4 Rand. 268; James v. Bird's Admr., 8 Leigh, 510; Terrell v. Imboden, 10 Leigh, 321; Owen v. Sharpe & al. 12 Leigh, 427; Watson v. Fletcher, 7 Grat. 13; Harris v. Harris, 23 Grat. 754 & seq.)

## 2<sup>d</sup>. The Doctrine in Virginia Touching the *Conveyance of Lands*.

The doctrine touching the conveyance of lands involves the consideration of, (1), The character of the conveyance; (2), The manner of executing a deed of conveyance; and (3), The registration of deeds of conveyance; and of other transactions which affect the title to lands;

W. C.

### 1<sup>st</sup>. The Character of the Conveyance of Lands in Virginia.

The character of the conveyance whereby lands may be transferred, in Virginia, from one person to another, may be conveniently set forth under the heads following, namely:

(1), The nature of the instrument of conveyance; (2), Cer-



tain general rules as to deeds of conveyance; (3), The form of deeds of conveyance; and (4), The effect of deeds of conveyance;

W. C.

### 1<sup>n</sup>. The Nature of the Instrument of Conveyance of Lands in Virginia.

Our statute of conveyances, formed somewhat after the model of that portion of the statute of *frauds and perjuries* which relates to conveyances (29 Car. II., c. 3, §§ 1, 2, 3, 7, 8), makes brief yet definite provision upon the subject: "No estate of inheritance or freehold, or for a term of more than five years, in lands *shall be conveyed unless by deed or will.*" (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413.)

The characteristics of a *deed* have been already fully stated, and to those passages reference is now made. (*Ante*, pp. 661 & seq., 726 & seq.) The nature and properties of *wills* will be explained in their proper places hereafter. (*Post*, , &c.)

### 2<sup>n</sup>. Certain General Rules as to Deeds of Conveyance of Lands.

The general rules touching deeds of conveyance of lands may be classed as follows: (1), The interest which may be had in conveyances by persons not parties thereto; (2), Conveyances made by attorneys in fact; (3), Real estate lies *in grant*, as well as *in livery*; (4), What interest in real estate may be lawfully transferred from one to another; (5), Executory limitations to take effect *in futuro*, created by deed; and (6), Conveyances of and liens upon certain property exempt from debts by the "poor man's" and "homestead" laws;

W. C.

### 1<sup>o</sup>. The Interest which may be had in Conveyances by Persons not Parties Thereto.

In order that the doctrine upon this subject may be understood, the student must recall the distinction between a *deed poll* and a *deed indented*. A *deed poll*, it will be remembered, is a deed where *but one party, or set of parties, stipulates*. It is not, strictly speaking, an agreement between two or more persons, but a declaration under seal by some one or more particular persons respecting an agreement or stipulation made by him or them with some other person or persons. A deed poll, whether deriving its effect from the common law or some statute, does, immediately upon its execution by the grantor, divest the estate out of him, and put it in the party to whom it is by the deed appointed to pass, though in his absence, and without notice to him, till some disagreement to such estate appears. No man, indeed, can be forced to take an estate against his will; but the law

naturally presumes that every estate is beneficial to the party to whom it is given, and, therefore, that he assents to it until and unless he renounces it. And hence, in such cases, the assent of the grantee is implied, first, because of the supposed benefit; secondly, because it is incongruous and absurd that when a conveyance, at least by a deed poll, is completely executed on the grantor's part, the estate should continue in him; thirdly, and especially, in order to prevent any uncertainty as to where the freehold is vested. Accordingly, while on the one hand *acceptance* of a deed is not essential to give it validity, *dissent* is one of the modes of avoiding it. (2 Bl. Com. 309; 2 Lom. Dig. 6, 7; Shepp. Touchst. 285; Butler & Baker's Case, 3 Co. 26 b, and n. (E.); Townsend v. Tickell, 3 B. & Ald. (5 E. C. L.) 31; Garnons v. Knight, 5 B. & Cr. (12 E. C. L.) 671; Skipwith's Ex'or v. Cunningham, 8 Leigh, 281 & seq.)

There would have been no occasion, therefore, for the statutory provision, presently to be mentioned, so far as relates to absolute conveyances by *deed poll*.

A *deed indented*, or an indenture, on the other hand, is a mutual agreement between two or more persons, whereby each stipulates for something on his part. And where a conveyance is effected by means of such a deed, although at common law, if a limitation were made by way of *remainder* to a stranger, not a party to the deed, it is valid if the stranger, upon the determination of the particular estate, enters and agrees to have the lands by force of the indenture; so that he would thereupon be bound to perform any conditions contained in the indenture; yet no stranger can take, in this case, any *present estate in possession*, because he is a stranger to the deed. (2 Th. Co. Lit. 130-'31; Ross v. Milne & ux. 12 Leigh, 218; Jones v. Thomas, 21 Grat. 98.)

To meet and obviate any inconvenience from this doctrine of the common law, which, as already observed, would, as to absolute conveyances, be confined to such as are effected by deeds indented, it is enacted that "an *immediate* estate, or interest in or the benefit of a condition respecting any estate, may be taken by a person under an instrument, although he *be not a party thereto*." (V. C. 1873, ch. 112, § 2; V. C. 1887, ch. 107, § 2415.)

## 2°. Conveyances Made by *Attorneys in Fact*.

A conveyance made by an attorney in fact ought, according to every consideration of good sense, to be made in the name, not of the attorney, but of the principal; and accordingly, the common law reasonably holds conveyances made in the *name of the attorney*, notwithstanding they purport to be made by him *as attorney in fact*,

to be inoperative to transfer the title. (Bac. Abr. Lease, (L.) 10; Combe's Case, 9 Co. 75 a, 76 b; Frontin v. Small, 2 Ld. Raym. 1418; White v. Cuyler, 6 T. R. 176; Clarke's Lessee v. Courtney, 5 Pet. 349; Jones' Dev. v. Carter, 4 H. & M. 184; Martin v. Flowers, 8 Leigh, 158, 162; Stinchcomb v. Marsh, 15 Grat. 202, 210-'11. See Shanks & al. v. Lancaster, 5 Grat. 119.)

This principle, however, proving inconvenient to that class of persons who cannot be prevailed upon to bestow either thought or pains upon the transaction of their business whilst it is in progress, and who are apt to be afterwards proportionately clamorous to have the consequences of their negligence repaired by some special interposition, it is enacted that "If in a deed made by one as attorney in fact for another, the words of conveyance, or the signature, be in the name of the attorney, it shall be as much the principal's deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be *manifest on the face of the deed* that it should be construed to be that of the principal, to *give effect to its intent.*" (V. C. 1873, ch. 112, § 3; V. C. 1887, ch. 107, § 2416.)

It may be allowed to doubt whether it is wise by such provisions as this to encourage that looseness in business transactions which is the parent of uncertainty, and therefore of litigation. The case of Stinchcomb v. Marsh, 25 Grat. 209 '10, well illustrates the confusion and doubt which this statutory rule may occasion; for had that case occurred after the enactment of the statute, the power might and perhaps ought to have been considered well executed, notwithstanding its gross irregularities; although it seems impossible to contemplate the facts without perceiving that they could not fail to engender a doubt of what was really intended; and thus under the statute to give countenance to pretensions which, according to the common law doctrine, could have been maintained with little confidence, and only as the last desperate resort of a hopeless litigant. See the well considered observations of Judge Lee, pronouncing the opinion of the court, in the same case, p. 211.

3°. All Real Estate, as to the *Immediate Freehold* Thereof, is Deemed to Lie in *Grant* as well as in *Livery*.

We have seen (*Ante*, p 660), that at common law the *freehold* of lands can be transferred only by *actual delivery* of the possession by the grantor to the purchaser, that is, by *livery of seisin*; and that in consequence of that established principle, lands are said, at common law, to lie in *livery* only. Amongst an unlettered people this was a wise and prudent institution, being, indeed, the best,

if not the only effectual mode of giving to the transaction the requisite notoriety. As population became more dense, society more cultivated, and individuals more engrossed with their separate concerns, it grew at once more troublesome and less notorious to convey lands by actual livery of seisin; and hence the statute of uses, 27 Henry VIII., c. 10 (A. D. 1536), was ardently welcomed by the people of England as substituting a *constructive* livery for an *actual* one. The principle of the common law, however, that lands, as to the immediate freehold thereof, lie *in livery* alone, either constructive or actual, remained unimpaired until, by the statute of *Grants* (8 and 9 Vict. c. 196), enacted in England in 1845, and with us in 1850, in substantially the same terms, it was provided that "all real estate shall, as regards the conveyance of the *immediate freehold* thereof, be deemed to *lie in grant as well as in livery*." (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417; Wms. Real Prop. 220.)

Under this statutory provision nothing is needed to transfer the freehold of lands from the grantor to the grantee except only a *deed* (the instrument of a grant), which is sufficient for the purpose although it mentions no consideration whatever, just as at common law a deed suffices to transfer a right of way, or of common, or any other incorporeal hereditament, which is therefore said to *lie in grant*. (See *Ante*, pp. 778 & seq.)

4°. What Interest in Real Estate may be *Lawfully Transferred from One to Another*.

At common law, in the view of a *court of law*, nothing *in entry or in action* can be granted over, the reason of which is, as Lord Coke explains, "for avoiding of maintenance, suppression of right, and stirring up of suits: for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession." (2 Th. Co. Lit. 85; Id. 154, n. (B.); Shepp. Touchst. 14, 243 '4; Lampert's Case, 10 Co. 46 b.) Hence, it is held that, if the grantor has neither the actual nor the constructive possession of the land sought to be conveyed, but it is held adversely by some one else, the conveyance is at common law *merely void*. (Kincheloe v. Tracewells, 11 Grat. 604; Early v. Garland's Lessee, 13 Grat. 1; Carrington v. Goddin, 13 Grat. 599; *Ante*, pp. 640 '41.)

This doctrine, judicious enough in the condition of society and with the irregular administration of justice which prevailed for several centuries after the Conquest, had long imposed a needless restraint, when, with us, by the revisal of 1849, it was enacted that "*any interest in*



or claim to real estate may be disposed of by deed or will." (V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418.) And under this statutory provision the interest or claim of the grantor will pass, notwithstanding the land be in the *adverse* possession of another, and the grantee may maintain an action of ejectment therefor, *in his own name*; a proposition which is supposed to apply as well to transactions anterior to the statute as to those subsequent thereto. (Taylor's Devisees v. Rightmire, 8 Leigh, 468; Carrington v. Godding, 13 Grat. 600; *Ante*, pp. 641-'2.)

The statutory provision just cited, and the first section of the same statute of conveyance (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413), declaring that "*no estate of inheritance, or of freehold, or for a term of more than five years, shall be conveyed unless by deed or will*," seem to be indubitably comprehensive enough to embrace trust estates of all kinds, including declarations of trust, *allowing* them to be conveyed by deed or will, and where the interest exceeds a term of five years, *requiring* a deed or will for the purpose, save only in the case of resulting, implied and constructive trusts, which are raised either in pursuance of the reasonably *implied* intent of the parties, or by construction of law, in order to prevent a fraud (*Ante*, pp. 218 & seq.) And so it is presumed that the statute of parol agreements (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840 (cl. 6).) which declares that "No action shall be brought to charge any person upon any contract for the sale of real estate, or for the lease thereof for more than a year, unless the contract, or some memorandum or note thereof, be in writing, and signed by the party to be charged thereby, or his agent;" also comprehends *contracts* for equitable estates or interests of every kind, as well as contracts for legal estates. (Henderson v. Hudson, 1 Munf. 510.) If this be so, our statutes correspond in effect and in substance with the English statute of 29 Car. II., c. 3, §§ 7, 8, requiring all declarations of trust, except resulting, implied and constructive trusts, to be *in writing*. It may be well here to observe, that whilst in the excepted cases of resulting, implied and constructive trusts, they may be established *by parol*, such evidence ought to be weighed with caution, and the trust set up only where the *case is clear*. (1 Lom. Dig. 201; Ross v. Norvell, 1 Wash. 14; Robertson v. Campbell, 2 Call, 421; Henderson v. Hudson, 1 Munf. 510; Bk. of U. S. v. Carrington, 7 Leigh, 576.)

5°. Executory Limitations to Take Effect *in Futuro*, Created by Deed.

At common law a freehold cannot be created *to commence at a future time* (2 Th. Co. Lit. 14; 3 Do. 102, n. (G.); 2 Bl. Com. 165 '6; *Ante*, p. 747); and it is only since the introduction of conveyances operating under the statute of uses, the statute of wills, and the statute of grants, which dispense with livery of seisin, that the creation of such freeholds has been possible. This possibility, however, is by no means confined to wills. Executory limitations of the freehold or inheritance may as well arise *by deed* under the statute of uses (since A. D. 1536), and under the statute of grants (since A. D. 1845 in England, and 1850 in Virginia), as by will. (*Ante*, pp. 430 & seq.) And it, therefore, seems hardly needful for the legislature to have interposed, as it did in 1819, with a provision that "an estate of freehold or of inheritance may be made to commence *in futuro* by deed, in like manner as by will" (1 R. C. 1819, p. 369, § 28); a provision which was incorporated in the revival of 1849, with the additional clause, the effect and extent of which it is difficult to forecast, that "any estate which would be good *as an executory devise or bequest*, shall be good if created *by deed*." (V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418.)

6°. Conveyances of, and Liens upon, Certain Property Exempt from Debts by the "*Poor Man's*" and "*Homestead*" Laws.

We have long had in Virginia what has come to be known as the "*poor man's law*," exempting from debts, in case of a *householder* (which is declared to be equivalent in meaning to *householder or head of a family residing in this State*, a considerable amount of *personal chattels* (V. C. 1873, ch. 49, §§ 33, 34; V. C. 1887, ch. 178, §§ 3650, 3651 to 3654); and it is provided by statute, in respect to such exempt property, that "any deed of trust, mortgage, or other writing or pledge made by a householder to give a lien on property which is exempt from distress or levy *under* § 3650, shall be void as to such property." (V. C. 1873, ch. 112, § 6; V. C. 1887, ch. 178, § 3655.) But as we have now under discussion the conveyance of, and lien on, *lands*, and not chattels, it will suffice barely to mention the restriction just stated, without dilating upon it.

Conveyances of, and liens upon, the "*homestead*," however, under "*homestead exemption laws*," relating, as the "*homestead*" does or may, to *real property*, belong to the present head, and must here be considered.

The policy of exempting from liability for debts any material portion of the debtor's property, lies open to several grave objections. The debtor is demoralized by being permitted to enjoy property which his creditors cannot reach; industrious and enterprising men of small means

are debarred from the credit whereby they might better their situation; and the industrial pursuits of society are hampered and paralyzed by the withdrawal of such a very large aggregate amount of property from the business of life, and tying it up more rigorously than by the law of entails, from the free circulation which is indispensable to the general prosperity. Even the shiftless and improvident class, for whose benefit the policy is devised, derive little or no real advantage from it, tending, as it does, to encourage them and their families in those habits of self-indulgence which probably have already been the means of reducing them to the necessity of claiming such exemption, whilst oft-times it exposes them to be severely pinched for want of a credit which the policy annihilates, and which yet few people are so provident as not sometimes urgently to need.

The "poor man's law" was a step in this direction, to be justly deprecated; but the chattels enumerated as exempt were, in general, comparatively of small value, and perhaps no great practical mischief ensued. But it was one of the deplorable consequences of the impoverishment and ruin which succeeded the late civil war, that there was brought upon the general assembly a pressure which it might perhaps be too much to expect a representative body to resist—to carry the precedent of the poor man's law to the extent of exempting from debt, real estate, as well as chattels, to an amount considerably exceeding what would have been once deemed reasonable. The act of April 29, 1867, exempted from all debts *thereafter contracted* a homestead not exceeding one hundred and sixty acres of land, including the buildings thereon, and not exceeding the value of \$1,200. (Acts 1866-7, p. 962, ch. 139.) But that statute had scarce gone into effect before it was superseded by the provisions of the existing constitution of 1869, taking effect 28th January, 1870, and the consequent legislation (Va. Const. 1869, Art. XI., § 1 to 7; V. C. 1873, ch. 183, §§ 1 to 19; V. C. 1887, ch. 178, §§ 3630 to 3649), whereby the exemption was enlarged to an amount not exceeding \$2,000, extending as well to debts *theretofore as thereafter contracted*, with some designated exceptions, and made to include either *lands or chattels*.

The terms of the statute enforcing the constitutional exemption of the homestead are as follows:

"Every householder residing in this State shall be entitled, in addition to the articles exempted from levy or distress by statute (V. C. 1873, ch. 49, §§ 33, 34; V. C. 1887, ch. 178, §§ 3650 & seq.) \* \* \* to hold exempt from levy, seizure, garnishment or sale, under any execution,

order or other process issued on any demand for *any debt or liability on contract*, his real and personal property, or either, including money and debts due him, to the value of *not exceeding two thousand dollars*, to be selected by him; provided that such exemption shall not extend to any execution, order or other process, issued on any demand in the following cases :

“1, For the purchase-price of said property or any part thereof;

“2, For services rendered by a laboring person or a mechanic;

“3, For liabilities incurred by any public officer, or officer of a court, or any fiduciary, or any attorney at law, for money collected;

“4, For a lawful claim for any taxes, levies or assessments, accruing after the first day of June, 1866 ;

“5, For rent hereafter accruing :

“6, For the legal or taxable fees of any public officer, or officers of a court, hereafter accruing.” (V. C. 1873, ch. 183, § 1 ; V. C. 1887, ch. 178, §§ 3630, & seq.)

The act in its further provisions, designed to give effect to its main purpose, as stated above, declares that it shall not be construed to interfere with the sale of the property set apart as a homestead, by virtue of any mortgage, deed of trust, pledge or other security thereon, and that the debtor or contractor may, in the body of the writing evidencing the debt or contract, *wavre the exemption* (§ 3 ; §§ 3630, 3632, 3647.) It also directs how the homestead is set apart and its benefit secured (§ 4 ; § 3631), and allows the assertion of the claim, and the actual laying off of the homestead, whenever it is proposed to sell, extend or rent, by decree or other legal process, the *real estate* of any householder or head of a family (§ 6 ; § 3642.) It prescribes how the homestead may be encumbered or aliened (§ 7 ; § 3634) ; how long it shall continue after the debtor's death for the *benefit of the family* (§§ 8 10 ; §§ 3635 to 3637, 3640, 3641) ; how, if there be not a sufficiency of real estate, the personal property may be resorted to to make up the amount of exemption allowed (§§ 11-14 ; §§ 3638, 3639) ; the mode of making the selection of personal chattels available as a homestead (§§ 16, 17 ; § 3639) ; and the registry of the declaration of homestead (§§ 18, 19 ; §§ 3631, 3639.)

The application of the homestead exemption to debts contracted, or contracts made, *before the adoption* of those provisions, was soon declared by our supreme court of appeals and by the United States supreme court, to impair the obligation of such contracts, and to be, therefore, violative of the United States Constitution (Art. I, § x., 1),



and consequently to that extent the provisions were void. (The Homestead Cases, 22 Grat. 266; Russell v. Randolph, 26 Grat. 713; Gunn v. Barry, 15 Wal 622; Edwards v. Kearzey, 96 U. S., 600 & seq.) But in other particulars the constitution, and the statute in pursuance thereof, regulate the law applicable to the subject.

And it is to be observed, that whilst the constitution secures the homestead to the debtor, yet the legislature prescribes the mode of setting it apart, and that mode must be followed, so that, unless the householder actually claims the exemption and causes it to be set apart, as the statute prescribes, he will not be entitled to it. (Wray v. Davenport, 79 Va. 19.)

The statute provides that a homestead, duly set apart, and registered according to law, "shall not be mortgaged, incumbered, or aliened by the owner, if a married man, except by the joint deed of his wife and himself, executed and acknowledged after the manner of conveyances of lands of a married woman; but the husband may, without the consent of his wife, mortgage such homestead for the purchase-money thereof, or for buildings erected thereon. A homestead may be sold by the joint act of the husband and wife, or by the act of the householder if unmarried, and the proceeds invested in another homestead; but in no case shall the purchaser be required to see to the application of the purchase-money. But the acquisition of a new estate of homestead shall determine any prior or other estate of homestead; and unless upon the face of the deed under which it is held it is expressed to be such homestead, it shall be so declared, by deed duly recorded in like manner as in the case of an original selection of homestead." (V. C. 1873, ch. 183, § 7; V. C. 1887, ch. 178, § 3634.)

It is provided that where a homestead of the value of \$2,000 has been once set apart to a householder, he shall not be afterwards entitled to the exemption of any other estate, except one substituted for the first under § 3645, or under the poor man's law, §§ 3650 to 3652. (V. C. 1887, ch. 178, § 3646; Oppenheimer v. Howell, 76 Va. 218.)

The homestead exemption *ceases* when the person claiming it ceases to be a householder, or when he removes from the State; and upon his death, without wife or minor children surviving him, or if she or any of them survive him, and he leaves any estate entitled to exemption in their hands, then upon her death or marriage, and if there be minor children, as soon as the youngest of them shall attain the age of twenty-one, or all marry, supposing all to marry under twenty-one, the exemption of

any estate of such householder, then remaining and held as exempt, *shall cease*, and shall pass as other estate, according to the law of Descents and Distributions, or according to the householder's will, *subject to his debts*; but the lien of a judgment or decree for money, rendered against a householder and which is not paramount to the exemption provided for, shall, as to the real estate held as exempt by him, his widow or minor children, attach to such only of that estate as he may be possessed of or entitled to at the time the exemption ceases as aforesaid, and until that time the lien shall not be enforced. (V. C. 1887, ch. 178, § 3649; *Strange v. Strange*, 76 Va. 240; *Scott v. Cheatham*, 78 Va. 82, 87; *Hamby v. Henritze's Adm'r*, 85 Va. 177.)

The homestead exemption thus provided for is illustrated by a number of cases determined in Virginia; but for a comprehensive view of the state of the law upon the subject in the United States generally, reference is made to Mr. Thompson's very useful work on "Homestead and Exemption Laws." The policy of homestead exemptions is said to have for its leading idea *the protection of the family*, which is made to over-ride the idea of justice to creditors. The policy is assumed to be supported by considerations both political and benevolent; *political* because it is supposed to foster in the citizen a spirit of *manly independence*, and also to afford encouragement to *immigration*, and to the *improvement of property*; and *benevolent* because it secures the family (albeit at the expense of other people), against the *imprudence and the folly*, or the misfortunes of the *husband or father*. The tendency in all the States, where these laws exist, has been to follow this leading idea, and to interpret them as designed to provide for families otherwise destitute and helpless. (Thompson, *Homestead*, §§ 1, &c.; *O'Docherty v. McGloen*, 25 Tex. 67; *Hode v. Johnson*, 40 Geo. 439; *Ruff v. Johnson*, *Ibid.* 555; *Hatorff v. Wellford*, Judge, 27 Grat. 360-'61.) Hence, where a householder dies, leaving a widow, without having had a homestead assigned in his life-time, the widow, remaining *unmarried*, is entitled to claim to have it assigned to her. (*Hatorff v. Wellford*, Judge, 27 Grat. 356.)

In the pursuit of the *leading idea* above named, it is held that the persons described in the Virginia constitution, and in the statute, as "every householder or head of a family," do not include an unmarried man, who has living with him no children or other persons *dependent on him*, although he keeps house, and lives there with hired servants. (Thompson, *Homest.* §§ 45-47 & seq., 55 & seq.; *Lynch v. Pace*, 40 Geo. 173; *Marsh v. Lazenby*, 41

Geo. 153; *Sallee v. Waters*, 17 Ala. 482; *Calhoun v. Williams*, 32 Grat. 18, 21 & seq.) But when the homestead has been *regularly set apart*, it is for the benefit of the *householder and his family* and is not ended by the *family* ceasing to exist. (*Wilkinson v. Merrill*, 87 Va. 518-19.) Nor is any difference of meaning recognized between the two phrases "*householder*" and "*head of the family*," the latter being held to be explanatory of the first, and the terms being often used interchangeably. A *family*, in the sense of these laws, is every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object, namely, the promotion of their mutual interests and social happiness, where the managing member is under a *moral* duty to support the others, or some of them, which managing member, whether husband or wife, father or mother, son, brother, uncle or other person, is the *head*. (*Thompson, Homestead*, §§ 44, 45, & seq., 51; *Wilson v. Cochran*, 31 Tex. 680; *Ketchell v. Burgwin*, 21 Ill. 40, 45; *Blackwell v. Broughton*, 56 Geo. 390; *Marsh v. Lazenby*, 41 Geo. 390; *Lynch v. Pace*, 40 Geo. 173; *Calhoun v. Williams*, 32 Grat. 20, 22-3. See *in re Lambson*, 2 Hughes' C. C. 233.)

To extend the benefit of homestead laws, after the death of the husband and father, to the widow and minor children, as *against creditors*, is in direct pursuance of the policy in question, and in the absence of negative words that construction should be adopted; but it does not follow that a similar claim would exist as *against the adult children*, supposing no debts to be owing. The better opinion seems to be that, as against them, the claim to a homestead on behalf of the widow cannot be maintained. (V. C. 1873, ch. 183, § 8; V. C. 1887, ch. 178, § 3636; *Kemp v. Kemp*, 42 Geo. 523; *Hager v. Nixon*, 69 N. C. 108; *Hatorff v. Wellford*, Judge, 27 Grat. 356, 362-3; *Helm v. Helm*, 30 Grat. 404, 411-12 & seq.)

It is a corollary from the proposition that the grand purpose of homestead laws is to *provide for families*, that the misconduct of the "head of the family," as by attempting to defraud his creditors, does not do away with the claim of the family to such a provision. Hence, where a conveyance by a husband and father was set aside as fraudulent and void as to judgment-creditors of the grantor, the latter was notwithstanding permitted to claim, at least as *against such creditors*, a homestead in the land which was the subject of the fraudulent conveyance; for the creditors having procured the conveyance to be annulled as to them, cannot be heard to set it up to repel the claim of homestead. (*Thomps. Homest.*, §§ 408

& seq.; *Sears v. Hanks*, 14 Ohio, 298; *Crummer v. Bannet*, 68 N. C. 494; *Cox v. Wilder*, 2 Dill. C. C. 45; *Shipe v. Repass*, 28 Grat. 729 & seq.; *Boynton v. McNee*, 31 Grat. 458 & seq.)

The student will remember that the statute upon the subject of homestead (V. C. 1873, ch. 183, § 3; V. C. 1887, ch. 178, §§ 3630 (clause 7), 3634,) makes provision for a *waiver of the exemption* in the "body of the bond, note, or other evidence of the debt or contract," in some such form as the following: "I (or we) hereby waive my (or our) homestead exemption as to this debt (obligation or contract, as the case may be)." The constitutionality of this relaxation of the stringency of the policy in question was for some time much questioned, it being supposed to be in conflict with the Va. Const. Art. XI. But the provision is now ascertained to be not liable to such objection, so that such a *waiver* does away with the exemption. (*Reed v. Union Bank*, 29 Grat. 722; *White v. Owen*, 30 Grat. 53; *In re Solomon*, 2 Hughes's C. C. 164; *Linkenhoker v. Detrick*, 81 Va. 52.)

And as by the statute (V. C. 1873, ch. 183, § 7; V. C. 1887, ch. 178, § 3634), a married man, by the joint deed of himself and wife duly executed, is expressly permitted to mortgage, incumber, or aliene the homestead, a deed of trust thereof, executed by husband and wife, although for a debt of the husband, will give the creditor secured priority over the claim of homestead. (*White v. Owen*, 30 Grat. 43, 50 & seq.)

The act expressly declares (V. C. 1873, ch. 183, § 1; V. C. 1887, ch. 178, § 3630) that the homestead exemption shall not prevail in several enumerated cases, and amongst others, not as to "liabilities incurred *by any public officer*, or officer of a court or other fiduciary, or any attorney at law for money collected;" and this provision is held to embrace the liabilities of a collector of taxes, and also of the *sureties on his official bond*. (*Com'th v. Ford*, 29 Grat. 686-'87 & seq.) So neither does the exemption prevail against a *fine* due to the commonwealth, imposed for a violation of the criminal laws (*Whiteacre v. Rector*, 29 Grat. 714, 716); nor, indeed, in any case against damages assessed *for a tort*, that is, a wrong, other than for breach of contract, for the law applies the exemption only in the case of "*debts contracted*." (*Thomps. Homest.* §§ 380, 381 & seq.; *Whiteacre v. Rector*, 29 Grat. 717; *Shonton v. Kilmer*, 8 How. N. Y. Pr. R. 527; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *Davis v. Henson*, 29 Geo. 345.) And so by the *effect* of the statute itself, a deed of trust or mortgage, created before the homestead is set out, has priority over it, although the householder may select and



set apart his equity of redemption as his homestead; and in that case, if a sale be had to satisfy the incumbrance, the surplus of the proceeds, if any, not exceeding his legal exemption, may be invested by the court, if the sale was made by order of court, in other property as his homestead; and if not made by order of court, the surplus may be paid to him, and invested by himself. (V. C. 1887, ch. 178, § 3632). And so if one becomes a householder *after* a judgment-lien has fastened on the land, he cannot claim a homestead exemption paramount thereto. (Kennerly v. Swartz, 83 Va. 704.)

When a deed setting apart a homestead, as claimed by the grantor therein, is ascertained to be made with a desire to hinder and delay his creditors in the recovery of their just debts, it is thereby invalidated. (Gilleland v. Rhodes, 34 Penn. St. 187; Smith v. Emerson, 43 Penn. St. 456; Strouse v. Becker, 38 Penn. St. 190; Rose v. Sharpless, 33 Grat. 156.) And where a stock of goods in which the homestead was claimed consisted in part of old goods, and in part of a stock recently purchased and unpaid for (the debt claimed being for the *purchase-price* thereof, and the stocks were so intermingled that they could not be discriminated), the homestead exemption was, by the express terms of the statute, excluded as to the *new stock*, because the demand was for the *purchase-price* thereof (V. C. 1873, ch. 183, § 1; V. C. 1887, ch. 178, § 3630), and could not be asserted as to the *old*, because the old could not be discriminated from the new. So the whole claim of homestead was repudiated. (Rose v. Sharpless, 33 Grat. 153, 158-'9.)

But although a deed setting apart a homestead is thus vitiated by a fraudulent intent to hinder and delay creditors, the right of homestead itself, according to the better opinion, remains, as we have seen, unaffected by the contemplated fraud. (Thompson, Homest. §§ 408 & seq.; Cox v. Wilder, 2 Dill. 49; Voglar v. Montgomery, 54 Md. 577; Kuewan v. Specker, 11 Bush, (K. Y.) 3; Crummer v. Bennet, 68 N. C. 494; Sears v. Hanks, 14 Ohio, St. 298; Pennington v. Seal, 49 Miss. 527; Edmonson v. Meacham, 50 Miss. 40.) In some States, however, it is held that a fraudulent conveyance does away with the homestead right, as in Minnesota, in New Hampshire and in Arkansas. (Thomps. Homest., §§ 414, 415, 416, 417.)

The question, whether a householder, etc., is entitled to have a homestead in a shifting stock of goods, used in the way of trade, and ever liable to change, so that it is not the same yesterday and to-day, seems not to have been decided. It may be conjectured that, as far as the articles originally selected as the subject of the homestead-claim

yet remained undisposed of, they would be protected by the exemption; but new stocks, or the money arising from sales, would have to be formally set apart anew in order to be exempt, pursuant to V. C. 1873, ch. 183, §§ 10-14; V. C. 1887, ch. 178, § 3639; *Wray v. Davenport*, 79 Va. 24. See *Rose v. Sharpless*, 33 Grat. 159.

### 3<sup>rd</sup>. The Form of Deeds of Conveyance.

Let us consider, under this head, (1), Forms of conveyance as existing at common law; and (2), Forms of conveyance as prescribed by statute in Virginia;

W. C.

#### 1<sup>o</sup>. Forms of Conveyance as Existing at Common Law.

We have seen, in some detail, the formal and orderly parts of a deed conveying lands (*Ante*, pp. 704 & seq.), and also the requisites of a deed (*Ante*, pp. 663 & seq.); and it is not needful now to add more upon the subject, save only to observe that, although our statutes, as we shall presently see, prescribe (perhaps superfluously) forms of sundry of the more frequently recurring conveyances, yet they use the precaution to enact that "Any deed, or part of a deed, which shall fail to take effect by virtue of this chapter, shall nevertheless be as valid and effectual, and shall bind the parties thereto, so far as the rules of law and equity will permit, as if this chapter had not been enacted." (V. C. 1873, ch. 113, § 8; V. C. 1887, ch. 108, § 2444.)

#### 2<sup>o</sup>. Forms of Conveyances as Prescribed by Statute in Virginia.

The forms prescribed (the first three of which are taken from the statute 8 & 9 Vict. cc. 119 and 124) seem to be in no wise preferable to those commonly in use before amongst us, unless that in some particulars they are somewhat shorter. They are necessarily confined to the merely formal and invariable parts of the conveyance, and therefore do not at all substitute a book of forms, which does, of course, supply the formal parts, but which also has it as a principal object to indicate proper expressions for a great variety of special clauses, such as experience suggests as likely to be called for by the demands of business. The forms contained in the statutes were probably more called for by the prolixity and verbiage which down to that time were general in English conveyances, than by the simplicity and directness which for the most part have always characterized our own.

The forms contained in the statutes are of four separate conveyances, namely, (1), Conveyance of lands in *fee-simple*; (2), Conveyance of lands by way of release; (3), Conveyance of lands *by way of lease*; and (4), Conveyances of lands *in trust to secure debts, &c.*;

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1<sup>p</sup>. Form of Conveyance of Lands in *Fee-Simple*.

The statute enacts that "A deed *may be made* in the following form, or to the same effect:

"This deed, made the            day of           , in the year           , between [*here insert names of parties*], witnesseth, that, in consideration of [*here state the consideration*], the said            doth (or do) grant unto the said            all, &c., [*here describe the property, and insert covenants or any other provisions*]. Witness the following signature and seal [*or signatures and seals*]."

And it further enacts that "every such deed conveying lands shall, unless an exception be made therein, be construed to include all the estate, right, title, and interest whatever, both at law and in equity, of the grantor in or to such lands." (V. C. 1873, ch. 113, §§ 1, 2; V. C. 1887, ch. 108, §§ 2437, 2438.)

2<sup>p</sup>. Form of Conveyance of Lands *by Way of Release*.

In this instance the full form is not given as in the preceding case, but the effect of certain words only is prescribed, and it must be allowed, most judiciously. The statute provides that, "Whenever in any deed there shall be used the words:

"'The said grantor [*or the said*           ] releases to the said grantee [*or the said*           ] all his claim upon the said lands;'

"Such deed shall be construed as if it set forth that the grantor [*or releasor*] hath remised, released and forever quitted claim, and by these presents doth remise, release and forever quit claim unto the grantee [*or releasee*], his heirs and assigns, all right, title and interest whatsoever, both at law and in equity, in or to the lands and premises granted [*or released*], or intended to be so, so that neither he nor his personal representative, his heirs or assigns, shall at any time hereafter have, claim, challenge or demand the said lands and premises, or any part thereof, in any manner whatever." (V. C. 1873, ch. 113, § 3; V. C. 1887, ch. 108, § 2439.)

3<sup>p</sup>. Form of Conveyance *by Way of Lease*.

The lease contemplated appears to be a lease *for years* only, and not for life. The statute says, "A deed of lease may be in the following form, or to the same effect: 'This deed, made the            day of           , in the year           , between [*here insert the names of the parties*], witnesseth: that the said            doth [*or do*] demise unto the said           , his personal representative and assigns, all, etc. [*here describe the property*], from the            day of           , for the term of            thence

ensuing, yielding therefor, during the said term, the rent of [*here state the rent and mode of payment*]. Witness the following signature and seal [or *signatures and seals*]." (V. C. 1873, ch. 113, § 4; V. C. 1887, ch. 108, § 2440; see *Michie v. Lawrence*, 5 Rand. 571.)

#### 4<sup>p</sup>. Conveyances of Lands in Trust to Secure Debts, etc.

The form of such a deed of trust is prescribed by the statute. "A deed of trust to secure debts or indemnify sureties *may be* in the following form, or to the same effect:

"This deed, made the                      day of                      , in the year                      , between (the *grantor*), of the one part, and (the *trustee*), of the other part, witnesseth: that the said                      (the *grantor*) doth (or do) grant unto the said                      [the *trustee*], the following property: [*here describe it*;] in trust to secure [*here describe the debts to be secured, or the sureties to be indemnified, and insert covenants or any other provisions the parties may agree upon*]. Witness the following signatures and seals [or *signature and seal*]." V. C. 1873, ch. 113, § 5; V. C. 1887, ch. 108, § 2441; see *Ante*, pp. 340 & seq.)

#### 4<sup>n</sup>. The Effect of Deeds of Conveyance.

In setting forth the *effect* of deeds of conveyance, it will be expedient to mention again some propositions which have already been stated; and what is to be said in relation to it may be arranged according to the distribution following:

(1), Effect of want of *words of limitation* in deeds of conveyance;

(2), Effect of attempt to convey a *greater estate than the grantor may lawfully pass* or assure;

(3), Effect of deed in conveying *all the estate of the grantor*, unless limited;

(4), Effect of deed including *buildings, privileges and appurtenances*, not excepted;

(5), Effect of words of simple release;

(6), Effect of covenants contained in deeds of conveyance;

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#### 1<sup>o</sup>. Effect of Want of *Words of Limitation* in Deeds of Conveyance.

It will be remembered that, at common law, the word "*heirs*" is, for the most part, indispensable in order to create *any estate of inheritance* in a natural person, and the word "*successors*" in a corporation, especially a corporation *sole*. And although, when devises of lands were admitted by the statutes of wills, 32 Hen VIII., c. 1, and 34 Hen. VIII., c. 5) the courts adopted in respect of wills



a more liberal construction, holding that any words which clearly indicated that the devisee was intended to have an estate of inheritance would suffice to transfer it (*Ante*, pp. 83-'4; 2 Bl. Com. 107 & seq., and n's (11) and (12); 1 Th. Co. Lit. 493-'4; *Kennon v. McRoberts*, 1 Washb. 96; *Wyatt v. Sadler's Heirs*, 1 Munt. 537; *Goodrich v. Harding*, 3 Rand. 280); yet the general rule remained unimpaired with us until 1st January, 1787, when the statute reported in Mr. Jefferson's revisal of 1779, and enacted in 1785, took effect. That statute proposed to dispense with technical words of inheritance, and, on the contrary, to establish the presumption that the grantor meant to convey *all the estate he had*, unless a different purpose was manifested by the deed. "Every estate in lands which shall hereafter be granted, conveyed, or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." (12 Hen. Stats. 157.) The corresponding provision in our present code is to the same effect. It enacts that "when any real estate is conveyed, devised or granted to any person, without any words of limitation, such devise, conveyance or grant shall be construed to pass the fee-simple, or other the *whole estate or interest which the testator or grantor had power to dispose of* in such real estate, unless a contrary intention shall appear *by the will, conveyance or grant*." (V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420. See *Elys v. Wynne*, 22 Grat. 229.)

In *Humphrey v. Foster & ux.* 13 Grat. 653, 656, a noteworthy construction of this statute occurs. In that case *Humphrey*, by deed of 23d June, 1820, conveyed to his wife *for ever* certain lands, to have and to hold the said lands *for life*; and the question was, whether by the deed she took an estate *for life* or in *fee-simple*. It was admitted that, if the deed had been to the wife *and her heirs, habendum* to her *for life*, the wife would, by the first clause, have taken, at common law, a *fee-simple*, and the *habendum* would have been *repugnant and void*; and it was also admitted that, under the statute above cited, the wife, notwithstanding the want of words of limitation, would, if the first clause had *stood alone*, have taken a fee-simple. But it could be treated as a fee-simple in virtue of the statute only, and by the statute the whole deed must be looked to for the purpose of ascertaining whether there is any qualification or limitation upon the generality of the first provision; for such a deed can only convey the fee-simple if a less estate be not limited by express words;

or, as it stands in our present code, unless a contrary intention appear by the conveyance, etc. And in the case under consideration, a less estate was limited by express words, namely, an estate for the wife's life. It was therefore concluded that the deed conveyed but a life estate to the wife.

Where property, real or personal, is given even expressly for life, but with absolute power in the first taker to dispose thereof, and it is directed that so much as may remain undisposed of by him shall, at his death, go to another person, the first taker is entitled to a fee-simple, and this last limitation over is void for repugnancy. (*Pushman v. Filliter*, 3 Ves. Jr. 7, 9; *Flanders v. Clarke*, 1 Ves. Sr., 10; *Bull v. Kingston*, 1 Meriv. 314, 319; 20; *Riddick v. Cohoon*, 4 Rand. 550 & seq.; *Madden v. Madden*, 2 Leigh, 382, 385, 391; *Burwell's Ex'ors v. Anderson*, 3 Leigh, 355 & seq.; *May v. Joynes & als.* 20 Grat. 682, 715; *Calvert v. Calvert*, 32 Grat. 357. But see *contra* *Brant v. Va. Coal &c. Co.* 93 U. S. 333.)

2°. Effect of Attempt to Convey a Greater Estate than the Grantor may Lawfully Pass or Assure.

We have seen (*Ante*, p. 597-'8) that when, *by feoffment with livery*, or *by fine or common recovery*, the particular tenant in possession attempts to convey a greater estate than he lawfully may pass or assure, it operates to *divest* the remainder or reversion, and to convert the *right of entry* of the reversioner or remainderman into a mere *right of action*; in consequence of which such particular tenant forfeits his estate by the bare attempt at such alienation. This common law doctrine is entirely superseded in Virginia by statute, which enacts that "a writing which purports to pass or assure a greater right or interest in real estate than the person making it may lawfully pass or assure, shall operate as an alienation of such right or interest in the said real estate as such person might lawfully convey or assure." (V. C. 1873, ch. 112, § 7; V. C. 1887, ch. 107, § 2419.) And thus, as no such conveyance can prejudice the reversioner or remainderman, it is believed that with us no forfeiture can in any case arise from a particular tenant undertaking to alienate a greater estate than he possesses. (*Ante*, pp. 599, &c.)

3°. Effect of Deed in Conveying *All of the Estate of the Grantor*, unless Limited.

The common law establishes it as a maxim, that grants are, in general, to be construed most favorably *to the grantee* (the words being supposed to be ambiguous), according to the maxims *verba chartarum fortius accipiuntur contra proferentem*, and *qualibet concessio fortissime contra donatorem interpretenda est*; or as it is more gen-

erally and accurately expressed, *words, if ambiguous, are to be construed most strongly against him who uses them*; the object being to prevent injury by the use of ambiguous terms, and to punish the party who employs them, and whose meaning they purport to express, by turning the ambiguity against him. A distinction, however, is made at common law between an indenture and a deed poll. The latter is executed by the grantor alone, and the words are *his only*, and shall therefore be taken most strongly against him; but in an indenture, which is executed by both parties, they are to be considered as the *words of them both*. This rule of construction, however, from its strictness and rigor, is the last to be resorted to, and is never to be relied on but where all other rules of exposition fail. Nor is it in any case to be applied where it would work a wrong. Thus, if a tenant in fee-simple alienes to one for life, without saying for whose life, it is to be construed for the *life of the grantee*, for that is most beneficial to the grantee. But if the grantor was seised for his own life, only, and should make a similar grant for life, it must be understood to be *for his own life*; for he has no power to do more, and upon ambiguous language, is not supposed to have designed to do more, especially as, at common law, it might have occasioned a forfeiture. (Shepp. Touchst. 87-8; 1 Plowd. 134; Doe v. Williams, 1 H. Bl. 25.)

We have a statutory provision, derived from 8 & 9 Vict. cc. 119 and 124, which seems to be designed to carry this principle of the common law yet further, although there has been as yet with us no judicial determination as to its construction. The enactment is that every deed "conveying lands shall, unless an exception be made therein, be construed to include all the estate, right, title, and interest whatever, both at law and in equity, of the grantor in or to such lands." (V. C. 1873, ch. 113, § 2; V. C. 1887, ch. 108, § 2438.)

4°. Effect of Deed in *Including Buildings, Privileges, and Appurtenances*, not Excepted.

"Land, in the legal signification," says Lord Coke, "comprehendeth any ground, soil, or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furzes, and heath." . . . "It legally includeth also castles, houses, and other buildings." (1 Th. Co. Lit. 197.) And from the same authority we learn that all things *appendant and appurtenant* to the manor, as incidents or adjuncts thereto, shall pass, together with the manor, without saying *cum pertinentiis*. (1 Th. Co. Lit. 205.) All these propositions, namely, that the grant of *land*, at common law, carries with it, as included therein, without

more words, all trees, houses and other buildings on the lands (for *cujus est solum ejus est usque ad calum*), and also things *appendant and appurtenant* thereto, at least as a general rule, are amply explained and illustrated in Sheppard's Touchstone of Conveyances, pp. 89 & seq.

The statute, therefore (taken from 8 & 9 Vict. cc. 119, 124), which enacts that "every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances, of every kind, belonging to the lands therein embraced," seems to be merely an affirmation of the common law. (V. C. 1873, ch. 113, § 7; V. C. 1887, ch. 108, § 2443.)

#### 5°. Effect of *Words of Simple Release*.

In order to abbreviate the necessary verboseness of deeds of conveyance, and at the same time to attain to the requisite certainty and precision, the legislature has very judiciously provided (in imitation of 8 & 9 Vict. cc. 119 and 124) that a few short expressions shall have a meaning (which to the popular ear they very sufficiently convey) equivalent to the much more elaborate and prolix technical phraseology. An instance of this we have already encountered, in connection with the *form of a conveyance* (*Ante*, p. 914), in respect to words of release, the statute declaring that, "Whenever in any deed there shall be used the words, 'The said grantor (or the said ———), releases to the said grantee (or the said ———), all his claims upon the said lands,' such deed shall be construed as if it set forth" the release in the fullest and most technical language, as expressed at large in the statute, and in the passage from this work just cited. (V. C. 1873, ch. 113, § 3; V. C. 1887, ch. 108, § 2439.)

#### 6°. Effect of *Covenants Contained in Deeds of Conveyance*.

The device referred to under the preceding head of abbreviating verbiage, without sacrificing precision and clearness, has been largely used in respect to *covenants* contained in deeds of conveyance. The idea and the terms employed are for the most part derived from 8 & 9 Vict. cc. 119 and 124, and in the main the provisions are eminently wise. Let us consider, (1), The effect of covenants *contained in conveyances of the freehold*, and especially of the fee-simple; and (2), The effect of covenants *contained in leases* for life or years;

W. C.

#### 1°. Effect of *Covenants Contained in Conveyances of the Freehold*, and Especially of the Fee-Simple;

W. C.

##### 1<sup>a</sup>. Effect in a Deed of Conveyance, of the Words, "*The said ——— Covenants.*"

The statute enacts that "when a deed uses the words,



‘The said ——— covenants,’ such covenant shall have the same effect as if it was expressed to be by the covenantor, for himself, *his heirs*, personal representatives and *assigns*, and shall be deemed to be with the covenantee, *his heirs*, personal representatives and assigns.” (V. C. 1873, ch. 113, § 9; V. C. 1887, ch. 108, § 2445.)

Let it be remembered, however, that, notwithstanding this provision, no covenants, save those which *run with the land*, and are *not yet broken*, are capable of passing to an assignee. It is a well known rule of the common law that *choses in action* are not assignable; to which it is one of the few exceptions that covenants running with land, and not broken, pass with the land to the assignee thereof. What covenants do run with the land, and before they are broken, pass with the land to whomsoever it may be conveyed, has been before explained (*Ante*, pp. 716 & seq.), and the student is advised to refer to that passage in this connection. (See 1 Smith’s L. C. 92, 96, & seq.; *Randolph v. Kinney*, 3 Rand. 394, 396 ‘7; *Dickinson v. Hoomes*’ Adm’r, 8 Grat. 395-’6.)

2<sup>d</sup>. Effect in a Deed of Conveyance of Covenant to “*Warrant Generally*,” or to “*Warrant Specially*.”

“A covenant by the grantor in a deed ‘that he will *warrant generally* the property hereby conveyed,’ shall have the same effect as if the grantor had covenanted that he, his heirs, and personal representatives will for ever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the *claims and demands of all persons whomsoever*.” (V. C. 1873, ch. 113, § 10; V. C. 1887, ch. 108, § 2446.)

And “a covenant by any such grantor ‘that he will *warrant specially* the property hereby conveyed,’ shall have the same effect as if the grantor had covenanted that he, his heirs, and personal representatives, will for ever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the *claims and demands of the grantor, and all persons claiming or to claim by, through, or under him*.” (V. C. 1873, ch. 113, § 11; V. C. 1887, ch. 108, § 2447.)

It may be questioned whether these provisions are sound in policy, tending as they do to encourage the use of covenants of title which, from their vagueness and imperfection, it would be better to discard altogether. (*Ante*, pp. 717 & seq.) Some enactments, presently to be noticed, very prudently seek to induce the substitution of the very complete series of covenants

employed in English conveyances, and known as the *English covenants*, by giving to short forms of expression the same meaning as belongs to very long and detailed ones (V. C. 1873, ch. 113, §§ 13 to 16; V. C. 1887, ch. 108, §§ 2439 to 2452); and it seems scarcely to tempt parties to conveyances to continue to use forms like those mentioned under this head and the next, notwithstanding they are obnoxious to objections so grave.

- 3<sup>d</sup>. Effect of the Words "*with General Warranty*," or "*with Special Warranty*," in the *Granting Part* of the Deed.

"The words '*with general warranty*' in the granting part of any deed shall be deemed to be a covenant by the grantor 'that he will warrant *generally* (that is, against the claims of all persons,) the property hereby conveyed.' The words '*with special warranty*' in the granting part of any deed shall be deemed to be a covenant by the grantor 'that he will warrant *specialty* (that is, against the claims of the grantor and his heirs and other designated persons,) the property hereby conveyed.'" (V. C. 1873, ch. 113, § 12; V. C. 1887, ch. 108, § 2448.)

- 4<sup>a</sup>. Effect of Covenant that the Grantor *has the Right to Convey the Land Embraced in the Deed to the Grantee*.

"A covenant by the grantor in a deed for land, '*that he has the right to convey the said land to the grantee*,' shall have the same effect as if the grantor had covenanted that he has good right, full power, and absolute authority to convey the said land, with all the buildings thereon, and the privileges and appurtenances thereto belonging, unto the grantee, in the manner in which the same is conveyed, or intended so to be, by the deed, and according to its true intent." (V. C. 1873, ch. 113, § 13; V. C. 1887, ch. 108, § 2449.)

- 5<sup>a</sup>. Effect of Covenant that the Grantee *shall have Quiet Possession of the Land Embraced in the Deed*.

A covenant by the grantor in a deed for land, "*that the grantee shall have quiet possession of the said land*," shall have "as much effect as if he covenanted that the grantee, his heirs and assigns, might at any and at all times thereafter, peaceably and quietly enter upon and have, hold, and enjoy the land conveyed by the deed, or intended so to be, with all the buildings thereon, and the privileges and appurtenances thereto belonging, and receive and take the rents and profits thereof to and for his and their use and benefit, without any eviction, interruption, suit, claim or demand whatever." (V. C. 1873 ch. 113, § 14; V. C. 1887, ch. 108, § 2450.)

6<sup>a</sup>. Effect of Covenant that *the Land is Free from all Incumbrances.*

If to the covenant for *quiet possession*, mentioned under the foregoing head, “there be added ‘*free from all incumbrances*,’ these words shall have as much effect as the words, ‘and that freely and absolutely acquitted, exonerated, and for ever discharged, or otherwise, by the said grantor or his heirs, saved harmless and indemnified of, from, and against any and every charge and incumbrance whatever.’” (V. C. 1873, ch. 113, § 14; V. C. 1887, ch. 108, § 2450.)

7<sup>a</sup>. Effect of Covenant by Grantor of Lands that *he will Execute such Further Assurances of the said Lands as may be Requisite.*

A covenant by the grantor in a deed for land, “*that he will execute such further assurances of the said lands as may be requisite*,” shall have “the same effect as if he covenanted that he, the grantor, his heirs or personal representatives, will at any time, upon any reasonable request, at the charge of the grantee, his heirs or assigns, do, execute, or cause to be done or executed, all such further acts, deeds and things for the better, more perfectly and absolutely conveying and assuring the said lands and premises hereby conveyed, or intended so to be, unto the grantee, his heirs or assigns, in manner aforesaid as by the grantee, his heirs or assigns, his or their counsel in the law shall be reasonably devised, advised or required.” (V. C. 1873, ch. 113, § 15; V. C. 1887, ch. 108, § 2451.)

8<sup>a</sup>. Effect of Covenant by Grantor of Lands that *he has Done no Act to Incumber the Land.*

“A covenant by any such grantor, ‘*that he has done no act to incumber the said lands*,’ shall have the same effect as if he covenanted that he had not done or executed, or knowingly suffered any act, deed or thing whereby the lands and premises conveyed, or intended so to be, or any part thereof, are or will be charged, affected or incumbered in title, estate or otherwise.” (V. C. 1873, ch. 113, § 16; V. C. 1887, ch. 108, § 2452.)

2<sup>p</sup>. Effect of Covenants *Contained in Leases*; w. c.

1<sup>a</sup>. Effect of a Covenant by the Lessee “*to Pay the Rent*” and “*to Pay the Taxes.*”

“In a deed of lease a covenant by the lessee ‘*to pay the rent*,’ shall have the effect of a covenant that the rent reserved by the deed shall be paid to the lessor, or those entitled under him, in the manner therein mentioned; and a covenant by him ‘*to pay the taxes*,’ shall have the effect of a covenant that all taxes, levies and assessments upon the demised premises, or upon the

lessor on account thereof, shall be paid by the lessee, or those holding under him." (V. C. 1873, ch. 113, § 17; V. C. 1887, ch. 108, § 2453.)

- 2<sup>a</sup>. Effect of a Covenant by the Lessee, that "*He will not Assign without Leave.*"

"In a deed of lease, a covenant by the lessee that '*he will not assign without leave,*' shall have the same effect as a covenant that the lessee will not, during the term, assign, transfer, or set over the premises, or any part thereof, to any person, without the consent *in writing* of the lessor, his representatives or assigns." (V. C. 1873, ch. 113, § 18; V. C. 1887, ch. 108, § 2454.)

- 3<sup>a</sup>. Effect of a Covenant by the Lessee, "to pay the rent" or that "*He will Leave the Premises in Good Repair.*"

"No covenant or promise by a lessee to *pay the rent* or that he will leave the premises *in good repair*, shall have the effect if the buildings thereon be *destroyed by fire* or otherwise, *without fault or negligence* on his part, or if he be *deprived of the possession* of the premises by the *public enemy*, of binding him to *make such payment*, or *erect such buildings* again, unless there be other words showing it to be the intent of the parties that he should be so bound. But in cases of such destruction, there shall be a *reasonable reduction* of the rent for such time as may elapse until there be again upon the premises buildings of as much value to the tenant for his purposes as what may have been so destroyed; and in case of such deprivation of possession, a like reduction until possession of the premises be restored to him." (V. C. 1887, ch. 108, § 2455; V. C. 1873, ch. 113, §§ 18, 19.)

The provision that the lessee should not be bound to rebuild was designed to obviate a construction of a covenant *to repair*, which at common law had prevailed, namely, that it obliged the lessee *to rebuild* in case of the destruction of the buildings by an accidental fire, or otherwise, although without his default. (Walton v. Waterhouse, 3 Saund. 420, 422 a, note; Chesterfield v. Duke of Bolton, Com. R. 627; Bullock v. Dommitt, 6 T. R. 650; Brecknock Nav. Co. v. Pritchard, 6 T. R. 750; Digby v. Atkinson, 4 Camb. 278, and note; Ross v. Overton, 3 Call, 309, 319; Scott v. Scott, 18 Grat. 167-'8; Phillips v. Stevens, 16 Mass. 238; 2 Rob. Pr. (2d ed.) 51.) The doctrine, *stricto jure* as it is considered to be, was not favored, nor extended beyond the adjudged cases; and, therefore, in Maggort v. Hansbarger, 8 Leigh, 536, it was held that an agreement "to *return* the property with all its appurtenances," the buildings having been consumed by fire,



accidentally or by some unknown incendiary, without the lessee's default, was not equivalent to an agreement to repair, but only to *return* the premises, in opposition to *holding over*, and that the action being *on the agreement*, could not be sustained. Had it been not on the agreement, but for the *waste*, it would seem the plaintiff must have recovered. (*Ante*, pp. 633-'4.)

- 4<sup>a</sup>. Effect of a Covenant by the Lessor "*For the Lessee's Quiet Enjoyment of His Term*."

"A covenant by a lessor '*for the lessee's quiet enjoyment of his term*' shall have the same effect as a covenant that the lessee, his personal representative and lawful assigns, paying the rent reserved, and performing his or their covenants, shall peaceably possess and enjoy the demised premises for the term granted, without any interruption or disturbance from any person whatever." (V. C. 1873, ch. 113, § 20; V. C. 1887, ch. 108, § 2456.) See *Ante*, p. 720.

- 5<sup>a</sup>. Effect of a *Proviso* in a Deed of Lease, that "*the Lessor may Re-Enter for Default of ——— Days in the Payment of Rent, or for the Breach of Covenants*."

"If in a deed of lease it be provided that '*the lessor may re-enter for default of ——— days in the payment of rent, or for the breach of covenants*,' it shall have the effect of an agreement that, if the rent reserved, or any part thereof, be unpaid for such number of days after the day on which it ought to have been paid, or if any of the other covenants on the part of the lessee, his personal representatives or assigns, be broken, then in either of such cases the lessor, or those entitled in his place, at any time afterwards, into and upon the demised premises, or any part thereof, in the name of the whole, may re-enter, and the same again have, repossess and enjoy, as of his or their former estate." (V. C. 1873, ch. 113, § 21; V. C. 1887, ch. 108, § 2457.)

For the effect of the five covenants above enumerated, in abbreviated forms of expression, the statutes of Virginia, in imitation of 8 & 9 Vict. cc. 119 and 124, make judicious provision. But there are two other covenants which, in the interest of the *lessee*, should never be omitted, and one which, in agricultural tenancies, the lessor should take care to insert. These three will be mentioned in continuous enumeration with those above stated (*Ante*, pp. 776, 600, 625, & seq., 59; 4 Min. Insts. 1329-'30).

- 6<sup>a</sup>. Covenant that the Lessee will Cultivate the Premises in Manner Prescribed.

Forms of such a covenant may be seen in Grayd. Forms, 327-'8, and Oliver's Convey. 299-303.

7<sup>a</sup>. Covenant that the Lessee shall not be Liable for Waste or Destruction of the Premises not Occasioned by *His own Default*.

See *Ante*, pp. 776, 600, 601, 625 & seq.; 4 Min. Insts. 1329-'30.

8<sup>a</sup>. Covenant that Rent shall be Suspended if the Premises are Destroyed or Rendered Incapable of Use by Casualty, *without the Default of the Lessee*.

Inasmuch as, without a special agreement to the contrary, the lessee is bound to pay the whole rent without abatement, notwithstanding the structures upon the premises (which may have constituted their whole value to the lessee), may have been destroyed by the *act of God*, it was an extravagant improvidence, and yet a frequent one, to omit such a stipulation as this. (*Ante*, p. 60; *Id.* 776; 4 Min. Insts. 1329-'30.)

The Code of 1887 provides for the case, however, as we have seen. *Ante*, pp. 923, 60; V. C. 1887, ch. 100, § 2455.

2<sup>m</sup>. The Manner of Executing a Deed of Conveyance of Lands.

Under this head let us observe, (1), The manner of executing a conveyance by a person *sui juris*, that is, free from disabilities; and (2), The manner of executing a conveyance by a *married woman*.

W. C.

1<sup>n</sup>. The Manner of Executing a Deed of Conveyance by a Person *Sui Juris*.

A person *sui juris*—that is, one free from disabilities (see *Ante*, pp. 642 & seq.)—executes a conveyance with a due observance of all the circumstances required to give it the desired effect, of which enough has already been said. (*Ante*, pp. 661 & seq.) But in case of persons not *sui juris* (other than married women), whilst the conveyance is to be executed in like manner, and with the same formalities, it is in general *voidable* by the grantor or his heirs; and in the case of a married woman, is at common law *ipso facto* void. But the exigencies of society require married women to convey so frequently that it has been found, as well in England as with us, absolutely indispensable, in one way or other, to make provision for it.

2<sup>n</sup>. The Manner of Executing a Deed of Conveyance *by a Married Woman*.

We will consider, (1), The manner of executing a married woman's conveyance in England; and (2), The manner of executing a married woman's conveyance in Virginia;

W. C.

1<sup>o</sup>. The Manner of Executing a Married Woman's Conveyance in England.

We have seen (*Ante*, 652 & seq.,) that a married woman is at common law disabled to dispose of her lands, or to make any other contract obligatory upon herself, for two reasons, namely, (1), Because, in law, she is one with her husband, her existence being merged in his; and (2), Because of the supposed constraining influence exerted by her husband. The most obvious way to surmount these obstacles would have been by act of parliament; but an act of parliament, in the early periods of the law, was not easily obtained, and meanwhile the needs of society required imperatively that married women should in some form be enabled to aliene their estates. In default of a statute, therefore, it will be remembered that the English *courts* devised the expedients, first of *fine*, and afterwards of *common recovery*, whereby, by means of a collusive suit, the difficulty was evaded of the legal *oneness* of husband and wife; and by means of a privy examination, the supposed *constraint of the husband* was obviated.

These very artificial but ingenious devices are no longer used in England, having been replaced, in 1834, and at subsequent periods by a very simple and direct statutory contrivance, such as has been in use in Virginia for more than 200 years, that is, since 1674, namely, *a deed*, with a privy examination before certain functionaries, the will of the legislature obviating the oneness of husband and wife, for the purpose of the conveyance, as effectually as the collusive suit did at common law. (Stat. 3 & 4 Wm. IV., c. 74; 8 & 9 Vict. c. 106; 19 & 20 Vict. c. 108; Wms. Real Prop. 212-113; 2 Hen. Stats. 317.)

2°. The Manner of Executing a Married Woman's Conveyance in Virginia.

The manner of proceeding has been from an early period prescribed by statute with us, fines and recoveries being too costly and inconvenient to meet the necessities of a new country still to be reclaimed from the wilderness. The *merger* of the wife's existence in that of the husband is obviated by the potency of the statute, as we have seen, and the husband's supposed coercion by the privy examination of the wife before certain accredited functionaries. (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502.)

The allowance of such a conveyance being an exception to the general principles of the common law, must for that reason be *construed strictly*. A *literal* compliance with the prescribed forms is not indeed required, but any substantial deviation therefrom, in any particular whatever, wholly invalidates the instrument. (*Countz v. Geiger*, 1 Call, 190; *Harvey & al. v. Pecks*, 1 Munf. 518; *Currie & al. v. Page & al.* 2 Leigh, 620; *Langhorne v.*

Hobson, 4 Leigh, 224; Tod v. Baylor, 4 Leigh, 513; Siter & als. v. McClanachan, 2 Grat. 294.)

We will consider, (1), What transactions of a married woman are made valid in Virginia by statute; and (2), The general requirements which must attend a married woman's conveyance;

W. C.

1<sup>st</sup>. What Transactions of a Married Woman are Made Valid in Virginia by Statute.

To determine what transactions of this character are valid, we must have recourse to the statute itself. None other have any validity, except such as are made effectual by the *terms of the statute*; and upon reference thereto we find that it applies only where "a husband and his wife have signed a writing purporting to *convey or transfer any estate, real or personal.*" (V. C. 1873, ch. 117, § 4; V. C. 1887, ch. 111, § 2502.) And hence it did not until recently extend to authorize a married woman to execute a *power of attorney*, which was void with us, as it is at common law. (Shanks v. Lancaster, 5 Grat. 110); unless where the wife is a *non-resident* of Virginia (V. C. 1887, ch. 111, § 2509); or by a later statute in *any case*, provided the power of attorney as well as the writing shall have been duly *admitted to record*. (Acts 1889-'90, p. 193, ch. 238.)

Some qualification of this doctrine, however, is to be made in respect of conveyances of a married woman's *separate estate*, as has been previously explained. (1 Min. Insts. pp. 351 & seq.) We there saw that, in respect to *personal property*, it is settled that a married woman, being entitled to a separate estate in chattels, may dispose of it freely, by will or otherwise, precisely as if she were a *feme sole*, save only when it is otherwise provided by the instrument whence she derives the estate. But as to *real property*, it will be remembered, a more rigorous doctrine prevails. If she is not allowed, by the instrument creating her estate, to dispose of that in some designated way, she can do so only by will, executed as a will of lands is required to be executed (V. C. 1873, ch. 118, §§ 4, 5; V. C. 1887, ch. 112, §§ 2514, 2515); or by deed of conveyance, executed with the formalities prescribed by law for married women. (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502.) And it seems that permitting her to dispose of her separate property in lands in some particular designated mode other than as the statutes direct, does not, without negative words, preclude her from the use of those statutory methods. (Lee & al. v. Bank of United States, 9 Leigh, 209.)



And yet another qualification must be noted in respect to a married woman's separate property, acquired under the *Married Woman's Law*; in which case the disposition of the wife's property is by the statute directed to be made by the *sole act* of the wife, as if she were a *feme sole*. (V. C. 1887, ch. 103, §§ 2285, 2286; *Gentry v. Gentry*, 87 Va. 482.)

- 2<sup>n</sup>. The General Requirements which must by Statute in Virginia Attend a Married Woman's Conveyance.

These have been already stated (*Ante*, p. 653); but it will not be amiss to recapitulate them;

W. C.

- 1<sup>a</sup>. The Instrument must be a Deed or Writing to which the *Husband and Wife are both Parties*.

See *Sexton v. Pickering*, 3 Rand. 468, 472.

- 2<sup>a</sup>. The Husband and Wife *must both Sign it*.

This and the preceding proposition both depend on the same phraseology of the statute. (V. C. 1873, ch. 117, § 4; V. C. 1887, ch. 111, § 2502.) "When a *husband and his wife have signed a writing* purporting or *contracting* to convey any estate, real or personal," &c. (*Tod v. Baylor*, 4 Leigh, 498, 509, 510, 515 '16.) The husband and wife must both sign the writing, and the same must be admitted to record *as to each*; and whilst before the Code of 1887, it must have been a *conveyance*, and nothing else, it may now be an *agreement to convey*, or a *power of attorney*. (V. C. 1887, ch. 111, § 2502; Acts 1889-'90, p. 193, ch. 238.)

Very proper qualifications, however, are made in cases where the husband being *infant or insane*, his real estate is decreed by a court of chancery to be sold. Thus, it is enacted that, "When a decree or order is made under chapter 117 or 75 of the Code of 1887, for the sale of real estate of an insane or infant husband, his wife may, *if she thinks fit*, join in the conveyance (which would be made by a commissioner of the court), and thereby release her right of dower, or sell and convey all her estate and interest in the granted premises in like manner as she might have done by a conveyance thereof, made jointly with the husband if he had been under no legal disability." And "in case of any such release by the wife of her right of dower, or any such conveyance of her own estate, the proceeds of the sale shall be so invested and disposed of, under the order of the court directing the sale, as to secure to her the same right, use, and benefit of, and in the principal sum and the income thereof, that she would have had of and in the real estate, and the income thereof, if it had not been sold; or, if she prefer it, she may receive, or have

secured to her out of the said proceeds, such sum *in gross* as, in the opinion of the court, may be sufficient to compensate her for her interest in the said real estate." (V. C. 1873, ch. 124, §§ 9, 10; V. C. 1887, ch. 117, §§ 2623, 2624, 2626.)

3<sup>a</sup>. No Other Disability is Obviated *Save that of Coverture*.

It is provided that, when all the requirements of the statute are complied with, "such writing shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title, and interest of every nature, which, at the date of such writing, she may have in any estate conveyed thereby, as effectually *as if she were, at the said date, an unmarried woman*." (V. C. 1873, ch. 117, § 7; V. C. 1887, ch. 111, § 2502.) And hence, if the wife be an *infant* at the date of the deed, however formal may be its execution, it is as voidable as the deed of any other infant under age. (Thomas v. Gammel & ux. 6 Leigh, 9, 12, 13, 15.)

No provision is made to legalize the alienation of an *infant wife's* dower interest; but for the transfer of an *insane wife's* right of dower provision has been made. It is enacted that, "If the husband of an insane wife wish to sell real estate, and to have her *right of dower* therein released to the purchaser, he may petition for that purpose the circuit or corporation court of the county or corporation in which such estate, or some part thereof, is; and if it appear to the court to be proper, an order may be made for the execution of such a release, by a commissioner, to be appointed by the court for the purpose, which release shall be effectual to pass her said right of dower to the purchaser. But the court shall make such order as in its opinion may be proper to secure to her the same interest in the purchase-money, and the income thereof, that she would have had in the real estate and income thereof if it had not been sold; or, at the discretion of the court, to secure to her out of the purchase-money such sum in gross as in the court's opinion may be sufficient to compensate her for the right of dower." (V. C. 1873, ch. 124, § 11; V. C. 1887, ch. 117, §§ 2625, 2626.)

4<sup>a</sup>. A Strict Observance of the Ceremonies Prescribed, at least *in Substance*, is Necessary.

Thus, it must appear (as the law was prior to the Code of 1887), *by the certificate of the authorities* empowered to take the wife's acknowledgment, that she has been examined *privily and apart from her husband* (Healy v. Rowan, 5 Grat. 414; Siter & als. v. McClanahan,

2 Grat. 294); that the writing *was duly explained to her* (Harkins v. Forsyth, 11 Leigh, 294; Hairston v. Randolphs, 12 Leigh, 445; Bolling v. Teel, 76 Va. 487, 494); and that she declared that the writing was her act, that she executed it willingly, and *does not wish to retract it* (Grove v. Zumbro, 14 Grat. 516). And an omission to state *in the certificate* the observance of any of these particulars incurably invalidates the conveyance. (Hockman v. McClanahan, 87 Va. 37-'8; First National Bank v. Paul, 75 Va. 600; Blair v. Sayre, 29 W. Va. 615; Laidley v. Land Co., 30 W. Va. 511.)

On the other hand, if the certificate states the observance of the requirements of the statute, being a *matter of record*, it conclusively proves the fact to have been so; and its truth can only be impeached (and that in equity alone) by showing that the authorities who made the certificate, or the party claiming under the deed, have been *guilty of fraud*. (Harkins v. Forsyth, 11 Leigh, 294, 302 & seq.; Carper v. McDowell, 5 Grat. 233 & seq.)

5<sup>a</sup>. The Character of the Ceremonies and Forms Prescribed.

The ceremonies and forms prescribed by the law as it was prior to the Code of 1887, are set forth in sections 4 and 7 of the statute (V. C. 1873, ch. 117, §§ 4, 7); and as prescribed by the Code of 1887, are stated in V. C. 1887, ch. 111, §§ 2500 to 2502; and Acts 1889, 1890, p. 193, ch. 238; and notwithstanding it will involve some repetition, they will be stated analytically; w. c.

1<sup>r</sup>. The Authorities Before Whom the Statute Allows the Ceremonies to Occur; w. c.

1<sup>s</sup>. Where the *Wife is in Virginia*.

The authorities before whom the ceremonies prescribed may take place, and who must certify them, when the *wife is in Virginia*, are stated in the statute (V. C. 1873, ch. 117, § 4; V. C. 1887, ch. 111, §§ 2500, 2501). They are as follows:

(1), "A court authorized to admit such writing to record;"

(2), The clerk of the same court (by V. C. 1887, ch. 111, § 2500), in his office *only*, and not as formerly, at any place *within his county or corporation*. And the deputy clerk may act as effectually as the clerk himself. (V. C. 1873, ch. 159, § 8; Id. ch. 117, § 4, n. \*; V. C. 1887, ch. 35, § 817; Acts 1889-'90, p. 44, ch. 55.)

(3), Prior to the Code of 1887, two justices of the peace, *present together*, were required, being within

their county or corporation; but the Code of 1887 requires but *one justice*. (V. C. 1887, ch. 111, § 2501.)

(4), A notary public, within his county or corporation; or,

(5), A commissioner in chancery of a court of record, within his county or corporation.

2<sup>s</sup>. Where the Wife is *not in Virginia*, but *within the United States*.

The statute gives the law in this case also. (V. C. 1873, ch. 117, § 4; V. C. 1887, ch. 111, § 2501.) The authorities who may act where the wife is not in Virginia, but within the United States, are as follows:

(1), One justice of the peace, within his own county, etc.;

(2), A notary public, within the local sphere assigned him;

(3), A commissioner in chancery of a court of record, within the local sphere of his authority; or

(4), A commissioner appointed by the Governor of Virginia, in pursuance of V. C. 1873, ch. 116, § 2; V. C. 1887, ch. 41, § 924; (in order to take acknowledgments of conveyances, etc.), within the limits of the State for which he was appointed.

3<sup>s</sup>. Where the Wife is *not within the United States*.

The reference is still to the same statute (V. C. 1873, ch. 117, § 4; V. C. 1887, ch. 111, § 2501); and the authorities appointed to act in the case are the following:

(1), Any diplomatic or commercial agent of the United States abroad, or, as the statute expresses it, "any minister plenipotentiary, *chargé d'affaires*, consul-general, consul, vice-consul, or commercial agent, appointed by the government of the United States to any foreign country."

It should be observed that there are two classes of public ministers not named as authorized to officiate in this way, namely, ambassadors and ministers resident (Wheat. Internat. Law, 264); but the United States has never employed ambassadors, and it is believed that ministers resident would be included within the policy and meaning of the statute.

It is to be noted, also, that the statute is not explicit in limiting the diplomatic and commercial agents, in acts of this kind, to the countries to which they are respectively accredited; but it is probable that they will be held to be so limited, especially as the action had must be under the *official seal*.

(2), *Any court* of a foreign country.

It is not in terms required that it shall be a *court*



*of record*; but that seems to be implied, inasmuch as the certificate is to proceed from “the *proper officer* of such court,” and is to be under his *official seal*; or

(3). Any mayor or chief magistrate of any city, town or corporation of a foreign country.

2<sup>d</sup>. What is Required to be Done before these Authorities.

In consequence of the changes in the law made by the Code of 1887, it will be needful to advert to, (1), What was required to be done, as the law was prior to the Code of 1887; and (2), What is required to be done by the Code of 1887, and subsequent enactments:

1<sup>st</sup>. What was required to be Done before the Authorities in Question, by the Law as it was *prior to the Code of 1887*.

What was required to be done before the authorities above described as the law was prior to the Code of 1887 is to be found in *section four*, and sections 5 and 7 of the statute, as in the Code of 1873. (V. C. 1873, ch. 117, §§ 4, 5, 7.) The provisions are as follows:

“If, on being examined *privily and apart* from her husband,” by the several functionaries to whom the authority is committed, “and having such writing *fully explained to her*, she (the wife) acknowledge the same *to be her act*, and declare that *she executed it willingly*, and *does not wish to retract it*, such *privy examination, acknowledgment and declaration* shall thereupon be *recorded* in such court, or in the clerk’s office;” if this acknowledgment takes place in the court of registry or the clerk’s office thereof, or if before two justices or other functionaries other than the court of registry, or the clerk thereof, such functionaries are to *certify* the *privy examination, acknowledgment and declaration* on or annexed to the said writing, in a form prescribed. It is further enacted (V. C. 1873, ch. 117, § 5), that “such certificate, either when the wife is within or without the United States, shall be *admitted to record* at the time of admitting the writing to which it is annexed, or on which it is.” And, last of all, it is provided (V. C. 1873, ch. 117, § 7), that “when the *privy examination, acknowledgment and declaration* of a married woman shall have been *so taken and recorded*, or when the same shall have been *taken and certified* as aforesaid, and the writing to which such certificate is annexed, or on which it is, shall have been *delivered to the proper clerk, and admitted*

*to record as to the husband as well as the wife, such writing shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her or her representatives all right, title and interest of every nature, which, at the date of such writing, she may have in any estate conveyed thereby, as effectually as if she were at the said time an unmarried woman; and such writing shall not operate any further upon the wife, or her representatives, by means of any covenant or warranty contained therein;”*

W. C.

- 1<sup>t</sup>. There must be an Examination of the Wife *Privily and Apart from Her Husband*.

The certificate of the functionaries appointed to make the examination, to explain the writing, and to take the acknowledgment and declaration of the wife, must set forth substantially these several particulars, although it is not indispensable to do so in the very words of the statute. And if any of these particulars be omitted in the certificate, the writing is void as to the wife. (Healy v. Rowan, 5 Grat. 414; Siter & als. v. McClanachan, 2 Grat. 294; Hairston v. Randolphs, 12 Leigh, 445; Grove v. Zumbro, 14 Grat. 514-15.)

- 2<sup>t</sup>. The Writing must be *Fully Explained* to the Wife by the Authorities.

This requisite also must appear from the certificate, which, in the absence of fraud, is *conclusive evidence of what it states*. (Harkins v. Forsyth, 11 Leigh 294; Hairston v. Randolphs, 12 Leigh, 445; Carper v. McDowell, 5 Grat. 212; Taliaferro v. Pryor, 12 Grat. 277; Grove v. Zumbro, 14 Grat. 515; Bolling v. Teel, 76 Va. 494.)

- 3<sup>t</sup>. The Wife, in the Presence of the Authorities, must Acknowledge the Writing *to be Her Act*, and Declare that She *Willingly Executed it*.

- 4<sup>t</sup>. The Wife, in the Presence of the Authorities, must Declare that She *Does not Wish to Retract it*.

If the certificate omits to state that the wife *does not wish to retract it*, it is fatal to the validity of the deed, so far as concerns the wife. (Grove v. Zumbro, 14 Grat. 515-16.)

- 5<sup>t</sup>. What is, upon such Examination, Acknowledgment, etc., to be done by the Authorities; W. C.

- 1<sup>u</sup>. Where the Acknowledgment, etc., of the Wife, is in the Court of Registry, or in the Clerk's Office thereof.

The *privy examination, acknowledgment and declaration* (including the *explanation* required), shall thereupon be recorded in the court, or in the clerk's

office, as the writing also shall be, at least as soon as it is duly acknowledged or proved as to the husband also. (V. C. 1873, ch. 117, §§ 4, 7.)

- 2<sup>n</sup>. Where the Acknowledgment, etc., of the Wife, Takes Place before any of the Other Authorities mentioned in the Statute.

The privy examination, explanation, acknowledgment, and declaration, as above explained, are to be *certified*, in a form prescribed, by the justices, notary public, commissioner in chancery, or commissioner of deeds in another State, *under their hands*; and by the diplomatic or commercial agent of the United States abroad, the foreign court, or foreign mayor, *under their official seals*. (V. C. 1873, ch. 117, § 4.)

The form of the certificate, as prescribed by the statute, is "*to the following effect*," namely:

State (or Territory, or District) of \_\_\_\_\_,  
County (or Corporation), of \_\_\_\_\_,  
to-wit:

I, \_\_\_\_\_, a commissioner appointed by the governor of the State of Virginia for the said state (or territory, or district) of \_\_\_\_\_,—or we, \_\_\_\_\_, and \_\_\_\_\_, justices of the peace, or I, a commissioner in chancery, of \_\_\_\_\_ court (or notary public for the county (or corporation), of \_\_\_\_\_, in the state (or territory, or district) of \_\_\_\_\_, do certify that E. F., the wife of G. H., whose names are signed to the writing above (or hereto annexed), bearing date on the \_\_\_\_\_ day of \_\_\_\_\_, personally appeared before me (or us), in the county (or corporation) aforesaid (or, if it be a *commissioner of deeds*, in the state, or territory, or district, aforesaid), and being examined by me (or us), privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said E. F., acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it. Given under my hand (or our hands), this \_\_\_\_\_ day of \_\_\_\_\_, Anno Domini, \_\_\_\_\_.

If the husband acknowledges the writing at the same time (generally the most convenient course), it may be certified immediately before the concluding clause—"Given under my hand," etc.—in terms like these:

"And we (or I) do also certify that the said G.

H., a party to the same writing, whose name is signed thereto, acknowledged the same before us (or me), in the county (or corporation) aforesaid."

If the wife be without the United States, the certificate is couched in corresponding terms, and must state the same particulars.

- 6<sup>t</sup>. The Registry of the Writing in the Proper Court, along with the Privy Examination (Explanation), Acknowledgment and Declaration.

It will be remembered, that the statute declares that, "when the privy examination, acknowledgment and declaration of a married woman shall have been *so taken and recorded*, or when the same shall have been *taken and certified* as aforesaid, and the writing to which such certificate is annexed, or on which it is, shall have been *delivered to the proper clerk and admitted to record as to the husband* as well as the wife, such writing shall operate to convey from the wife her *right of dower* in the real estate embraced therein, and pass from her and her representatives *all right, title and interest* of every nature, which, at the date of such writing, she may have in any estate conveyed thereby, as effectually as if she were, at the said date, *an unmarried woman*; and such writing shall not operate any further upon the wife, or her representatives, by means of any covenant or warranty contained therein." (V. C. 1873, ch. 117, § 7; 2 Lom. Dig. 467 & seq.; Elliott v. Peirsol, 1 Pet. 338; Jackson v. Stevens, 16 Johns. 100.) Nor does it *convey* to the purchaser any estate separate and distinct from that of the husband. It merely *relinquishes* the contingent right of dower, which would otherwise remain attached to the land. (2 Bish. Married Women, § 348; Carr v. Porter, 33 Grat. 285.)

- 2<sup>s</sup>. What is required to be Done before the Authorities by the Code of 1887, and Subsequent Enactments.

The requirements of the Code of 1887 are far less complex than those of the previous law, but much less adapted to protect the wife against conjugal influence, regular or irregular, and against the arts of designing third persons.

The provisions of the Code are as follows:

§ 2502, "When a husband and his wife have *signed a writing* purporting or *contracting* to convey any estate, real or personal, such writing may be admitted to record as to each of them, according to the provisions of section 2500, or section 2501, and when it shall have been so admitted to record as to the hus-



band as well as the wife, or if executed under a power of attorney, when the writing and the power shall have been admitted to record, it shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title, and interest of every nature, which at the date of such writing, she may have in any estate conveyed thereby, as effectually as if she were, at the said date, an unmarried woman. Such writing shall not operate any further upon the wife, or her representatives, by means of any covenant or warranty contained therein, which is not made with reference to her separate estate as a source of credit, or which, if it relates to her said right of dower or to any estate or interest conveyed other than her own, is not made with express reference to her separate estate as a source of credit." (V. C. 1887, ch. 111, § 2502; Acts 1889-'90, p. 193, ch. 238.)

And nothing contained in section 2502, "shall be so construed as to impair or affect any right or power a married woman has, by her *sole act*, in virtue of the provisions of chapter 103 (*the Married Woman's Law*), to convey or transfer any estate, real or personal, which is made her separate estate by that chapter; and any writing which is to be or may be recorded, signed by a married woman, though not signed by her husband, conveying or transferring any estate, real or personal, which is made her separate estate as aforesaid, may be admitted to record as to her, according to section 2500, or section 2501, in the same manner as if she were unmarried." (V. C. 1887, ch. 111, § 2503.)

Summing up these requirements, it appears,

- 1<sup>t</sup>. That the writing to which the statute gives effect must be a *conveyance of estate, real or personal*, or a *contract to convey it*, and nothing else. But the statute allows a married woman *not a resident of Virginia, in conjunction with her husband*, by power of attorney duly executed, acknowledged and certified as to each of them, as prescribed in section 2501, to *appoint an attorney* in fact for her and in her name, to execute and acknowledge for record, any deed or other writing which she might execute and acknowledge in conjunction with her husband; and every deed or other writing executed or acknowledged *by such attorney*, in pursuance of the power, and admitted to record, according to section 2502, shall be valid and effectual to convey the interest and title of the married woman in and to the

real estate thereby conveyed, and to bar her right of dower therein.

And by Acts of 1889-'90 it is provided, as we have seen, that the wife may *in any case* make a power of attorney in *conjunction with her husband*, by virtue of which a conveyance may be executed by the attorney, provided the *power of attorney* as well as the *conveyance* shall be duly admitted to record, as to the *husband as well as the wife*. (Acts 1889-'90, p. 193, ch. 238.)

- 2<sup>d</sup>. That the husband and wife must both have *signed the writing*, and that it must be *admitted to record as to both of them*.

But there need be *no explanation* of the writing ; no *privy examination* of the wife apart from her husband ; no *declaration* that she executed it *willingly*, and *does not wish to retract it* !

- 3<sup>d</sup>. When *so signed and recorded*, it operates to *convey from the wife her dower* in the premises, and to *pass* all her right, title and interest therein.

- 4<sup>d</sup>. But it imposes no obligation upon the wife, by means of *any covenant or warranty* contained therein, which is not made with reference to her separate estate as a source of credit.

- 5<sup>d</sup>. The statute is not applicable to property accruing to the wife under the *married woman's law*, which is transferred *directly by the wife alone*, without the concurrence of the husband.

- 6<sup>d</sup>. Nor is it applicable unqualifiedly to the *separate property* of the wife, not accruing under the *married woman's law*, but *derived by deed or will*.

Such property may be conveyed in the manner *indicated by the instrument which conferred it*, or by the *mode prescribed by the statute* as above.

## CHAPTER XXIV.

### THE REGISTRY OF CONVEYANCES AND OTHER TRANSACTIONS AFFECTING THE TITLE TO PROPERTY.

- 3<sup>rd</sup>. The Registry or Recordation of Conveyances, and of other Transactions Affecting the Title to Property.

The common law does not require any deed or writing in order to pass the title to lands, and of course, therefore, knows nothing of the doctrine of *registration*. The only notoriety which it demands in such transactions, and the only one compatible with the illiteracy of ancient Anglo-Norman society, is *livery of seisin* for estates of freehold, and *entry* for estates for years.

The first essay towards the policy of registering conveyances, other than conveyances of record, such as fines and common recoveries, is to be found in the statute of *enrolments* (27 Hen. VIII., c. 16), which is an appendage to the famous statute of uses (27 Hen. VIII., c. 10). The framers of the statute of uses could not fail to perceive that, by means of its provisions, estates, even of inheritance, in lands might be created and transferred by deed merely, without actual livery of seisin, and, therefore, with a secrecy eminently promotive of fraud, and inconvenient to society; and it was, therefore, enacted by the statute of enrolments, at the same session of parliament which passed the statute of uses, that conveyances by *bargain and sale* (which were the more likely to be prostituted to bad ends), should not enure to pass a *freehold* unless the same were by "writing *indented, sealed and enrolled*" in one of the courts at Westminster, or else with the *custos rotulorum* of the county, within six months after the date of the writing. Clandestine bargains and sales of terms for years were deemed not worth regarding, such interests, indeed, having been perfectly precarious, and subject to the caprice or good faith of the lord, until about six years before, when, by statute 21 Henry VIII., c. 15, the termor was protected against those fictitious recoveries whereby previously he was liable to be at any moment divested of his estate. (2 Bl. Com. 338; Bac. Abr. Barg. & Sale, and Id. (E).)

The policy thus hesitatingly and imperfectly inaugurated was almost immediately frustrated by the ingenious adaptation of the *lease and release* to the purpose of conveying the title to lands, as explained *Ante*, p. 810, whereby conveyances might be as secret as could be desired. Nor does parliament appear to have made any further effort to prevent so mischievous a result until the statute 2 & 3 Anne, c. 4 (A. D. 1704), which, together with several subsequent statutes, provided for a general registry of conveyances in the counties of York and Middlesex; and with so little favor were these attempts regarded, that so philosophic an observer as Blackstone, after fifty years' experience, speaks more than doubtfully of the utility of their results. "However plausible," says he, "these provisions may appear in theory, it hath been doubted by very competent judges whether more disputes have not arisen in those counties by the inattention and omission of parties, than prevented by the use of the registers," (2 Bl. Com. 343.)

The statute 2 & 3 Anne, c. 4, it may be well to transcribe, since, although it is not the original model whence our present registry laws were taken, yet its analogies have been allowed, unfortunately, too much to influence their construction. The statute recites that, by different and *secret* ways of conveying lands, etc., such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means

whereof some persons have been undone in their purchases and mortgages by *prior and secret conveyances and fraudulent incumbrances*, and enacts, "That a memorial of all deeds and conveyances which, after the 29th day of September, 1704, shall be made and executed of or concerning, and whereby any manors, lands, tenements, or hereditaments in the *West Riding* of the county of York, may be any way affected in law or equity, may, *at the election* of the party or parties concerned, be *registered*. And that every such deed or conveyance that shall, at any time after the said day, be made and executed, shall be adjudged *fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration*, unless such memorial thereof *shall be registered*, as by this act is directed, *before the registering* of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." (2 Lom. Dig. 476; 4 Ruffh. Eng. Stats. 137 & seq.)

A similar statute, with somewhat enlarged provisions, was by 6 Anne, c. 35, extended to lands in the *East Riding* of the county of York, and of the town and county of the town of Kingston upon Hull (4 Ruffh. Eng. Stats. 328, 333-'4); and by 7 Anne, c. 20, was still further extended to lands in the county of Middlesex (4 Ruffh. Eng. Stats. 368); and by statute 8 George II., c. 6, like provisions were applied to lands in the *North Riding* of the county of York. (6 Ruffh. Eng. Stats. 175.)

In Virginia, and generally in the United States, the legislature has been far more alive to the advantages of a general registration of all conveyances of, liens on, and transactions affecting lands, and the system (which was begun with us so early as 1639-'40), has been gradually perfected, until it is believed there is nothing touching the title to lands which it concerns a purchaser or creditor to know (unless it be the liens for *quotas* of the Mutual Assurance Society against fire), which is not required to be set down in the registry of the county or corporation where the land is, and that registry is made so convenient of access that for one to be deceived argues, in general, a negligence so gross as to exclude sympathy for the sufferer. (1 Hen. Stats. 227, 248, 419, 472.)

Whilst discussing the system now prevailing with us allusion will occasionally be made to the statute of Anne, as well as to the provisions and construction of our former acts *in pari materia*.

The divisions following will enable us to take a pretty satisfactory survey of the registration policy, as it exists amongst us, namely:

(1), What conveyances and other transactions are *required to be registered*;



- (2), The *effect of non-registry* where, by law, registry is required ;
- (3), In what *office, or offices*, the registry is to be made ;
- (4), Within *what time* registration must take place ;
- (5), Modes of *authenticating transactions* for registration ;
- (6) The *duty of the clerk* of the court of registry ; and,
- (7), The *effect of registration*, where registry is required ;

W. C.

# 1<sup>n</sup>. What Conveyances and other Transactions are Required to be Registered.

The conveyances and other transactions which are required to be registered (some of which relate to chattels only), may be enumerated as follows, namely :

(1), “*Any contract in writing, made in respect to real estate, or goods and chattels, in consideration of marriage.*” (V. C. 1873, ch. 114, §§ 4, 5 ; V. C. 1887, ch. 109, §§ 2463, 2464.)

(2), “*Any contract in writing, made for the conveyance or sale of real estate, or a term therein of more than five years.*” (V. C. 1873, ch. 114, §§ 4, 5 ; V. C. 1887, ch. 109, §§ 2463 to 2465 ; Floyd v. Harding, 28 Grat. 401 ; Hicks v. Riddick, 28 Grat. 418 ; Long v. Hagerstown Ag. Imp. Man. Co. 30 Grat. 669.)

(3), “*Every deed conveying any such estate or term.*” (V. C. 1873, ch. 114, § 5 ; V. C. 1887, ch. 109, § 2465.)

(4), “*Every deed of gift conveying real estate, or goods and chattels.*” (V. C. 1873, ch. 114, § 5 ; V. C. 1887, ch. 109, § 2465.)

(5), “*Every deed of trust or mortgage, conveying real estate, or goods and chattels.*” (V. C. 1873, ch. 114, § 5 ; V. C. 1887, ch. 109, § 2465.)

(6), “*Any loan of goods or chattels,*” where the possession remains with the loanee *as much as five years*, without demand made and pursued by due process of law on the part of the lender. (V. C. 1873, ch. 114, § 3 ; V. C. 1887, ch. 109, § 2461.)

(7), “*Any reservation or limitation of a use or property, by way of condition, reversion, remainder, or otherwise, in goods or chattels, the possession whereof shall have remained in another.*” (V. C. 1873, ch. 114, § 3 ; V. C. 1887, ch. 109, § 2461.)

(8), Every sale, or contract for the sale, of goods or chattels, wherein the title is reserved until the same be paid for in whole or in part, or the transfer of the title is made to depend on any condition, and possession be delivered to the vendee, shall be void as to creditors of and purchasers for value without notice from such *vendee*, unless the sale or contract be evidenced by a writing executed by the vendor, and expressing the reservation or condition, and until and except it be recorded in the county or corporation in which the

chattels are; or, if the chattels are the equipments to be used about the operation of any railroad, until and except it is recorded in the county or corporation wherein is the principal office of the railroad, and a copy be also filed in the office of the Board of Public Works; and each locomotive, etc., to be distinctly marked with the name of the vendor or the owner. (V. C. 1887, ch. 109, §2462.)

(9), Every transaction creating a *mechanic's lien*. (V. C. 1873, ch. 115, §§ 2 to 11; V. C. 1887, ch. 110, § 2476.)

(10), Any *agreement in writing* creating a *lien on crops* to be made during the year, for advances of money or supplies to agriculturists. (V. C. 1873, ch. 115, §§ 12, 13; V. C. 1887, ch. 110, §§ 2494, 2496.)

(11), *Partitions of land, assignments of dower therein, and judgments or decrees for land*. (V. C. 1873, ch. 159, § 15; V. C. 1887, ch. 111, § 2510.)

(12), Every *lis pendens* touching real estate. (V. C. 1873, ch. 182, § 5; V. C. 1887, ch. 174, § 3566.)

(13), Every *attachment* against the real estate of a *non-resident* of the commonwealth. (V. C. 1873, ch. 182, § 5; V. C. 1887, ch. 174, § 3566.)

(14), Every *judgment, decree or order* requiring the *payment of money*. (V. C. 1873, ch. 182, §§ 4, 2, 8; V. C. 1887, ch. 174, §§ 3559, 3560, 3570.)

Of these several transactions of which the memorials are required to be registered, the first, third, fourth, fifth, sixth, seventh, and eleventh have been the subjects of registration from an early period of our law; the ninth and fourteenth instances originated prior to the revival of 1849; the twelfth, thirteenth and tenth, since that revival; the second was created, or at least perfected, by that revival; and the eighth originated with the revival of 1887.

Prior to 1849, the statutes of Virginia *allowed* "every title-bond, or other written contract in relation to land to be proved, certified or acknowledged and recorded, in the same manner as deeds for the conveyance of lands;" and enacted that "such proof, acknowledgment or certificate, and the delivery of such bond or contract to the clerk of the proper court, to be recorded, shall be *taken and held as notice* to all subsequent purchasers of the existence of such bond or contract" (1 R. C. 1819, 365, c. 99, § 13); but there was then no *requirement* as there is now, that *contracts* in writing for the conveyance or sale of real estate, or a term therein of more than five years, should be registered. (Withers v. Carter, &c., 4 Grat. 413; Floyd v. Harding, 28 Grat. 401; Hicks v. Riddick, Id. 418; Long v. Hagerstown Ag. Imp. Man. Co. 30 Grat. 669.)

2<sup>n</sup>. The Effect of Non-Registry, where, by Law, Registry is Required.

The statute declares that any transaction to which it relates "shall be void as to *creditors and subsequent purchasers for valuable consideration without notice, until and except* from the time it is duly admitted to record in the county or corporation wherein the property embraced" may be (V. C. 1873, ch. 114, § 5; V. C. 1887, ch. 109, §§ 2465, 2466); a proposition literally and unqualifiedly true in respect of *mortgages and deeds of trust*, not in consideration of marriage; but in respect to contracts for, and conveyances of, lands for a term exceeding five years, deeds of marriage settlement, whether relating to real estate or chattels, and deeds of *gift of chattels*, it is subject to this qualification, namely, that any such writing, which is admitted to record *within twenty days* from the day of its being acknowledged before and certified by a justice, notary public, or other person authorized to certify the same for record, shall be as valid as to creditors and subsequent purchasers, as if such admission to record had been on the day of such acknowledgment and certificate (V. C. 1873, ch. 114, § 7; V. C. 1887, ch. 109, § 2467.) And in respect to most of the other transactions required to be registered, some grace is allowed for the purpose of registering them before they are invalidated.

It is worthy of observation, that where there is a failure to register the writing in due season, the fact that it was occasioned by its accidental loss or destruction, without any default of the person interested in the registry, in no wise obviates the result denounced by the statute. The writing being unrecorded is unqualifiedly void as to creditors and subsequent purchasers for value and without notice. (Withers v. Carter, 4 Grat. 407, 413, 416.)

The doctrine as to the effect of non-registry will be discussed farther in connection with the *seventh* sub-division of this topic. (*Post*, pp. , &c., 7<sup>m</sup>.)

3<sup>n</sup>. In *what Office or Offices the Registry is to be Made.*

Let us consider the rules which are laid down as to where the registry is to be made: (1), In the case of real property; and (2), In the case of chattels;

W. C.

1<sup>o</sup>. Where the Registry is to be Made *in the Case of Real Property.*

The universal rule is, that a contract, conveyance, or transaction affecting real estate, is to be registered or recorded in the *county or corporation court*, or in the *clerk's office thereof*, of the county or corporation wherein *the real estate may be*; and if it lies in more than one county or corporation, the registration must be made in each and every one, in order to be valid as to so much as may be therein. (V. C. 1873, ch. 114, §§ 5, 6; *Id.* ch. 117, §§ 2, 3;

V. C. 1887, ch. 109, §§ 2466, 2467; Id. ch. 111, §§ 2503, 2504.)

Previous to 1st July, 1850, when the revisal of 1849 took effect, the requirement was, that the registration should take place in "the county, city or corporation in which *the land, or part thereof, lieth*" (1 R. C. 1849, 362, ch. 99, § 2), thus raising perplexing questions as to whether, when the land lay contiguously, but in different counties, it constituted *one tract*, in which case *one registration* sufficed, or consisted of several tracts, when a registration in each county was requisite. This was one of the questions in *Horsley v. Garth*, 2 Grat. 490, and it was there determined that, although land may have been held by the proprietor, and by him offered for sale as one tract, yet, where a navigable stream is the dividing line between two counties, and so separates the land as to throw part on one side of the stream, and part on the other, the parts so separated must be regarded as *distinct tracts*, and the registry must take place in *both counties*. All doubt, however, upon the subject is very prudently obviated by the provisions above cited.

2°. Where the Registry is to be Made *in the Case of Chattels*.

In the case of *chattels* the registration is to take place in the *county or corporation court*, or in the *clerk's office thereof*, of the county or corporation wherein the *chattels may be*; and if the chattels be in more than one county or corporation, the registration must be made in each and every one, in order to be valid as to such as shall be therein. (V. C. 1873, ch. 114, §§ 5, 6; Id. ch. 117, §§ 2, 3; V. C. 1887, ch. 109, §§ 2466 to 2468; Id. ch. 111, § 2503.)

It is obvious that whatever idea of *place* may attach, for any purpose, to certain descriptions of chattels, as notably to *choses in action*, is purely conventional, the things having in themselves *no natural locality*; nevertheless, rules have for ages been established in England, in connection with the probate of wills and grants of administration, which assign a locality to every subject of personal property; and no reason is perceived why the same rules may not be invoked with us in reference to the statute of registry. See *Bac. Abr. Ex'ors, &c. (E.)*; *Wentw. Office Ex'or*, 108 '9; 1 *Lom. Ex'ors*, 201-'2.

These rules are as follows :

(1), Movable and tangible chattels are, of course, of the county or corporation where they are at the date of the writing to be registered ;

(2), Shares in joint-stock companies belong to the county or corporation where the chief office of the company is situated and shares transferred ;

(3), Judgments, decrees, recognizances, and other debts



of record, are of the county or corporation where the record is kept, that is, where is the seat of the court;

(4), Bonds, mortgages, and specialties generally (and, it would seem, negotiable securities in a negotiable state), are of the county or corporation where they happen to be at the date of the execution of the writing which affects them; and if not then in the State, they are understood to belong where the *debtor resides*. (*Ex parte Barker*, 2 Leigh, 719; *Fisher v. Bassett*, 9 Leigh, 119);

(5), Promissory notes, bills of exchange, and all simple-contract demands, are of the county or corporation where the *debtor resides*. (*Fisher v. Bassett*, 9 Leigh, 119); and lastly,

(6), Demands against the commonwealth belong to the county or corporation wherein is situated the *seat of government*. (*Hudgin's Case*, 2 Leigh, 248.)

It may be said that the statute did not contemplate the application of the requirement of registry to *choses in action*, in consequence of the difficulty of assigning them a locality; but the difficulty is not greater than in the case of the probate of wills and the grant of administration; and it seems hardly supposable that the legislature did not design to include *choses in action* within the provisions of the law of registry when the terms used (*goods and chattels*) are sufficient to embrace them, and the *policy and purpose* of the statute applies to them not less than to chattels *visible and tangible*. And if it be urged that the provision made for registering the writing anew in any county or corporation whither the chattel may be *removed*, militates against the conclusion that *choses in action*, like other chattels, are comprehended by the registry laws, it may be replied that, by means of the foregoing rules of locality, it is as easy to trace the place to which a *chose in action* is removed as to follow a chattel of any other description.

Yet, notwithstanding the seeming reasonableness of these views and conclusions, the student must observe that our supreme court appears to have negatived the applicability of the statute of registry to any chattels but such as are *visible and tangible*, holding that the words "goods and chattels" in V. C. 1873, ch. 114, §§ 4, 5, and 6; V. C. 1887, ch. 109, §§ 2462, 2465, 2466, "do not include a mere *chose in action*, as a debt or claim on another for money due," and that the assignment for value of such a debt or claim, by way of trust or mortgage, though not recorded, is yet valid as against any subsequent lien or charge, as by way of attachment or otherwise. (*Kirkland v. Brune*, 31 Grat. 126, 130-133.)

And in order to prevent the effect of the registration from being frustrated by the *subsequent removal* of the goods or

chattels to another county or corporation, it is enacted that, "If any goods or chattels mentioned in such writing be removed from a county or corporation *in* which it is admitted to record, the said writing shall, *within one year* after such removal, be admitted to record in the county or corporation to which the property is so removed; otherwise the same, for so long as it is not admitted to record in such last mentioned county or corporation, shall, as to the property so removed, be void as to such *creditors or purchasers*," reserving to infants, married women, and insane persons, for such registry, *one year* after the removal of their respective disabilities. (V. C. 1873, ch. 114, § 8; V. C. 1887, ch. 109, § 2468.)

In pursuance of this provision, if after the removal of the chattels to another county or corporation, the writing be not recorded in the latter, according to the statute, any subsequent recorded mortgage or conveyance of the same property will prevail over the prior one. (*Lane v. Mason*, 5 Leigh, 520.) But if the first conveyance or lien, although not registered within the year, be yet recorded before a creditor or any other person acquires a right to subject the property by execution or otherwise (*Bryan v. Cole*, 10 Leigh, 497); or if a bill in chancery be filed, within the twelve months, by the first grantee or incumbrancer, to set the subsequent conveyance or incumbrance aside, and enforce his own (*Hughes v. Pledge*, 1 Leigh, 443); or if the property has been removed without the consent of the grantee,—as for example of the mortgagee or trustee,—which assent is not to be presumed, but must be proved (*Crouch, &c. v. Dabney*, 2 Grat. 415); in all cases the first conveyance or encumbrance retains its priority.

4<sup>n</sup>. Within *what Time after the Transaction* the Registration must Take Place.

Some account of the growth of the registry laws, in respect to the *time for registration*, will be neither uninteresting nor without interest. And as, until a comparatively recent period, they contemplated the recordation of nothing but conveyances of land, the topic naturally falls into two divisions, namely, (1), The *history of the registration laws*, in respect of the time for registration of *conveyances of lands*; and (2), The *existing doctrine in Virginia*, as to the time for registration of *all transactions required to be registered*;

W. C.

1<sup>o</sup>. The *History of the Registration Laws*, in Respect of the *Time for Registration of Conveyances of Lands*.

The registration policy, in respect to conveyances *in pais*, began in England, as we have seen, by the statute of *enrolments* (27 Hen. VIII., c. 16), which required deeds of *bar-*

*gain and sale of freeholds* to be registered *within six months* from the date, or *otherwise to be void*, even, it would seem, as *between the parties*. (Bac. Abr. Barg. & Sale.) The statutes 2 and 3 Anne, c. 4; 6 Ann, c. 35; 7 Ann, c. 20, and 8 Geo. II., c. 6, declared all deeds and conveyances affecting lands in the West, East or North Riding of Yorkshire, or in the county of Middlesex, to be void against any *subsequent purchaser or mortgagee for valuable consideration*, unless registered *before the registering* of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim, but did not otherwise prescribe the time within which the registry should be made. (2 Lom. Dig. 476.)

The first registry law enacted in Virginia (A. D. 1639-'40, 14 Car. I.), contemplated, like 27 Hen VIII., c. 16, an *absolute avoidance* of the conveyance unless it were recorded. The terms of that statute were as follows: "A deed or mortgage made *without delivering of possession*, to be adjudged *fraudulent* unless entered in some court." (1 Hen. Stats. 227.) The second act (A. D. 1642-'43, 18 Car. I.), is much more formal, but to the same effect as to *mortgages*, namely, that every conveyance by way of *mortgage* shall be adjudged *fraudulent*, and to *all intents and purposes void*, unless registered in the *quarterly or monthly court*, or accompanied by the *actual delivery of possession*. (1 Hen. Stats. 248.) The next act *estant* (A. D. 1656-'57, Com'th), confirms the previous enactments (one of which, passed at the session 30th April, 1652, does not survive), *applying them to all conveyances*, and adds that the registry shall be within six months from the alienation, and that delivery of possession shall not dispense with it. (1 Hen. Stats. 417, 418.) Thenceforward, until 1813, the successive registry laws enforced the same principle, without distinguishing between mortgages and absolute conveyances, namely, that they must be recorded, or *lodged with the clerk* to be recorded, within a limited time—more recently within *eight months* from their date,—in which event they would take effect, *by relation*, from their date, and have priority over intermediate conveyances; but if not lodged with the clerk to be recorded within the prescribed period, they were void even *as to the parties*, until 1734 (4 Hen. Stats. 397-'8); and, after 1734, void as to *creditors*, and *as to subsequent purchasers* for value and without notice, without the possibility of being revived by a subsequent registry, which was without effect, and nugatory as to *everybody*, including the parties, until 1734, and thence until 1813, *as to creditors and purchasers*.

Courts of record, indeed, might and did exercise the *common law power* of spreading conveyances and other in-



struments upon their records for safekeeping, and if the deed were recorded upon the *party's acknowledgment*, an *exemplified* copy (or doubtless an *office copy*, with us), would be evidence against the grantor and those claiming under him; but it would have none of the privileges, under the statute, of a recorded deed. (*Heron v. U. States Bank*, 5 Rand. 427-'8.)

By act of 1813, the power was conferred upon the *courts of registry*, but *not upon the clerk in his office*, to admit deeds to record notwithstanding the lapse of eight months, to take effect as to creditors and subsequent purchasers for value and without notice, from the *time of such recording*, and from *that time only* (*Heron v. U. States Bank*, 5 Rand. 429-'30). And since 1819 (1 R. C. 1819, p. 364, ch. 99, § 12), the law has been substantially as it now is, distinguishing between mortgages and deeds of trust, on the one side, and all other conveyances, covenants, agreements, and deeds, on the other; giving effect to the former only when they should be delivered to the clerk to be recorded; whilst as to the latter, it was provided by the Code of 1819, that if they were acknowledged, proved, or certified according to law, and delivered to the clerk of the proper court, to be recorded, *within eight months* after the sealing and delivery thereof, they should take effect and be valid, as to all persons, from the *time of such sealing and delivery*. The Code of 1849 and of 1873 retains substantially the same distinction. After providing (V. C. 1873, ch. 114, § 5), that the several contracts and conveyances embraced by its provisions shall be void as to creditors and subsequent purchasers for valuable consideration without notice, *until and except* from the time that they are duly admitted to record, it is enacted (V. C. 1873, ch. 114, § 7; V. C. 1887, ch. 109, § 2467), that "any such writing which is admitted to record *within twenty days* from the day of its being *acknowledged before and certified by* a justice, notary public, or other person authorized to certify the same for record, shall, *unless it be a mortgage or a deed of trust*, not in consideration of marriage, be as valid as to creditors and subsequent purchasers as if such admission to record had been on the day of such acknowledgment and certificate."

By analogy to the state of the law as it existed prior to 1850 (when the Code of 1849 took effect), it seems that if the writing were *re-acknowledged* before a justice, etc., and recorded within twenty days thereafter, the registry would have relation to the *re-acknowledgment* (just as it would have had relation to a first, or original acknowledgment), notwithstanding more than twenty days might have elapsed since the original acknowledgment. (*Eppes & al v. Randolph*, 2 Call, 125, 184-'5; *Colquhoun v. Atkinsons*, 6 Munf.



550; Com. v. Selden, 5 Munf. 160; Roanes v. Archer, 4 Leigh, 565-'6.)

Where several writings embracing the same property are admitted to record *on the same day*, the rule prescribed by statute, prior to 1850, was to give priority to that which was *first executed* (Naylor v. Trockmorton & als. 7 Leigh, 98, 106); but it is enacted by the Code of 1849, that if the case is not otherwise provided for by statute, the one *first admitted to record* shall have priority. (V. C. 1873, ch. 114, § 9; V. C. 1887 ch. 109, § 2469.)

The period for registration is not restricted by the terms or policy of the statute to the *life time* of the grantor, and may take place *after his death*; and in such case a deed of trust to secure debts will have precedence over the decedent's *general creditors*, having no specific lien, and that whether the decedent dies intestate, or leaves a will charging his lands with the payment of his debts, because in either case the general creditors are entitled to subject no more than the interest *remaining in the decedent* at his death. (McCandlish v. Keen & als. 13 Grat. 630 to 636.)

It must be observed, finally, upon this head, that the *impossibility of registering the writing*, as because unavoidable accidents prevent the attendance of the witnesses who are to prove it, or by reason of the casual loss or destruction of the writing itself, does not avert the legal consequence of its being therefore void as to creditors and subsequent purchasers for value, and without notice. (Eppes v. Randolph, 2 Call, 185; Harvey v. Alexander, 1 Rand. 240; Withers v. Carter, &c. 4 Grat. 407.) Thus, in Withers v. Carter, &c. 4 Grat. 407, 413, 416, William H. Triplett, in pursuance of a *previous contract* in writing, dated 27th February, 1834, on the 25th January, 1835, executed and duly acknowledged a deed conveying a tract of land in the county of Loudoun, to Jonathan Carter, and Carter, as it seems, on the same day committed the deed to his son to be delivered to the clerk of the county court of Loudoun for record, and by the son it was lost, and was never found, and consequently was never recorded. Meanwhile, certain creditors of Triplett, having obtained judgment against him at a term of the court of the county of Frederick, commencing 26th January, 1835 (one day *after* the execution of the lost deed), attempted to subject the land in the hands of Carter to those judgments. It was held that the *lost deed unrecovered* was, by the statute, void as to those creditors, and could not be set up as against them. However, it was also determined that the *previous executory contract* for the land created an *equity* in Carter as to the creditors, which the abortive attempt (abortive *as to them*) to execute a conveyance did not supersede; the law not then avoiding unregis-

tered *executory contracts* in writing for land, as to creditors and purchasers, as it does now, and since 1850. (V. C. 1873, ch. 114, §§ 4, 5; V. C. 1887, ch. 109, §§ 2464, 2465.)

A case similar and parallel to *Withers v. Carter* may, however, still occur; as, for example, where a *parol contract* for land has been entered into, and has been *partly performed* by the vendee having entered and taken possession, etc., whereby an equitable title has vested in the vendee, which a court of equity will enforce (*Ante*, pp. 851 & seq.), and which yet is not required to be registered. If a conveyance of such land be executed, but left unrecorded, the vendee may assert, as against creditors of the vendor, relying upon the invalidity of the unregistered conveyance, his prior equity arising out of the parol contract partly performed. (*Floyd v. Harding*, 28 Grat. 401; *Hicks v. Riddick*, 28 Grat. 418; *Long v. Hagerstown Ag. Imp. Man. Co.* 30 Grat. 669; *Burkholder v. Lullam*, 30 Grat. 259; *Halsey v. Peters*, 79 Va. 60; *Grigsby v. Osborne*, 82 Va. 371.)

But this doctrine in respect to parol *gifts*, or *promises of gifts*, must now, by the Code of 1887, be taken with the important qualification that they cannot be enforced in equity, although they be followed by *possession thereunder* and *improvement of the land* by the donee, or those claiming under him. (V. C. 1887, ch. 107, § 2413.)

## 2°. The Existing Doctrine in Virginia as to the Time for the Registration of *all Transactions Required to be Registered*.

In some instances, as we have seen, the transaction is of no validity as to purchasers for value without notice, and as to creditors, *until the registry takes place*; whilst, in other cases, some time, although not always the same time, is allowed, within which, if the registration be made, *it has relation back to the transaction itself*.

### 1°. The Transactions which Take Effect *only from the Registration*.

The fifth, eighth, ninth, tenth, twelfth and thirteenth, of the transactions requiring registry, as enumerated *Ante*, p. 940, take effect *only from the registration*;

W. C.

### 1<sup>a</sup>. Mortgages and Deeds of Trust not in Consideration of Marriage, whether of Lands or Chattels.

These are void as to *creditors* (whether they have notice or not (*Guerrant v. Anderson*, 4 Rand. 211 (12),) and as to *subsequent purchasers* for valuable consideration, without notice, *until and except* from the time that they are duly admitted to record in the proper county or corporation. (V. C. 1873, ch. 115, §§ 5, 7; V. C. 1887, ch. 109, §§ 2465, 2467.)

### 2<sup>a</sup>. Sales or Contracts to sell Chattels Transferring the Possession, but Reserving the Title.

These are void, unless and except they are recorded, as to purchasers for value and without notice, and creditors. (V. C. 1887, ch. 109, § 2462; *Ante*, p. 946.)

3<sup>a</sup>. Transactions Creating a *Mechanic's Lien*.

All artisans, builders, mechanics, lumber dealers and other persons performing labor about, or furnishing material for the construction, repair, or improvement of any building or structure, *permanently annexed* to the freehold, whether they be general contractors, or sub-contractors, shall *have a lien*, if perfected as hereinafter provided, upon such building or structure, and *so much land therewith* as shall be necessary for the convenient use and enjoyment of the premises, for the *work done and material furnished*. But where the claim is for *repairs only*, no lien shall attach unless the repairs were ordered by the owner or his agent. Nor shall any lien attach *under this section*, to a *railroad track* or bed. (V. C. 1887, ch. 110, § 2475; Roanoke L. & I. Co. v. Karn, 80 Va. 589; Shen. Val. R. R. Co. v. Miller, 80 Va. 821; N & West. R. R. Co. v. Howison, 81 Va. 125; Lester v. Pedigo, 84 Va. 309; Shackelford v. Beck, 80 Va. 573; Trustees Franklin St. Ch. v. Davis, 85 Va. 193; Kim v. Champion Iron Fence Co. 86 Va. 608; Sergeant v. Denby, 87 Va. 208.)

A *general contractor* (that is, one who contracts immediately with the employer), *perfects his lien* by filing at *any time after* the work done, or the material furnished, and *before the expiration of thirty days* from the completion of the building or structure, or the work thereon *otherwise terminated*, in the *clerk's office* of the county or corporation court of the county or corporation where the structure is, or in the *clerk's office of the chancery court of Richmond*, if the structure is in that city, an account showing the character and amount of the work done, or material furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant or his agent, with a statement attached, declaring his intention to claim the benefit of the lien, and giving a brief description of the property. And this account and statement is to be duly recorded and indexed. (V. C. 1887, ch. 110, § 2476; Shackelford v. Beck, 80 Va. 573.)

A *sub-contractor* (that is, one who contracts not directly with the employer, but with the contractor), *perfects his lien* by the same proceeding as the general contractor, and, *in addition*, must give notice *in writing* to the owner of the property or his agent, of the amount and character of his claim. But the amount for which the sub-contractor's lien is perfected, must not exceed the amount of

the owner's indebtedness to the general contractor *at the time the notice is given.* (V. C. 1887, ch. 110, § 2477.)

See *Ante*, pp. 323-'4.

- 4<sup>a</sup>. Any *Agreement in Writing* Creating a *Lien on Crops*, to be made during the year, for Advances of Money or Supplies to *Agriculturists*. See V. C. 1887, ch. 110, §§ 2494, 2496.

- 5<sup>a</sup>. *Lis Pendens* and Attachment.

The *lis pendens*, and the attachment against the estate of a non-resident, take effect as against a *purchaser* of such *real estate only from the time of registry*, or at least from the time of delivery to the clerk. The statute provides that "No *lis pendens* or *attachment* against the estate of a *non-resident* shall bind or affect a *purchaser of real estate*, without actual notice thereof, *unless and until* a memorandum setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the land, and the name of the person whose estate is intended to be affected thereby, shall be *left with the clerk* of the court of the county or corporation in which the land is situate, who shall forthwith record the said memorandum in the deed-book, and index the same by the name of the person aforesaid." (V. C. 1873, ch. 182, § 5; V. C. 1887, ch. 174, § 3565.)

- 2<sup>a</sup>. The Transactions which, if Recorded within Certain Prescribed Periods, *have Relation Back* to the Transaction Itself, and Take Effect *from that Time*.

The first, second, third, fourth, sixth, seventh, ninth, eleventh, and fourteenth of the transactions requiring registry, as enumerated *Ante*, p. 940, if recorded within certain periods prescribed, *have relation back* to the transaction itself, and take effect *from that time*.

W. C.

- 1<sup>a</sup>. Any Contract in Writing, *Touching Lands or Chattels*, Made in *Consideration of Marriage*.

"Any such writing which is admitted to record *within twenty days* from the day of its being *acknowledged before and certified by a justice, notary public, or other person* authorized to certify the same for record, shall be as valid as to creditors and subsequent purchasers as if such admission to record had been on the *day of such acknowledgment and certificate.*" (V. C. 1873, ch. 114, § 7; V. C. 1887, ch. 109, § 2467. See *Briscoe v. Clark*, 1 Rand. 213; *Eppes v. Randolph*, 2 Call, 125; *Harvey v. Alexander*, 1 Rand, 219; *Roanes v. Archer*, 4 Leigh, 550.)

- 2<sup>a</sup>. Any *Contract in Writing* for the Conveyance or Sale of *Real Estate*, or a Term therein of *More than Five Years*.

The same provision applies as *supra*, 1<sup>a</sup>. (V. C. 1873,



ch. 114, § 7; V. C. 1887, ch. 109, § 2465; *Ante*, pp. 948-9; *Floyd v. Harding*, 28 Grat. 401; *Hicks v. Riddick Id.* 418; *Long v. Hagerstown Ag. Imp. Man. Co.* 30 Grat. 669.)

3<sup>a</sup>. Every Deed *Conveying any such Estate or Term.*

The same provision applies as *supra*, 1<sup>a</sup>. (V. C. 1873, ch. 114, § 7; V. C. 1887, ch. 109, § 2465.)

4<sup>a</sup>. Every Deed of Gift conveying Real Estate or Goods and Chattels.

The same provision applies as *supra*, 1<sup>a</sup>. (V. C. 1873, ch. 114, § 7; V. C. 1887, ch. 109, § 2465.)

5<sup>a</sup>. Any Loan of Goods or Chattels, where the Possession Remains with the Loanee as much as Five Years.

The Registry may be made *at any time within the five years*, and it will prevent the loan from being void as to creditors of and purchasers from the loanee, or persons claiming under him, having the same effect as a *resumption of possession* by the lender. (V. C. 1873, ch. 114, § 3; V. C. 1887, ch. 109, § 2461; *Beasley v. Owen*, 3 H. & M. 449; *Collins v. Lofftus & Co.* 10 Leigh, 10.)

6<sup>a</sup>. Any Reservation or Limitation to Take Effect in Future of Chattels, the Possession whereof Remains in Another.

It seems that the registry may be made *at any time within five years*, and that it will then prevent such reservation or limitation from being void as to creditors of and purchasers from the *person remaining in possession*. (V. C. 1873, ch. 114, § 3; V. C. 1887, ch. 109, § 2461; *supra*, 5<sup>a</sup>.)

7<sup>a</sup>. Partitions of Land, Assignments of Dower therein, and Judgments or Decrees for Land.

No time is prescribed within which the registry shall take place, nor does that statute declare that the partitions, etc., shall be void as to anybody, if not recorded. It is presumed, therefore, that whensoever registered, or, although the clerk neglects his duty, and omits to register them at all, they are, notwithstanding, *good from their date*.

8<sup>a</sup>. Every Judgment, Decree or Order Requiring the Payment of Money.

No judgment or decree is a lien on real estate as *against a purchaser thereof* for valuable consideration without notice (it is otherwise as to judgment creditors), unless it be docketed according to law, in the county or corporation wherein such real estate is, either *within twenty days next after the date of such judgment*, or *fifteen days before the conveyance of said estate to such purchaser*. (V. C. 1873, ch. 182, §§ 8, 1, 4; V. C. 1887, ch. 174, §§ 3567, 3570; *Withers v. Carter*, 4 Grat. 407; *Floyd v. Harding*,

28 Grat. 401, 415; Hicks v. Riddick, Id. 418; Gordon v. Rixey, 76 Va. 702, 703; Gurrin v. Johnson, 77 Va. 712, 727.) The mode of docketing such judgment or decree is set forth V. C. 1887, ch. 174, §§ 3559 to 3561.

5<sup>n</sup>. Modes of Authenticating Transactions for Registration.

It will readily be conceived that the clerk of the court of registry is not at liberty to record a writing without satisfactory evidence of its genuineness; and especially as an office copy of a deed *duly recorded* is admissible as *primary* evidence of its contents. (Baker, Treas'r, v. Preston, Gilm. 235; Lee v. Tapscott, 2 Wash. 276; Pollard's Heirs v. Lively, 2 Grat. 218; Johnson & ux. v. Slater, 11 Grat. 324.)

Let us consider, (1), The modes of authenticating for registry the conveyance of a married woman; and (2), The modes of authenticating for registry the conveyance of one not a married woman;

W. C.

1<sup>o</sup>. Mode of Authenticating for Registry the Conveyance of a *Married Woman*.

This subject has been already explained at length. (See *Ante*, pp. 928 & seq.; V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502.)

2<sup>o</sup>. Modes of Authenticating for Registry the Conveyance of One *not a Married Woman*.

The mode of authenticating writings for registry is cautiously prescribed, and is either *by acknowledgment* of the parties thereto before certain designated authorities, or *by proof* as to such parties, *by two witnesses*.

W. C.

1<sup>p</sup>. Authentication of Writings for Registry *by Proof* of the Instrument by *Two Witnesses*.

It is not requisite that the witnesses shall be *subscribing witnesses*, as it is in case of wills. (Turner v. Stip, 1 Wash. 322; Long v. Ramsay, 1 Serg. & R. (Pa.) 72.) Nor, if they have subscribed as witnesses, need they remember the transaction in order to constitute sufficient *formal proof*. It is enough for that formal purpose that they can testify that they recognize their own signatures; and their testimony becomes decidedly more satisfactory if they depose that they were acquainted with the requisites of the proper execution of a writing, and would not have attested it had those requisites been wanting. (Currie v. Donald, 2 Wash. 58; Clark v. Dumnivant, 10 Leigh, 13.) The witnesses, however, must be *competent*, and therefore a husband is not a legal witness to prove a conveyance to his wife (Johnston & ux. v. Slater, &c., 11 Grat. 321); for it must be observed that, although in general, *interest in a subject* no longer disqualifies a witness with us (V. C. 1873, ch. 172, § 21; V. C. 1887, ch. 164, §§ 3345, &c.), yet it is expressly de-

clared that the provision shall not apply to witnesses to *wills, deeds, and other instruments*. (V. C. 1873, ch. 172, § 22; V. C. 1887, ch. 164, § 3346.)

Let us consider how the writing is to be proved by witnesses, (1), In Virginia; (2), Out of Virginia, within the United States; (3), Out of the United States;

W. C.

1<sup>a</sup>. Proof of Writings *by Two Witnesses*, in Virginia.

The proof may be made in Virginia by two witnesses, *before the court* of any county or corporation in this State, or *before the clerk* of such court *in his office*, or his duly qualified deputy, certified in either case *under his hand*, by the clerk or deputy. (V. C. 1873, ch. 117, §§ 3, 2; V. C. 1887, ch. 111, §§ 2500, 2501; Acts 1889-'90, p. 44, ch. 55.)

2<sup>a</sup>. Proof of Writings by Two Witnesses, *out of Virginia*, within the United States.

The proof may in this case be made by two witnesses, before any court out of this State within the United States, or before the clerk of such court, certified in either case, *under his hand*, by the clerk. (V. C. 1873, ch. 117, § 3; V. C. 1887, ch. 111, § 2501.)

3<sup>a</sup>. Proof of Writings by Two Witnesses, *out of the United States*.

The proof in this case may be made by two witnesses, before any minister plenipotentiary, *chargé d'affaires* (omitting ambassadors and *ministers resident*!) consul-general, consul, vice-consul, or commercial agent appointed by the government of the United States to any foreign country; or before any court of such country, or the mayor or other chief magistrate of any city, town, or corporation therein, with certificate of the proof *under the official seal* of the functionary. (V. C. 1873, ch. 117, § 3; V. C. 1887, ch. 111, § 2501.)

2<sup>b</sup>. Authentication for Registry *by the Acknowledgment of the Parties*.

It is to be noted how the acknowledgment is made, (1), In Virginia; (2), Out of Virginia, within the United States; and (3), Out of the United States;

W. C.

1<sup>a</sup>. Acknowledgment of the Writing by the Party *in Virginia*.

The acknowledgment of the writing by the party in Virginia may be made before any county or corporation court in which the writing is to be or may be recorded, or it seems any county or corporation court in this State, or the clerk thereof *in his office*, or his duly qualified deputy (V. C. 1873, ch. 117, §§ 2, 3; V. C. 1887, ch. 111, §§ 2500, 2501; Acts 1889-'90, p. 44, ch. 55); or before a justice of

the peace, commissioner in chancery, or notary public, within their respective counties; certified by the clerk of the court or his deputy, the justice, commissioner, and notary, respectively, *under their hands*. (V. C. 1873, ch. 117, § 3; V. C. 1887, ch. 111, § 2501.)

2<sup>a</sup>. Acknowledgment of the Writing by the Party *out of Virginia, within the United States*.

The acknowledgment of the writing by the party out of Virginia, within the United States, may be made before any court out of this state, within the United States, or the clerk thereof, *in his office* (it is supposed); or before a justice of the peace, a commissioner in chancery of a court of record, or a notary public, within the United States' (doubtless within their proper districts or spheres of authority), or any commissioner to take acknowledgment of deeds, etc., appointed (pursuant to V. C. 1873, ch. 116, § 2; V. C. 1887, ch. 41, § 924), by the governor of Virginia, within the United States; certified by the clerk of the court, the justice, commissioner in chancery, notary public, or commissioner appointed by the governor, *under their respective hands*. (V. C. 1883, ch. 117, § 3; V. C. 1887, ch. 111, § 2501; *Grove v. Zumbro*, 14 Grat. 501.)

3<sup>a</sup>. Acknowledgment of the Writing by the Party *out of the United States*.

The acknowledgment of the writing by the party, *out of the United States*, may be made before any minister plenipotentiary, *chargé d'affaires* (omitting ambassador and *minister resident*!) consul-general, consul, vice-consul, or commercial agent appointed by the government of the United States to any foreign country; or before any court of such country, or the mayor or other chief magistrate of any city, town, or corporation therein, with certificate of the acknowledgment *under the official seal* of the functionary. (V. C. 1873, ch. 117, § 3; V. C. 1887, ch. 111, § 2501.)

The *official character* of the authority before which the acknowledgment may take place in any of these three cases, as well as the fact of such acknowledgment is sufficiently proved by the *certificate* of the functionaries themselves. (*Willink v. Miles*, 1 Pet. Cir. Ct. R. 424 '30; *Rhodes, &c. v. Selim*, 4 Wash. Cir. Ct. R. 715; *Coles v. Miller*, 8 Grat. 12, 13; *Welles v. Cole*, 6 Grat. 660.) And in *Welles v. Cole*, the case last cited, it was determined that, although the certificate describe the officers taking the acknowledgment, not as *justices of the peace*, but as *aldermen in a city*, in another state, yet as aldermen with us, and generally in the United States, act as justices, it is to be presumed, in the absence of any contrary proof,



that they are justices, especially as they undertake to authenticate deeds under our statute, which requires them to be such, and the authentication is sufficient.

It is not necessary that the party should *reside*, or appear to reside, within the limits of the district to which the authority certifying the acknowledgment belongs. He will be supposed, for the purpose of the acknowledgment, to be for the time being domiciled there. (*Coles v. Miller*, 8 Grat. 12, 13; *Hassler's Lessee v. King*, 9 Grat. 119.)

The form of the certificate, as prescribed by the statute (V. C. 1873, ch. 117, § 3; V. C. 1887, ch. 111, § 2501), is "to the following effect:"

Virginia (or *other State*):  
County (or *Corporation*) of \_\_\_\_\_ to-wit:  
I, \_\_\_\_\_ Clerk of \_\_\_\_\_ Court (or *deputy clerk of \_\_\_\_\_ County*) (or a *justice of the peace*, or *commissioner in chancery* of the \_\_\_\_\_ Court, or a *notary public* for the county (or corporation) aforesaid), in the State, (or *Territory* or *District*) of \_\_\_\_\_, do certify that E. F. (or *E. F. and G. H.*), whose name (or *names*) is (or *are*) signed to the writing above (or *hereto annexed*), bearing date on the \_\_\_\_\_ day of \_\_\_\_\_, has (or *have*) acknowledged the same before me, in my county (or *corporation*) aforesaid. Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord 18—.

Of course some slight modification must be made in the certificate of a commissioner of deeds, appointed by the governor of Virginia (pursuant to V. C. 1873, ch. 116, § 2; V. C. 1887, ch. 41, § 924.) It is directed to run thus: State (or *Territory*, or *District*) of \_\_\_\_\_, to wit:

I, \_\_\_\_\_, a commissioner appointed by the governor of the State of Virginia, for the said State (or *Territory*, or *District*) of \_\_\_\_\_, certify that E. F., etc.

#### 6<sup>n</sup>. The Duty of the Clerk of the Court of Registry.

Every writing duly admitted to record, the statute provides, "shall, with all certificates of privy examination or acknowledgment, and all plats, schedules, and other papers thereto annexed, or thereon endorsed, be recorded by or under the direction of the clerk, in a well-bound book, to be carefully preserved; and there shall be an index to such book, as well in the name of the grantee as of the grantor. After being so recorded, such writing shall be delivered to the party entitled to claim under the same." (V. C. 1873, ch. 117, § 8; V. C. 1887, ch. 111, § 2505.) And if, after a writing has been duly recorded in a proper county or corporation, it is desired to have it recorded in another place, and the original is lost or mislaid, on affidavit of this fact the court or clerk of the last named county or corporation may

admit to record an office copy of such writing from the records of the court where it has already been recorded, with the same effect as if it had been the original. (V. C. 1873, ch. 117, § 9; V. C. 1887, ch. 111, § 2506.)

It is also made the clerk's duty (in order to give all possible notoriety to such transactions) to set up, early in the morning on the first day of each term (of the county or corporation court of course), at the door of the court-house, a list of all writings admitted to record under V. C. 1873, ch. 117, or V. C. 1887, ch. 111, during or since the preceding term, specifying the date and nature of the writing, the names of the parties thereto, the day each was admitted to record, and describing the property. And a duplicate of such list is to be presented and read to the court, and inserted in the minutes. (V. C. 1873, ch. 117, § 10; V. C. 1887, ch. 111, § 2507.)

The same anxious wish for the publicity and preservation of writings which concern the property interests of the country, even though they are not duly authenticated by proof or acknowledgment for registry, is manifest in yet another provision, that if any writing which it is lawful to admit to record shall have remained six months in the clerk's office without being fully proved or acknowledged, so as that it may be recorded, the clerk, for the preservation thereof, shall, when required by any person interested, copy the same into a book, separate from registered writings, and keep an index thereof. (V. C. 1873, ch. 117, § 11; V. C. 1887, ch. 111, § 2508.)

It must be observed, lastly, in respect to the duty of the clerk of the registry court, that neither such clerk, nor any other officer authorized to certify acknowledgments of writings, in order that they may be recorded, is competent to take and certify his own acknowledgment of a deed wherein he is the *grantor*, nor the acknowledgment of another of a writing wherein he is the *beneficiary*, or a *grantee*, save as trustee only. This principle is based upon sound sense and policy, and is well nigh universally admitted. (1 Bish. Marr'd. Wom. § 452; Scanlan v. Turner, 1 Bailey (S. C.) 421; Withers v. Baird (7 Watts Penn. 227), 32 Am. Dec. 754, 757, note; Bowden v. Parrish, 86 Va. 68, &c.; Barton v. Brent, 87 Va. 387.) But it is not unfrequently put upon a ground that seems open to much question, namely, that the function of thus taking and certifying acknowledgments is *judicial*, or, as it is cautiously expressed, that it "partakes of a judicial character," and none can *ever be judge in his own case*. (Withers v. Baird, 7 Watts (Pa.), 227; S. C. 32 Am. Dec. 755, 757, note; Groesbeck v. Seeley, 13 Mich. 329; Beaman v. Whitney, 20 Maine, 413; Stevens v. Hampton, 46 Mo. 404; Wasson v. Conner, 24 Miss. 354; Brown v.

Moore, 38 Texas, 645; Davis v. Sims, Va. Law Jour., May, 1881, p. 321 '2; Davis v. Beazley, 75 Va. 495; Bowers v. Bowers, 29 Grat. 700 & seq.; Bowden v. Parrish, 86 Va. 68; Corey v. Moore, 86 Va. 733 '4.). But see opinion of Waite, C. J., in Nat. Bank v. Conway, 1 Hughes C. C. 44-'5. It is not needful, however, to suppose that the clerk, or other officer, acts judicially in such cases (and, if not necessary, it is surely a forced and unnatural assumption), for although he be taken to act ministerially, a like condition of impartial disinterestedness is required. Thus, the law does not suffer a sheriff to serve process (undoubtedly a ministerial act) when he is personally interested, but devolves the duty in that case upon the coroner or other officer. (1 Min. Insts. 121, 123.) Nor does it follow that such action is judicial because of its *conclusive effect*; for the conclusiveness arises from the certificate being a *record*, and from the general doctrine that wherever the law appoints a person for a specific purpose it confides implicitly in his acts performed under his authority, as in the case of certificates and returns of sheriffs and other public officers in the execution of their duty. (Harkins v. Forsyth, 11 Leigh, 306-308; Carper v. McDowell, 5 Grat. 233.) And lastly, the supposition that the action in question is judicial is hardly compatible with the distribution of the powers of government under our organic law, which declares that no one shall exercise the powers of more than one department of government at the same time. (Va. Const. Art. II.)

7<sup>n</sup>. The Effect of Registration, where Registry is Required.

The exposition to be made of this subject may well enough be arranged under the divisions following: (1), The general effect of registration; (2), The effect of registration *in respect to the parties* to the writing; (3), The effect of registration *in respect to creditors*; and (4), The effect of registration *in respect to purchasers*;

W. C.

1<sup>o</sup>. The General Effect of Registration of Writings Required to be Recorded.

The statute declares (V. C. 1873, ch. 114, § 5; V. C. 1887, ch. 109, § 2465), that every one of the writings enumerated (*Ante*, pp. 939-41) as required to be recorded, from *one to five, inclusive*, shall be void as to *creditors*, whether they have notice or not (Guerrant v. Anderson, 4 Rand. 211), and as to subsequent purchasers for valuable consideration without notice, *until and except* from the time it is duly admitted to record, save only the twenty days' grace from the time of acknowledgment allowed in the case of the first four, as described *Ante*, p. 947. As to the remainder of the transactions, enumerated on page 940 (from *six to thirteen, inclusive*), the student is referred to the statutes which relate to them severally. It is necessary, at present,

to limit the explanation to be presented to *conveyances* and *contracts to convey*.

Prior to the revival of 1849, the language of the statute touching registration was more explicit than it is at present. It declared that the writings included in it should be "void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved, and *lodged with the clerk to be recorded*, according to the directions of this act: but the same as between the parties and their heirs, and as to all subsequent purchasers with notice thereof, or without valuable consideration, shall nevertheless be valid and binding." (1 R. C. 1819, p. 362, ch. 99, § 4; see *Id.* § 12.) Under this state of the law, it was held, unavoidably, that if the writing were *lodged with the clerk to be recorded*, it sufficed, whether it were actually recorded or not; and it was suggested that the recourse of a creditor or subsequent purchaser, injured by the non-registry, was *against the clerk* for damages. (*Ellis v. Allan*, 1 Rand. 106; *Douglass v. Yallop*, 2 Burr. 722.) It was never sufficient, however, merely to carry the writing *to the clerk's office*. It was always held to be requisite to *lodge it with the clerk to be recorded*. (*Horsley v. Garth*, 2 Grat. 471.)

The terms of the statute at present unfortunately do not admit the same certainty of construction. Every writing contemplated by it is declared to be "void as to creditors and subsequent purchasers for valuable consideration without notice, *until and except* from the time it is *duly admitted to record*." (V. C. 1873, ch. 114, § 5; V. C. 1887, ch. 109, §§ 2464, 2465); which seems to allow no effect to the mere *lodging of the writing with the clerk*. (*Johnson v. Nat. Exch. Bank*, 33 Grat. 480, 485.) But see 2 Bart. Ch. Pr. 998-1000; *Shadrach v. Woolfolk*, 32 Grat. 712, tending to show that it is enough to deposit the writing, duly certified, with the clerk. And it is supposed that, if any injury results to the grantee from the omission of the clerk to make the registration immediately, such grantee may have against the clerk the same redress which before, the subsequent purchaser had. (*Douglass v. Yallop*, 2 Burr. 722; *Ellis v. Allan*, 1 Rand. 106.)

But if the deed be *admitted to record*, by the clerk entering an order directing it to be recorded, the statute is thereby satisfied, notwithstanding the clerical act of spreading it *in extenso* in the deed-book be never performed; although, in case the transcription be omitted by the clerk, and any purchaser or other person suffers an injury in consequence, the clerk is no doubt answerable. (*Davis v. Beazley*, 75 Va. 495; *Ellis v. Allan*, 1 Rand. 106; *Douglass v. Yallop*, 2 Burr. 722.)



Admitting a deed to record is merely a *ministerial act*, which the clerk or court cannot lawfully refuse to perform, and which may be compelled by a writ of *mandamus* (Dawson v. Thurston, 2 H. & M. 132; Manns v. Givens, 7 Leigh, 705); and consequently, as *mandamus* lies only where there is no other remedy, no process of appeal is admissible to a higher court from the sentence declining to admit the writing to record. It moreover follows from the proposition, that the act of admitting the writing to record is merely ministerial, that it gives no additional validity to the instrument. (Dawson v. Thurston, 2 H. & M. 132; Manns v. Givens, 7 Leigh, 705-'6-'7.) Hence, whilst if a deed be *duly recorded*, an *office copy*, certified by the clerk of the court where it is registered, is *primary evidence* of its contents, without accounting for the original, (V. C. 1873, ch. 172, § 4; Baker, Treas'r, v. Preston, Gilm. 235; Lee v. Tapscott, 2 Wash. 276; Pollard's Heirs v. Lively, 2 Grat. 218; Johnson & ux. v. Slater, 11 Grat. 324), yet a writing which is improperly recorded, either because it was not duly authenticated, or because the court wherein it was registered was not the proper court for the purpose, is not regarded as a recorded deed (Turner v. Stip, 1 Wash. 319), and, therefore, a copy, though duly certified, is not competent evidence, (Le Neve v. Le Neve, 2 Wh. & Tud. L. C. (Pt. I), 161; Pollard's Heirs v. Lively, 2 Grat. 216; Carter v. Robinett, 33 Grat. 432, 440); except, indeed, where both parties claim *under the same deed*, or under an instrument which *refers to the writing* thus irregularly registered, (Hannon v. Hannah, 9 Grat. 146; French v. Townes, 10 Grat. 513; Fiott v. Comm'r, 12 Grat. 577.)

Thus, in Turner v. Stip, 1 Wash. 319, 233, the *original deed*, which had been executed in 1785, in South Carolina, was offered in evidence in an action of ejectment for the land in controversy, and in proof of its genuineness, the plaintiff offered the certificate of two persons who *styled themselves* justices of the peace for the district of Camden, in South Carolina, stating that three witnesses swore before them to the execution of the deed by the parties thereto, upon which certificate the deed had been admitted to record in the county court of Berkeley county, where the land lay. As the law then was, the official character of the justices was required to be attested by the certificate of the *governor of the State* where they belonged, and as such certificate was wanting here, it was held that the conveyance had been illegally recorded, and, therefore, its authenticity was not adequately established *for any purpose*, by the proof in question, neither for the purpose of admitting it to record, nor for the purpose of evidence to the jury. It is worthy of observation, however, that a deed duly authenticated for

registry is admissible as *original* evidence, without further proof of its execution, although it has not been duly recorded. (*Hassler v. King*, 9 Grat. 115.)

So in *Pollard's Heirs v. Lively*, 2 Grat. 216, 218, a writ of right had been instituted in the circuit court of Monroe county, by Benjamin Pollard's heirs against one Lively, to recover a tract of 200 acres of land; and in the progress of the trial, the *tenant*, (that is the *defendant*, Lively), offered in evidence, *office copies* of two deeds, admitted to record in the *borough court of Norfolk*, whereby Benjamin Pollard purported to convey certain lands lying *in the county of Greenbrier*. It was determined that the hustings court of Norfolk had no authority to admit the deeds to record, nor consequently (as the law then was), to receive proof for that purpose, and that the acknowledgment or proof and the admission to record and the registry of the instruments being all unwarranted by the law, the certificate of the clerk, the public custodian of the record, was entitled to no more respect than that of a private man.

In respect to the qualification of the doctrine, namely, that where both parties claim *under the same deed*, or *under an instrument which refers to a deed*, not duly recorded, it is not competent to either to object to the illegal registry; we find ample illustration thereof in *Hannon v. Hannah*, 9 Grat. 146; *French v. Townes*, 10 Grat. 513; and *Piott v. Commonwealth*, 12 Grat. 577.

In *Hannon v. Hannah*, 9 Grat. 146, a certain John Austin had, in 1814, conveyed lands lying *in Kanawha county*, to one Mosby Shepherd, of Henrico, and the conveyance was recorded in *Hanover*, where Austin lived, and *not in Kanawha*. Afterwards Mosby Shepherd conveyed two-thirds of the lands to John Wilson and Jesse Winn, respectively, and the deed to them, which recited the conveyance from Austin to Shepherd as being *registered in Hanover*, was duly recorded in Kanawha. Subsequently John Wilson conveyed *his third* of the tract to Luke Prior, and in the deed referred to the conveyance under which he claimed from Shepherd to himself, as recorded in Kanawha, and Prior conveyed parts of the same land, with similar references, to John Hannon and to M. D. Brown. Jesse Winn likewise conveyed *his third* to Samuel Hannah, citing the conveyance from Mosby Shepherd to Wilson and himself, as of record in Kanawha. The owners of the tract, therefore, were Mosby Shepherd's heirs of one-third undivided, Luke Prior's heirs and alienees of one-third part undivided, and Samuel Hannah of one-third part undivided. The suit was a bill in equity filed by Hannah for a *partition* against Shepherd's heirs and Prior's heirs and alienees. Hannah sought to prove his title by an *office copy* from *Hanover*

*county court* of the deed from Austin to Mosby Shepherd, to which Prior's heirs and alienees, though claiming *under the same deed*, objected, because that deed was improperly recorded in Hanover. The court held, however, that, as the deed was the *common source* of title of all parties, and was referred to directly or *mediately* in all the conveyances to them respectively, as well by its *place of record* as its date, it was not competent to any of the defendants to object, either to the validity of that deed for want of registry, or to an office copy thereof as evidence.

French v. Townes, 10 Grat. 513, 514, 524, is the case of several persons claiming under the same instrument; and it was therein decided that none of them could allege any defect in the recordation.

In Fiott v. Commonwealth, 12 Grat. 564, 577-'8, the same doctrine is reiterated as in Hannon v. Hannah, 9 Grat. 146. Fiott, a British subject and resident, in 1793, bought of one Vancouver land lying in the *county of Cabell*, and the conveyance was recorded in 1794, in the *county of Kanawha*. Fiott having died in 1818, leaving two children his heirs, the escheator of the county of Cabell, in 1831, set on foot proceedings to escheat the land to the Commonwealth. The escheator's jury found that Fiott died in 1818, that he was an alien at the time of his death; and that then, and long before, he was seised of the land in question, which had been conveyed to him by Charles Vancouver, "as by deed dated 27th July, 1793, now of *record in the county court of Kanawha county*, will more fully appear." In 1833, Fiott's heirs filed their *monstrans de droit* in the circuit court of Cabell county, setting out their father's title, that they were his heirs, and that the title to the land was preserved to him and them, notwithstanding their alienage, by Article IX. of the treaty with Great Britain of 1794, commonly called Jay's treaty, to which the attorney for the commonwealth replied generally, and the issue was joined thereon. At the trial, the plaintiffs, after endeavoring in vain to introduce the original deed from Vancouver to their father, which was rejected because insufficiently proved, proposed to read an *office copy* of the deed from the *records of Kanawha*. The court held that, whether the deed were properly recorded or not, the office copy was admissible, because the inquisition, which was the basis of the commonwealth's title, *referred to it*, and both parties to the controversy *claimed under it*.

The certificate of the clerk of the court of registry, written on the conveyance, that it has been acknowledged or proved, and admitted to record, is evidence of the fact (Kinnersley v. Orpe, 1 Dougl. 57; Davis v. Sims, Va. Law Jour., May, 1881, p. 320; Beverley v. Ellis, 1 Rand. 106); and being



*itself a record*, is, in the absence of proof of *fraud*, conclusive of the *facts of acknowledgment and registry* (*Harkins v. Forsyth*, 11 Leigh, 294), of the *place of acknowledgment*, that is, the *clerk's office*, where alone the clerk can receive acknowledgments (*Carper v. McDowell*, 5 Grat. 212), and by parity of reason, it would seem, of the *time of acknowledgment*, although this last conclusion is in conflict with the case of *Horsley v. Garth*, 2 Grat. 471.

2°. The Effect of Registration in Respect to the *Parties to the Writing*.

The validity of the conveyance, *as to the parties thereto* and their heirs, and *as to volunteers* claiming under them as devisees, or as purchasers without valuable consideration, and also as to purchasers for valuable consideration but *with notice*, depends in no degree upon the circumstance of registration, whose design is to acquaint persons concerned with the existence of the transaction, which cannot fail to be known, of course, to the parties thereto. The statute, accordingly, makes an unregistered writing void only *as to creditors and subsequent purchasers for value, and without notice*. (V. C. 1873, ch. 114, § 5; V. C. 1887, ch. 109, § 2465; *Turner v. Stip*, 1 Wash. 319; *Currie v. Donald*, 2 Wash. 63; *Dabney & ux. v. Kennedy*, 7 Grat. 327; *McCandlish v. Keen & als.* 13 Grat. 632; 2 Lom. Dig. 484.)

3°. The Effect of Registration *in Respect to Creditors*.

The *creditors*, as to whom writings required to be registered, and which yet are unrecorded, are vacated, embrace the same description of persons as are intended by the same word in the statute of *fraudulent conveyances* (V. C. 1873, ch. 114, §§ 1, 2; V. C. 1887, ch. 109, § 2472), where it will be remembered that it includes not only all persons who claim *ex contractu*, as by reason of a collateral agreement, as well as a debt properly so called, but also persons who sue *ex maleficio*, for some tort, as for adultery, seduction, slander, assault and battery, etc. (*Ante*, p. 690.) Formerly it included not creditors *at large*, but those creditors only who had obtained, by some lien imposed by the law, a right to charge the debtor's property *specifically*, as by recognizance, by judgment or execution, by a forthcoming bond forfeited and duly returned, by an attachment, etc. (2 Lom. Dig. 486; *Tate v. Liggat, &c.*, 2 Leigh, 99, &c.; *Kelso v. Blackburn*, 3 Leigh, 299, 309, 312.) But at present, in Virginia, it is provided by statute that a creditor *at large*, as he is styled, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment or transfer of, or charge upon, the estate of his debtor, which he might institute after obtaining such judgment or decree, and may have all the relief to which he would be entitled after obtaining a judgment or decree. (V.



C. 1873, ch. 179, § 2; V. C. 1887, ch. 109, § 2460; Tichenor v. Allen & als. 13 Grat. 37; *Ante*, pp. 690 & seq.) And the lien of such a creditor dates from the time of the *filing of his bill or petition* for the purpose. (Wallace v. Treacle, 27 Grat. 479, 487; *Ante*, p. 691.)

This provision, it will be observed, does not *in terms* apply to an *unrecorded* deed, but to a *fraudulent* one. And although, during the life-time of the debtor, it would doubtless avail in respect to a conveyance unregistered, yet *after his death* it would not be so, because the creditors are then considered entitled to nothing but what the debtor himself might have claimed at the *time of his death*, and of course the non-registry, as we have seen, would operate nothing as to them, any more than as to him. (McCandlish v. Keen & als. 13 Grat. 630.)

It is immaterial, as has been remarked more than once (*Ante*, p. 958; Guerrant v. Anderson, 4 Rand. 211), whether the *creditor has notice* of the unrecorded writing or not, when the debt was contracted. The statute declares it void as to *all creditors*, without discriminating, as it does in the clause touching purchasers, *in respect of notice*. It should be observed, however, that this doctrine is not that which generally prevails in the United States, but is rather peculiar to Virginia. (Basset v. Noseworthy, 2 Wh. & Tud. L. C. (Pt. I.), 110, 111, &c.; Eidson v. Huff, 29 Grat. 342.)

It is a necessary part of the protection thus afforded to *creditors*, that a purchaser at a sale made for the creditor's benefit, in pursuance of the statute, is also to be protected, for else the creditor would derive no advantage, or at least an imperfect advantage, from his privileged position. (Guerrant v. Anderson, 4 Rand. 211.) It should be noted, also, that where a creditor who has a right to charge land as against an unrecorded deed is paid by a surety, the latter is subrogated to his rights, and may enforce all his remedies. (Eidson v. Huff, 29 Grat. 342.)

At one time the statute was construed to mean by *creditors*, creditors of the *grantor only*, and, therefore, deeds of marriage-settlement, whereby a woman's personal property was settled *upon herself*, in contemplation of marriage, were supposed not to need recording in order to intercept the rights of the *husband's creditors*. (Prior v. Kinney's Ex'ors, 6 Mumf. 510, 514; Pierce v. Turner, 5 Cr. 154; Land v. Jeffries, 5 Rand. 211; *Ante*, p. 691.) This doctrine, however, never gave satisfaction to the profession in Virginia. It was thought to be at variance with the obvious policy of the statute, and not easily reconcilable (although the attempt was made to reconcile it in Pierce v. Turner, and also in Land v. Jeffries) with the previous case of Anderson v. Anderson, 2 Call. 205. And at length, more recently, in

Thomas v. Gaines, &c., 1 Grat. 355, after a very elaborate discussion, it was determined that the purpose and true construction of the statute is to avoid unregistered conveyances, etc., as to all creditors who, but for the instrument in question, might have *charged their debts on the property*, and, therefore, that an unrecorded marriage-settlement, securing the wife's property to herself, was void as to the *creditors of the husband*. And this principle has been almost in these terms enacted into the present Code, in respect of purchasers as well as creditors, the provision as to creditors being that the word "*creditors*" shall "extend to and embrace all creditors who, but for the deed or writing, would have had a right to subject the property conveyed to *their debts*." (V. C. 1873, ch. 114, § 11; V. C. 1887, ch. 109, § 2472. See Dabney & ux. v. Kennedy, 7 Grat. 317.)

It is a long established rule of the courts of equity that (apart from any positive provision of a statute to the contrary), where one has an *equitable interest* in land, with a good right to call for the conveyance of the legal title, and a subsequent incumbrancer (*e. g.*, a *judgment creditor*), whose debt did not originally affect the land, acquires the legal title, he shall notwithstanding be postponed to the equitable claimant. For since the subsequent incumbrancer did not *originally* take the land for his security, nor had in his view an intention to affect it when afterwards the land is affected by his lien, and he comes in claiming *under the very person* that is obliged in conscience to make the assurance good, he stands in that person's place, and is postponed, despite his legal title, to the *superior equity* of the adverse claimant. (2 Lom. Dig. 487; Burgh v. Francis, 1 P. Wms. 279; Withers v. Carter, 4 Grat. 411.)

This doctrine is very well illustrated by the case of Withers v. Carter, 4 Grat. 407, the circumstances of which have been detailed (*Ante*, p. 948), and also by Coleman v. Cocke, 6 Rand. 618, both of which cases, and, indeed, the doctrine itself, rest upon the noted cases of Burgh v. Francis, 1 P. Wms. 279 (S. C. 1 Eq. Abr. 320), and Finch v. Earl of Winchelsea, 1 P. Wms. 282. Burgh v. Francis was the case of a defective mortgage in fee for £500, it being made by way of feoffment, *without livery*, and afterwards the mortgagor confessed a judgment to a third person; nevertheless, by Lord Keeper Bridgman, and also by Lord Chancellor Nottingham, it was decreed that, the estate being in equity *specifically* bound by the mortgage, the mortgage should be preferred to the judgment, though at law, the former being in strictness void, the judgment-creditor would have taken the first place. And in Finch v. Winchelsea, 1 P. Wms. 282, the case was, that one agreed for a valuable consideration to convey lands to T. S., and afterwards con-

fessed a judgment to J. N. ; and it was held that, if the consideration money paid by T. S. be any ways adequate to the value of the land, it binds the land in equity, and shall defeat the judgment.

To these cases it will be expedient to add the mention of *Coleman v. Cocke* (6 Rand. 618, 649), notwithstanding that it prolongs the discussion undesirably. In that case Cocke had recovered a very large sum by decree against William Bentley, who had been Mrs. Cocke's guardian. Whilst indebted to his ward, William Bentley had bought a tract of land and paid for it, without getting a title ; but after some years, he had caused the vendor to make a conveyance to his son, William A. Bentley, who, by his father's direction, conveyed a part of the land to another son, Peter B. Bentley, who conveyed it to Henry E. Coleman for a valuable consideration, and without notice of any fraud on the part of the Bentleys ; but neither the deed to Coleman, nor that from William A. to Peter B. Bentley, nor from the original vendor to Wm. A. Bentley, *was recorded*. The conveyance to Coleman was in 1813, and the decree obtained by Cocke against Bentley was in 1819. It was held that, inasmuch as Wm. A. Bentley had acquired (by his father's direction to the original vendor to convey to him) an *equitable title* which did not need to be recorded, and that Coleman had become a *bona fide* purchaser for value, without notice, of that equitable title before Cocke's decree, he was, as to that, entitled to priority over that decree, and it would therefore do Cocke no good to set the conveyance aside as unrecorded, since Coleman would then be immediately remitted to his *superior equity*. (2 Lom. Dig. 488.)

It must be observed, however, that this equitable ground of priority and relief is not admitted *against the positive provisions of a statute*, to sustain the prior against the subsequent incumbrancer. Of this the case of *McClure v. Thistle's Ex'ors*, 2 Grat. 182, affords a good illustration. On the 23d of December, 1835, David Agnew conveyed a lot in the city of Wheeling to John McClure, and put him in possession, but the conveyance was *not recorded until May 21st, 1842*. Subsequent to the conveyance, but before its registry, Benjamin Thistle obtained a judgment against Agnew, upon which the latter took the insolvent debtor's oath in August, 1840, and in 1843 Thistle filed his bill to subject the lot in McClure's possession to his judgment, upon the ground (as is explained in *Withers v. Carter*, 4 Grat. 416) that McClure appeared to have had *no previous equitable title* which did not require to be registered, but from the first had owned nothing but the *legal title* created by Agnew's conveyance, which, in consequence of not being recorded, the statute *peremptorily declared* to be void as to



*creditors*, of whom Thistle was one. Since 1st July, 1850 (when the revisal of 1849 took effect), a similar doctrine would have prevailed in *Withers v. Carter*, 4 Grat. 407, and such like cases; for since that period, *contracts in writing* for the sale of lands, or a term therein of more than five years, are, like conveyances, declared to be void as to creditors and subsequent purchasers for valuable consideration without notice, *until and except* from the time that they are duly admitted to record. (V. C. 1873, ch. 114, §§ 4, 5; V. C. 1887, ch. 109, § 2465; *Eidson v. Huff*, 29 Grat. 341.) A case parallel to *Withers & al. v. Carter*, however, and regulated by the doctrine laid down therein, is still to be found, as we have seen (*Ante*, p. 949 '51); as for example, in a *parol contract* for valuable considerations partly performed by the vendee, by *taking possession*, etc., whereby an *equitable title* vests in him, which yet is not required to be registered. (*Floyd v. Harding*, 28 Grat. 401; *Hicks v. Riddick*, *Id.* 418; *Long v. Hagerstown Ag. Imp. Man. Co.*, 30 Grat. 669.) But by the Code of 1887, it is enacted that no right to a conveyance of land shall accrue to the donee thereof *under a gift or promise of a gift, not in writing*, although such gift or promise be followed *by possession thereunder, and improvement of the land by the donee* or those claiming under him. (V. C. 1887, ch. 107, § 2413; *Halsey v. Peters*, 79 Va. 60; *Griggsby v. Osborne*, 82 Va. 371.)

#### 4°. The Effect of Registration *in Respect to Purchasers.*

Let us consider, (1). Who are purchasers; and (2). What purchasers are protected;

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##### 1°. Who are Purchasers Within the Policy of the Statute.

Purchasers are understood to include all persons who, *by contract*, have acquired a *direct interest in the subject*, whether *by way of lien*, as by mortgage or deed of trust, or *by absolute conveyance*, in contradistinction to *creditors*, who are persons claiming debts or demands, and have either no lien at all on the property in question, or one arising *by act of the law* (i. e., by judgment, etc.), and not *by contract*. (*Tate v. Liggat*, 2 Leigh, 104; *Wickham, &c., v. Lewis Martin & Co.* 13 Grat. 430, 432, 437.) Thus, not only are absolute grantees of the legal or equitable title regarded as *purchasers*, but so also are *mortgagees* and *deed of trust creditors* (2 Lom. Dig. 449, 489; *Beverley v. Brooke*, 2 Leigh, 446; *Wickham, &c. v. Lewis Martin & Co.* 13 Grat. 430, 432, 437; *Evans v. Greenhow*, 15 Grat. 157; *Carter v. Allen & als.* 21 Grat. 247); nor can the latter pretend to be any longer regarded as creditors, or in the double character of creditor and purchaser, but *only as purchasers* (*Ante*, page 691); whilst persons claiming debts and demands, whether arising out of contract or tort,



who have acquired no right specifically to charge the property conveyed, or, if they have, have acquired it by means of a recognizance, judgment, or execution, forthcoming bond returned, attachment, or other lien arising by *act of the law*, come under the designation of *creditors*.

2<sup>p</sup>. What Purchasers are Designed by the Statute to be Protected.

The purchasers designed to be protected, are by the statute itself declared to be purchasers for *valuable consideration without notice*, including not only purchasers *from the grantor*, but *all* "*purchasers* who, but for the deed or writing, would have had title to the property conveyed." (V. C. 1873, ch. 114, §§ 5, 11; V. C. 1887, ch. 109, § 2472.) And apart from this latter special statutory provision, as a purchaser for value and without notice is entitled to protection, it is a necessary inference that a purchaser for value from him, even *with notice*, is to be protected; and so also, if one purchases for value and *without notice* from a purchaser who *has notice*, he is likewise entitled to be protected. (*Lacy v. Wilson*, 4 Munf. 313; *Curtis v. Lunn*, Ex'or, 6 Munf. 42; *Spangler v. Snapp*, 5 Leigh, 478; *French v. Loyal Co.* 5 Leigh, 627, 640, 648.)

The subsequent purchaser, in order to be entitled to the protection accorded by the statute, must be, (1), A *complete purchaser*, who has *paid the purchase-money*, and *taken a conveyance* before notice; and (2), *Without notice* of the unrecorded writing, when he completes his purchase. As no other requirement is demanded, it seems not to be needful that the subsequent purchaser should have *had his conveyance recorded*. In England it is otherwise, by the very terms of their statute, which invalidate the prior unregistered conveyance only in favor of a subsequent one which has been *first recorded*. (2 Lom. Dig. 493.)

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1<sup>a</sup>. The Subsequent Purchaser, in Order to be Protected, must be a *Complete Purchaser*, who, before Notice, has both *Paid the Purchase-Money* and *Taken a Conveyance*.

The authorities are emphatic in declaring that, in order to be protected, the subsequent purchaser, before he received notice of the prior unrecorded conveyance, must have *received his conveyance*, and *paid the whole of the purchase-money*. (*Beverley v. Brooke*, 2 Leigh, 446; *Doswell v. Buchanan's Ex'ors*, 3 Leigh, 381, 383-4; *Mut. Assur. Soc. v. Stone & al.* 3 Leigh, 235; *Briscoe v. Ashby*, 24 Grat. 475-6; *Tourville v. Naish*, 3 P. Wms. 307; *Wigg v. Wigg*, 1 Atk. 384.) The allegation that one is such a purchaser must aver a *conveyance*, and not merely a *contract to convey*; and a valuable consideration and *actual*

payment thereof, and not merely that it is *secured to be paid*. It must also explicitly deny notice of the unrecorded writing sought to be impeached *previous to the execution of the subsequent conveyance*, and the payment of the consideration. (Mitf. Eq. Pl. 215; 16:3 Sugd. Vend. 348.) If the purchaser receive notice of the prior conveyance before *both of these acts* are perfected, he ought to forbear to proceed until the equity is inquired into, or else he will take subject thereto. Whatever he does after notice, is done *mala fide*, and cannot avail him. And this is in consonance with justice, as well as in strict analogy with the principles of the courts of equity. It rests upon the reasonable maxim, *qui prior in tempore, potior est in jure*. If A has made a first purchase of an estate, and B proposes to purchase afterwards, as soon as he receives notice of A's prior claim, it is obviously a fraud in him to take a single step further to get a title to property which he knows belongs to another. But if he has paid the consideration, and has also obtained a conveyance before notice reaches him of the unregistered writing, his conduct has been fair and unimpeachable, and having *equal*, though *posterior* equity, he is protected, because he has the *legal title also* honestly acquired, agreeably to the maxim of which we have encountered several instances, that "where equity is equal, the law shall prevail." And hence arises a qualification of the general doctrine, namely, that where the first purchaser has not the legal title, and the subsequent one has *paid his money*, and has not, indeed, the legal title, but the *best right to call for the legal title*, before he receives notice, he shall be entitled to priority, notwithstanding he has not actually acquired such title. (Mut. Assur. Soc. v. Stone, 3 Leigh, 236; Cox v. Romine, 9 Grat. 28. But see Preston v. Nash, 75 Va. 954, &c.)

This doctrine of what constitutes a *complete purchaser* seemed to the revisors of the Code of 1850 to be so severe, that they proposed to give to a purchaser who, without notice, had paid only a part of the purchase-money a lien on the land purchased for the money so paid, but the suggestion was not then adopted by the legislature. (Revisors' Rep. p. 615, n. &c.) It has, however, been enacted into the Code of 1887. (V. C. 1887, ch. 109, § 2472.)

One of the earliest English cases upon the subject is *Tourville v. Naish*, 3 P. Wms. 307, where Naish purchased land, and having paid part of the purchase-money, *gave his bond for the residue*. Tourville then had an equitable lien on the premises, of which Naish, as the latter alleged, had no notice at the time of making the purchase, but of

which he admitted he was apprised before payment of the money for which he had executed his bond. It was insisted, on his behalf, that the giving a bond *was a payment*, since the bond obliged him at all events to go on to pay, and precluded *at law* any plea of equitable incumbrance. Lord Chan. Talbot, however, decided that notice *before the payment of the purchase-money* was sufficient to avoid the plea of purchaser for value, etc., and that the bond was not equivalent to a payment, for although the purchaser had no remedy *at law* against the bond, yet he might have been relieved against it *in equity*. The case of *Wigg v. Wigg*, 1 Atk. 384, was decided by Lord Hardwicke, five years afterwards (1739), in accordance with *Tourville v. Naish*. The circumstances are not stated, but the chancellor says that “it appears he had notice, for though he had no notice before *he paid his money*, yet he had notice *before the execution of the conveyance*, and it is all but one transaction.” So in *Story v. Lord Windsor* and others, 2 Atk. 630, Lord Hardwicke reiterated the same proposition.

*Beverley v. Brooke & als.* 2 Leigh, 446, affords an instance of the rigor with which the rule is applied, that, in order to be protected, a subsequent purchaser must be a *complete purchaser*, having both paid the purchase-money, and taken a conveyance before notice. *Beverley* in that case had obtained a lien on *Pickett's* land, by deed of trust, which was unrecorded, and afterwards *Pickett* proposed to give a second deed of trust to *Scott*, for the benefit of himself (*Scott*) and others. It appeared that, after the last-mentioned deed was prepared, and when *Pickett* had *taken the pen in his hand* to execute it, he observed to *Scott* that he had already executed a deed of trust on part of the same land to secure a debt to *Beverley*, but that the deed was *usurious*. This was held to charge *Scott*, and all claiming under the deed to him, with notice of *Beverley's* prior deed, making this latter as valid against *Scott*, and all claiming under the deed to him, as if it had been duly recorded, liable to be impeached for usury, as it would have been if recorded, and no otherwise.

See, further, *Wilcox v. Calloway*, 1 Wash. 41; *Blair v. Owles*, 1 Munf. 44; *Lambert v. Nanny*, 2 Munf. 196; *Hoover v. Donnally*, 3 H. & M. 316.

It may be observed, in conclusion of this topic, that a purchaser for value, *without notice*, actual or constructive, having obtained a conveyance, will not be affected by a *latent equity*, whether by lien, incumbrance, trust, fraud, or any other claim. (*Carter v. Allan & als.* 21 Grat. 241.)

2<sup>a</sup>. The Subsequent Purchaser, in Order to be Protected,

must be not only a *Complete Purchaser*, but he must have been *Without Notice* of the Prior Unrecorded Deed.

The English statutes, 2 and 3 Anne, c. 4 (applicable to the West Riding of Yorkshire), and the registry statutes following, it will be remembered, declared conveyances unregistered to be "void against any *subsequent purchaser or mortgagee for valuable consideration*," without *in terms* prescribing that he should also be *without notice*. But the case of *Le Neve v. Le Neve*, 2 Ambl. 436 (S. C. 3 Atk. 646; 1 Ves. Sen. 64), determined that, notwithstanding it was not *expressly* so ordained, the statute certainly contemplated that the subsequent purchaser, who was to be protected by it, should have *no notice* of the prior conveyance. Lord Hardwicke, in coming to this conclusion, laid much stress on the *recital* in the preamble of the statute, whence it appeared to be its intention to secure subsequent purchasers and mortgagees against *prior secret conveyances* and fraudulent incumbrances. "Where a person had no notice," says he, "of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice of a prior conveyance, then *that* was not a *secret conveyance*, by which *he* could be prejudiced," (pp. 441-'42). The case was as follows: The father of Edward Le Neve, in 1718, upon his son's inter-marriage with Henrietta Le Neve, who had a considerable fortune, made a settlement, whereby, in consideration of Henrietta's fortune, certain estates (including some leaseholds), lying in the county of Middlesex, in the neighborhood of London, were conveyed to trustees in trust for Edward Le Neve for his life; and after his death to pay Henrietta, in case she survived him £250 a year for her life; and after the death of both, *in trust for their issue*; and in default of issue, for the father and his heirs. But the conveyance *was not registered*. The marriage took effect, and Henrietta died in 1740, leaving surviving her, her husband, Edward, and two children, Peter and Elizabeth. In 1743, Edward Le Neve married again, but previously entered into articles with the second wife's trustees, in pursuance of which the very same property was settled in trust for himself for life; then, to secure the wife in case she should survive him, a jointure of £150 per annum, and after the death of both, for the issue of the marriage; and this settlement *was duly registered*. The bill was filed by Peter Le Neve and his sister Elizabeth, now the wife of Hugh Pigott, in order to have an execution of the trust in their favor, declared by the first settlement, and with that view, to set aside or postpone the second settlement, though duly registered, upon the ground that the second



wife, Mary, by herself, or at least *by her attorney*, one Joseph Norton, *had notice* of the prior settlement before her marriage and the execution of the second articles. Mary, the second wife, by her answer, denied *any actual notice* to herself, and stated that she was entirely ignorant of the prior unregistered settlement until six months after her marriage; and as to *notice to Joseph Norton*, she said that Norton was *not employed by her* about the settlement, but being her husband's solicitor, she was thereby induced to place confidence in him; and upon her husband recommending him as a proper person to prepare the deed, *she consented*; and Norton assured her that he had taken care to secure to her a jointure of £150 a year, and did not then, nor at any time before her marriage, give her any notice of any former settlement. Lord Hardwicke held, first, "that notice to Norton (who was the wife's attorney, however she was led to confide in him), was *notice to her* (citing *Brotherton v. Hatt*, 2 Vern. 574, and *Jennings v. Moor*, 2 Vern. 609); and second, that the design of the statute was to prevent the perpetration of frauds by *secret conveyances*, a design which was not applicable where the subsequent purchaser was *aware of the previous conveyance*, and that such subsequent purchaser was himself guilty of fraud in seeking to acquire a title when he knew the first purchaser had a prior right to the estate. (2 Ambler, 446-'7; S. C. 2 Wh. & Tud. L. C. (Pt. I.), 163-'4.)

Let it be observed, however, that notice to counsel, agents, or solicitors, in order to affect the employer, must have been imparted to them in the same transaction, or, if in a previous transaction, it must be made to appear clearly that that previous transaction was present to the mind of the counsel or agent whilst engaged in the business in question. (2 Wh. & Tud. L. C. (Pt. I.), 139 & seq.; *Warrick v. Warrick*, 3 Atk. 294; *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Hamilton v. Royse*, 2 Scho. & Lefr. 327; *Fuller v. Bennett*, 2 Hare (24 Eng. Ch.), 394; *Morrison v. Bauseman*, 32 Grat. 229; *Johnson v. Nat. Exch. Bank*, 33 Grat. 486-'7.)

The terms of the statute in Virginia leave no possible room for question on this point. The purchasers protected are expressly described as "purchasers for valuable consideration *without notice*" (V. C. 1873, ch. 114, § 5; V. C. 1887, ch. 109, § 2465); thereby making that an *express rule of law* which was before a rule of *courts of equity*. (2 Lom. Dig. 490.)

It might have been thought, from the tenor of the reasoning in *Le Neve v. Le Neve*, that the English statutes of 2 & 3, and of 7 Anne, would have been construed to

make registry equivalent to *constructive notice* of the instrument recorded, by which subsequent purchasers would in all cases be charged. But to this conclusion the courts of that country have persistently declined to accede. They have invariably held that, whilst unregistered deeds are made void as to creditors and subsequent purchasers for valuable consideration without notice, yet that the recording does not charge the subsequent purchaser *with notice of the deed*. If not recorded, the deed is *void* as to him; if recorded, it is only so far valid that it *passes to the bargainee* the title it purports to convey, provided the bargainor had that title; if he had it not, the deed cannot pass it, though recorded; nor will the putting it on the record affect the conscience of a subsequent purchaser of a *legal title*, nor, of course, charge that title *with an equity* which the deed raised between the bargainor and bargainee. (*Morecock v. Dickens*, 2 Ambl. 680; *Wiseman v. Westland & als.* 1 Younge & Jerv. 120; *Bedford v. Bacchus*, 2 Eq. Ca. Abr. 615; *Underwood v. Ld. Covertown*, 2 Sch. & Lefr. 40; *Doswell v. Buchanan*, 3 Leigh, 377.) In *Morecock v. Dickens* (decided 1768), Lord Camden, and in *Wiseman v. Westland* (decided 1826), the court of exchequer intimate some dissatisfaction with the doctrine; but even Lord Camden, in his day, held it to be too well settled, especially by the case of *Bedford v. Bacchus*, to be disturbed. Lord Redesdale has sought to reconcile it to good sense and sound policy as successfully as any one else, by observing, that if the registry were allowed to be “notice, it must be notice, *whether the writing were duly registered or not*,” as if it were recorded in the wrong county, or upon insufficient proof; and that conclusion is contrary to the plain intent of the registry laws, and would be extremely mischievous. (*Latouch v. Dunsany*, 1 Sch. & Lefr. 157; *Bushell v. Bushell*, 1 Sch. & Lefr. 90.) But it will not escape the thoughtful student’s attention, that the dilemma suggested by Lord Redesdale does not exist; for the constructive notice raised by the statute could only apply when the registry had *conformed to the statute*.

The registry laws of Virginia, prior to 1819, received a similar construction. They enacted that “all deeds of conveyance, etc., of lands \* \* \* shall be void as to all creditors and subsequent purchasers, *unless they shall be acknowledged or proved, and recorded according to the directions of this act*,” and thus closely resembled, in their phraseology, the English statutes above referred to. The question of the interpretation of our statutes, in this particular, was presented in *Doswell v. Buchanan’s Exors.* 3 Leigh, 365. In that case an estate called *Ballfield*, in

the county of Hanover, had been conveyed, in 1788, by General Thomas Nelson, to certain trustees, for purposes in the deed of trust named, and in 1789 the trustees sold the land, in pursuance of the deed, to John Lyons, but withheld the legal title as security for the purchase-money. Lyons, after some time, sold to Hopkins, and in 1808, by decree of a court of equity, at the joint instance of Hopkins and Lyons, Nelson's surviving trustee was directed to convey the legal title to Hopkins, which was done accordingly, by deed dated 2d December, 1810, and recorded in the county court of Hanover in June, 1811. Meantime, and while Hopkins yet held only the *equitable title* to Bullfield, he had executed a deed of trust, dated 7th May, 1808, without any warranty of title, on eight hundred acres, part thereof, to secure \$5,000, which he borrowed of John Buchanan; and that deed was duly registered in June, 1808. After the conveyance of the *legal title* to Bullfield, in December, 1810, by Nelson's surviving trustee, namely, on the 16th December, 1811, Hopkins conveyed the *whole tract* to James Doswell for \$22,000, payable in instalments, the last due 1st January, 1814. In 1822 Buchanan exhibited his bill in equity against Hopkins, Doswell, and the trustees in his deed of trust, in order to have the eight hundred acres of Bullfield included in that deed subjected to pay his debt, alleging that Doswell had *actual* notice of the deed; or if he had not, that the registry of it afforded him constructive notice thereof, whereby he was concluded. Doswell answered, insisting that he was a *complete purchaser* for value, and had paid *all the purchase-money*, and had *obtained a conveyance* before he was made aware, *actually*, of the existence of Buchanan's incumbrance; and that the registry gave him *no constructive notice* of it. He said, 1st, That having *equal equity* with Buchanan, he had also honestly acquired *the legal title*, and so was entitled to priority over him; and 2d, That even if registry could *ever* be regarded as *constructive notice* of a prior equity, it could not properly do so in this case, because it would have been unreasonable to expect him to look back farther than to the conveyance by Nelson's trustee of the *legal title* to Hopkins in 1810, and that would not have disclosed Buchanan's equitable interest, which was created by the deed of trust registered in June, 1808. The court held, upon this state of facts:

(1), That as there was no clause of *warranty* in Buchanan's deed of trust, Hopkins' subsequent acquisition of the legal title and estate did not enure to Buchanan's trustee, so as to give them the better right to call for the legal title;



(2), That the case presented no *adequate proof of notice* to Doswell of Buchanan's lien ;

(3), That registry was *never constructive notice* of any equity ; and,

(4), That a vendee could not be lawfully required to examine the registry *further back* than the date of the conveyance *to the vendor*. (3 Leigh, 365, 381. See also *State of Connecticut v. Bradish*, 14 Mass. 303 ; *Murray v. Ballew*, 1 Johns. C. R. 566, 573 ; 2 Wh. & Tud. L. C. (Pt. II.), p. 162.)

The case of *Doswell v. Buchanan* originated under the law as it was *prior to 1819*, and, of course, was ruled thereby. At the revisal of that year the phraseology of the statute was so changed as to manifest an intent to alter the very questionable policy of the English enactments. The provision was expressed thus : "All bargains, sales, and other conveyances whatsoever of any lands, etc., \* \* \* shall be void as to all creditors and subsequent purchasers for valuable consideration, without notice, unless they shall be acknowledged or proved, and lodged with the clerk to be recorded, according to the directions of this act ; but the same as between the parties and their heirs, and as to subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be *valid and binding* ;" and furthermore, "Every conveyance, etc., in this act mentioned, except deeds of trust and mortgages, which shall be acknowledged, proved, or certified according to law, and delivered to the clerk of the proper court to be recorded *within eight months* after the sealing and delivery thereof, shall *take effect and be valid as to all persons* from the time of such sealing and delivery ; but all deeds of trust and mortgages, whensoever they shall be delivered to the clerk to be recorded, and all other conveyances, etc., which shall not be acknowledged, proved, or certified, and delivered to the clerk of the proper court to be recorded, within eight months after the sealing and delivery thereof, shall *take effect and be valid as to all subsequent purchasers for valuable consideration, without notice, and as to all creditors*, from the time when such deed of trust or mortgage, or such other conveyance, etc., shall have been so acknowledged, proved, or certified, and delivered to the clerk of the proper court to be recorded, and from that time only." (1 R. C. 1819, 362, 364, ch. 99, §§ 4, 12.) And the effect of these provisions, as designed to change the policy of the law, is rendered yet more apparent by another enactment introduced into the revisal of 1819, that "Every title-bond, or other written contract in relation to the land, *may be proved*, certi-



fied, or acknowledged, and recorded, in the same manner as deeds for the conveyance of land; and such proof, acknowledgment, or certificate, and the delivery of such bond or contract to the clerk of the proper court, to be recorded, shall be *taken and held as notice* to all *subsequent purchasers* of the existence of such bond or contract." (1 R. C. 1819, 365, ch. 99, § 13.)

The two principal doctrines of *Doswell v. Buchanan* (namely, that registry duly made is *not constructive notice* of the writing, and secondly, that a subsequent purchaser is not bound to search the records for liens or conveyances created by his vendor, *further back* than to the date of the conveyance to his vendor), are understood by this legislation to have been set aside; and so the law continued to be until the revisal of 1849 again changed the statute to what it is at present, viz.: that every writing required to be recorded "shall be void as to creditors and subsequent purchasers, for valuable consideration, without notice, *until and except* from the time that it is duly admitted to record." (V. C. 1873, ch. 114, § 5; V. C. 1887, ch. 109, § 2465.)

This provision, taken by itself, would seem to be essentially equivalent to the more distinct and unmistakable enactment of 1819, at least as to the registry of a previous writing being a *constructive notice thereof to all persons*, even to subsequent purchasers for value and without actual notice. But § 12 of ch. 114, V. C. 1873 (V. C. 1887, ch. 109, § 2473), declares unequivocally that a purchaser shall *not be affected by the record* of a writing made by a vendor before the date of the deed to such vendor himself, thus affirming in terms the second proposition above stated of *Doswell v. Buchanan*. This provision, even if it stood alone, could not fail to throw some doubt upon the construction which would otherwise seem to belong to the phrase "*until and except*" in § 5 (§ 2465), but a further doubt is occasioned by a note of the revisors appended to § 12, from which it appears that they did not assign to it such an interpretation, and expected to secure validity for conveyances and charges of equitable interests by § 4 of ch. 114, whereby it is provided that any *contract in writing* "made for the conveyance or sale of real estate, or a term therein of more than five years, shall, from the time it is *duly admitted to record*, be, as against creditors and purchasers, as valid as if the contract was a deed *conveying the estate or interest* embraced in the contract." (V. C. 1887, ch. 109, § 2464.) The language which they proposed for that section (Revisors' Report, p. 613, § 3) was, indeed, somewhat different in the latter clause, viz.: "as valid *in respect to any equitable estate or interest em-*

*braced thereby, as a deed conveying the legal title, would be in respect to such legal title.*" In the note referred to (Revisors' Report, p. 616) it is insisted that there was no hardship in a case such as *Doswell v. Buchanan*, for that the party claiming under the deed of trust conveying the equitable interest, "could protect himself by seeing when he took his deed of trust that there was on record a *deed conveying the land* to the person who made that deed of trust, or at least (under the third (now fourth) section of this chapter) a *contract for the sale or conveyance of the land to him*, while, on the other hand, the purchaser had no means of protection, for there was nothing on record by which title could be traced to the person who made that deed of trust at so early a period, and consequently nothing to lead a purchaser to look for such a deed of trust more than any other deed in the world." It seems, then, that one possessed of an *equitable interest only*, according to this idea, may mortgage or convey it securely, by causing to be registered, not only the mortgage or conveyance, but also the *contract* out of which the equitable interest proceeds. Thus, in such a case as *Doswell v. Buchanan*, if Buchanan, besides recording his deed of trust, should also procure Lyons' contract with Nelson's trustees, and Hopkins' contract with Lyons, to be registered, he would have a secure title.

We are next to advert to the *character of the notice* (apart from such as may arise out of the registry laws), which will charge a subsequent purchaser for valuable consideration, and exclude him from the protection of the statute. The effect of such notice, it will be observed, is to attach to the subsequent purchaser the *guilt of fraud*. It is, therefore, *never to be presumed*, but *must be proved*, and *proved clearly*. A mere *suspicion* of notice, even though it be a *strong suspicion*, will not suffice. (3 Sugd. Vend. 260, &c.; *Hine v. Dodd*, 2 Atk. 276; *Jolland v. Stainbridge*, 3 Ves. Jr. 478, and n. (a), 486; *Le Neve v. Le Neve*, 2 Wh. & Tud. (Pt. I.), 165 to 174; *Curtis v. Lunn*, 6 Munf. 44; *Vest v. Michie*, 31 Grat. 151; *Johnson v. Nat. Exch. Bank*, 33 Grat. 485-486.) Hence, neither the *registry*, nor *actual notice* of a deed which is so vaguely expressed as to give no information as to the property embraced in it, or not enough to show that a subsequent purchase embraces such property, will suffice to invalidate such subsequent purchase. Thus, in *Mundy v. Vawter* & als. 3 Grat. 545, it was held that a conveyance of "*all the estate, both real and personal*, to which J. (the grantor) is in any manner entitled at law or in equity," notwithstanding it was good and valid *as between the parties*, contained so indefinite a designation of the

lands intended to be conveyed, that the registry thereof was, *in point of law*, not notice of the existence of the deed to a subsequent purchaser from the grantor; nor would notice, *in point of fact*, of the deed and of its contents affect such purchaser, unless he had further information that the land purchased by him was *embraced by the provisions of the deed*; information so strong and clear as to affect his conscience, and to fix upon him the imputation of *mala fides*. See, also, *Lewis v. Madison*, 1 Muuf. 303.

But whilst the proof of notice is required to be *explicit and clear*, so as not merely to put the party on inquiry, but to affect his conscience, and to fix upon him the imputation of *mala fides*, the fact of notice may as well be *inferred from circumstances* as proved by *direct evidence*; circumstantial testimony being capable of producing upon a well ordered understanding a conviction as satisfactory and complete as that which is direct. Any distinction, therefore, which may be found in the cases (and it has been taken in very many—*Le Neve v. Le Neve*, 2 Wh. & Tud. L. C. (Pt. I.), 165-'6 & seq.), between the effect of an *actual* and a *constructive* notice, is needless and illogical, and in Virginia, at least, is discarded. (2 Lom. Dig. 492; 4 Kent's Com. 172-173; *Hiern v. Mill*, 13 Ves. 120; *Newman v. Chapman*, 2 Rand. 93, 101; *French v. Loyal Co.* 5 Leigh, 641, 655, 677; *Siter, Price & Co. v. McClanachan & als.* 2 Grat. 313.)

However, although we need make no distinction between *actual* and *constructive* notice, in respect to the effect of either, yet it is well to discriminate between them in determining *what constitutes notice*. Let us, therefore, observe briefly what amounts to, (1), Actual notice; and (2), Constructive notice.

W. C.

#### 1<sup>st</sup>. What Amounts to *Actual Notice*.

Notice is actual where the purchaser *knows* of the existence of the adverse claim, or perhaps where he is conscious of having the means of knowledge, and yet does not use them; and it is immaterial whether his knowledge results from direct information, or is gathered from facts and circumstances. (*Le Neve v. Le Neve*, 2 Wh. & Tud. (Pt. I.), 144; *Morris & al. v. Terrill*, 2 Rand. 6; *French v. Loyal Co.* 5 Leigh, 627, 655, &c.; 677, &c.)

The information must proceed, however, from some person interested, or otherwise likely to be well informed, or from some one who gives specific and definite statements; and that in the course of the treaty for the purchase. Vague reports, or general assertions,



especially from persons *not interested in the property*, and who, therefore, *may not be well informed*, will not affect the purchaser's conscience; nor will he be charged with a notice which he had in a *previous transaction*, for he may have forgotten it. (3 Sugd. Vend. 451 '2; Jolland v. Stainbridge, 3 Ves. Jr. 478, 486; Le Neve v. Le Neve, 2 Wh. & Tud. L. C. (Pt. I.), 132, 145, 148, &c.; Argenbright v. Campbell, 3 H. & M. 144, 189, 198. See Butcher v. Stapeley & al. 1 Vern. 364-'5.)

## 2<sup>r</sup>. What Amounts to *Constructive Notice*.

Constructive notice in its nature is no more than *evidence of notice*, the presumptions of which are so violent that they are not allowed to be controverted; but it is difficult to define more particularly what amounts to it. It is that notice which the law *imputes to a man*, whether he has or has not actual knowledge of the thing; nay, though it be clearly proved that he *had not* such actual knowledge. It differs, therefore, essentially in its nature from actual notice, which, whether it be proved by *presumption* or by *direct testimony*, must appear clearly to *have actually existed*. (3 Sugd. Vend. 453; French v. Loyal Co. 5 Leigh, 658, 677-'8.)

The instances of constructive notice are referrible to several classes, all depending on the general consideration that *sound public policy* requires the presumption that he was aware, or at least that he should be treated as if he were aware, of the existence of the prior conveyance or charge. They are as follows:

(1), Where the subsequent purchaser has *actual notice* that the property in question was incumbered or affected, he is charged *constructively* with notice of *all facts and instruments* to the knowledge of which he would have been led by an *inquiry* into the incumbrance or other circumstance affecting the property of which he had actual notice. (Le Neve v. Le Neve, 2 Wh. & Tud. L. C. (Pt. I.), 132-'3, 136, 253, &c.; Jones v. Smith, 1 Hare (23 Eng. Ch.), 55; S. C. on appeal to Ld. Chan'r Lyndhurst, 1 Phil. (19 Eng. Ch.) 253 '4 & seq.; Brush v. Ware, 15 Pet. 93; Oliver & als. v. Pratt, 3 How. 333, 409-'10; Graff v. Castleman, 5 Rand. 207 '8; Beverley v. Brooke, 2 Leigh, 446; Pinckard v. Wood, 8 Grat. 145-'6; Burwell's Adm'rs v. Fauber & als. 21 Grat. 462; Wood v. Krebbs, 30 Grat. 715; Lamar v. Hale, 79 Va. 147; Effinger v. Hall, 81 Va. 94; Morgan v. Fisher, 82 Va. 422; Robinson v. Crenshaw, 84 Va. 356.)

(2), Where the subsequent purchaser has *designedly abstained from inquiry* for the very purpose of *avoiding notice*; or perhaps, where he has been guilty of *gross negligence in omitting such inquiry*. (Le Neve v.



Le Neve, 2 Wh. & Tud. L. C. (Pt. I.), 133; Taylor v. Hibbert, 2 Ves. Jr. 437, 440; Hiern v. Mill, 13 Ves. 120, 121; Dryden v. Frost, 3 My. & Cr. (14 Eng. Ch.) 673; Jones v. Smith, 1 Hare, (23 Eng. Ch.) 55; S. C. on appeal, 1 Phil. (19 Eng. Ch.) 253-'4 & seq.)

(3), Where the counsel, attorney, or agent of the subsequent purchaser, whether *for the whole or a part* of the transaction, and the *same transaction*, or at least one *closely followed by or connected with it*, has notice of the prior incumbrance, etc., whilst *concerned for his principal*. (3 Sugd. Vend. 318 to 320; Le Neve v. Le Neve, 2 Wh. & Tud. L. C. (Pt. I.), 139 & seq., 149 and seq.; Hiern v. Mill, 13 Ves. 120; Dryden v. Frost, 3 My. & Cr. (14 Eng. Ch.) 673; Astor v. Wells, 4 Wheat. 466; Blair v. Owles, 1 Munf. 38, 44; Morrison v. Bauseman, 32 Grat. 229; Johnson v. Nat. Exchange Bank, 33 Grat. 486-'7.)

(4), Where the adverse claimant is in the *actual adverse possession and occupancy* of the land when the subsequent purchaser buys. (3 Sugd. Vend. 329 & seq.; Hiern v. Mill, 13 Ves. 121; Le Neve v. Le Neve, 2 Wh. & Tud. L. C. (Pt. I.), 134 & seq., 150 & seq.)

(5), Where, in Virginia, there is a *lis pendens attachment, judgment, or decree*, duly registered or docketed. (Le Neve v. Le Neve, 2 Wh. & Tud. L. C. (Pt. I.), 157 & seq.; V. C. 1873, ch. 182, § 5, 6, 8; V. C. 1887, ch. 174, §§ 3566, 3567, 3570.)

It is worthy of observation, however, that with us the effect of a *lis pendens* is understood to rest not so much upon a presumption of notice as upon reasons of *public policy*, in order to have an end of suits. (2 Lom. Dig. 493; Newman v. Chapman, 2 Rand 93.) And a similar observation may perhaps be applicable to attachments, judgments, and decrees.

(6), Where there is a registration according to law, of the prior incumbrance, in states where the *statute law so prescribes*. (Le Neve v. Le Neve, 2 Wh. & Tud. L. C. (Pt. I.), 143, 160 & seq.)

(7), Where the prior incumbrance depends on a *public act* of the legislature. Le Neve v. Le Neve, 2 Wh. & Tud. L. C. (Pt. I.), 143; Pomfret v. Windsor, 2 Ves. Sr. 480, 472.)

## CHAPTER XXV.

## OF ALIENATION BY MATTER OF RECORD.

2<sup>h</sup>. Alienation by *Matter of Record*.

Assurances by *matter of record* are such as do not depend exclusively on the act or consent of the parties themselves, but derive an additional sanction from the concurrence of some public authority, whose acts have the force and effect of a record, and is called in to substantiate, preserve and be a permanent testimony of the transfer of property from one man to another, or of its establishment, when already transferred. Of this nature are, (1), Private acts of the legislature; (2), The king's or commonwealth's grants; (3), Fines; and (4), Common recoveries;

W. C.

1<sup>i</sup>. Private Acts of the Legislature.

Private acts of the legislature constitute in England a not uncommon mode of assurance. With us they are of late years almost wholly unknown, as will be explained in its place. Let us consider now, (1), Conveyance by private act of the legislature in England; and (2), Conveyance by private act of the legislature in Virginia;

W. C.

1<sup>k</sup>. Conveyance by Private Act of the Legislature in England.

It appears that it was a common practice in England, so early as the reign of Edward I., to present petitions to parliament in private affairs, as to a *great court* having plenary powers to give relief in all cases where the ordinary administration of the law was defective. Such petitions were referred to a sort of standing committee, composed of certain prelates, earls, and barons, who were appointed at the meeting of every parliament. They reported whether special action by the high court of parliament was needful, or if relief might be had in the ordinary course of law; and in the former case proposed an enactment adapted to the case, which, when adopted by the lords (then composing the *commune concilium* or parliament), and, sanctioned by the king, had all the force of law. The house of commons (which was permanently instituted only about 23 Edw. I., A. D. 1295), did not at first participate in general legislation, and was especially denied the power of concurring in the particular function of considering private petitions, and of awarding relief thereupon, which they were told, in the king's name, were *judgments*, which appertained only to the king and to the lords. However, as the commons were allowed to be the sole originators of bills to raise money for the public occasions, their ascendancy speedily made itself felt in all departments of the govern-

ment; and in the reign of Richard III. (A. D. 1483), it had become fully established that no award could be made on any such private petition by the lords only, nor without a formal and complete act of the whole legislature; so that from that period such awards have been known as private acts of parliament. (2 Lom. Dig. 496; Hale's Jurisd. of Lords, cc. 4 and 10.)

Let us observe, (1), The cases wherein private acts are used as a mode of assurance; and (2), The mode of enacting such private acts so as to guard against abuses. (2 Bl. Com. 344 & seq.);

W. C.

- 1<sup>l</sup>. The Cases wherein Private Acts of Parliament are Used as a *Mode of Assurance*; W. C.

- 1<sup>m</sup>. Cases of Title Entangled by Complex Limitations, Future or Contingent.

Where, in consequence of unskillful conveyancing, or of unforeseen circumstances, a title to lands has become so perplexed with contingent remainders, resulting or implied trusts, executory limitations, etc., that the owner of the estate can neither adequately enjoy nor dispose of it, an act of parliament may be, and sometimes must be resorted to, to *cut the knot* which it is impossible to untie. (2 Bl. Com. 344; 2 Lom. Dig. 498.)

- 2<sup>m</sup>. Cases wherein the Life Tenant in Family Settlements is Abridged of *Some Needful Power*, as in Respect of *Making Long Leases*.

Regularly, a tenant for life cannot, of course, make a lease to endure beyond his own life; and as leases thus precarious would not warrant large expenditures in improvements or improved husbandry, nor would be sought after by the better class of tenants, it is customary, as we have seen (*Ante*, 770 & seq.), to insert, in family settlements, a power, duly guarded, whereby tenants for life are enabled, in the interest of their successors, as well as of themselves, to grant leases for convenient terms, without regard to the continuance of their own life-estates. Now, it sometimes may happen that, inadvertently or indiscreetly, such a power is not conferred on the life-tenant; and if the inconvenience arising from its omission becomes very urgent, the resource is to apply to the legislature for a special private act, making the exercise of such power lawful in that case. (2 Bl. Com. 344; 2 Lom. Dig. 498.)

- 3<sup>m</sup>. Cases wherein, in Family Settlements, Contingent Claims of Persons *not in Being* Obstruct the Present Enjoyment or the Alienation of the Property.

Where executory limitations have been created for the benefit of persons not yet in being, and who, perhaps,

will never come into being, and the present enjoyment of the land, or its advantageous sale, is hindered by the contingent interest outstanding, it is generally needful to obtain a private act, which shall remove the obstruction without prejudice to the future possible owner, thus, by its extraordinary intervention, unfettering an estate which has been unwisely or unfortunately tied up and restricted. (2 Bl. Com. 344-5; 2 Lom. Dig. 498; V. C. 1873, ch. 112, §§ 20 to 24; V. C. 1887, ch. 107, §§ 2432 to 2436; *Ante*, pp. 421-'2.)

- 4<sup>m</sup>. Cases of Estates Vested in Infants, Idiots, and Lunatics, when for their Advantage a *Sale and Re-Investment are Desirable*.

As infants, idiots and lunatics can make no valid contract, lands vested in them cannot be sold, however important and desirable to them a sale and re-investment may be. Nor is there, at common law, any power, in the ordinary administration of justice, nor even in the courts of equity, to decree such a sale. The only mode of accomplishing the result in England (and until 1820 with us), is by private act, specially providing that the transaction, with cautious guards against abuse, shall be lawful and valid in the particular instance. (2 Bl. Com. 344-5; 2 Lom. Dig. 498.)

- 2<sup>l</sup>. Mode of Enacting Private Acts of Parliament so as to Guard Against Abuse.

Acts of this kind are carried on in both houses of parliament with great deliberation and caution, particularly in the house of lords; they are usually referred to two judges to examine and report the facts, and to settle all technical forms; other precautions against an injury upon the rights of third persons being also employed. (2 Bl. Com. 345; 2 Lom. Dig. 499);

W. C.

- 1<sup>m</sup>. Reference to Two Judges (in the House of Lords), to *Report upon the Facts, and to Settle Technical Forms*.

With us no reference is made to the judges, but to a committee from either house, as the act comes successively to be considered by the houses. And it is the duty of such committee to report upon the facts, and upon the general propriety of the action contemplated.

- 2<sup>m</sup>. Consent of the Parties who *are in Being, and Capable to Consent*.

The consent of all parties interested who are in being, and capable to consent, is required, unless such consent appear to be perversely, and without any reason withheld. (2 Bl. Com. 345.)

- 3<sup>m</sup>. An Equivalent in Money, or other Estate Provided for Persons Interested, who are Infants, or Otherwise *not Sui Juris*.



An equivalent in money or other estate is usually settled by the act upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by the private statute. (2 Bl. Com. 345.)

4<sup>m</sup>. General Saving of the Rights of all Parties not Consenting.

A general saving is constantly appended, at the close of the bill, of the right and interest of all persons whatsoever, except those whose consent is so given or purchased, as above mentioned, and who are therein particularly named or described, though it seems that even if such saving were omitted, the act shall bind none but the parties. (2 Bl. Com. 345; 2 Th. Co. Lit. 604, n. (A).)

5<sup>m</sup>. Relief if the Act be Obtained *by Fraud*, etc.

A private act is relieved against in a court of equity when it is obtained by *fraudulent suggestions*; and if *contrary to law or reason* will be held by any court before which it may be adduced in maintenance of asserted rights, to be merely void. (2 Bl. Com. 346; 2 Lom. Dig. 499–500; 2 Th. Co. Lit. 604, n. (A).; Cromwell's Case, 4 Co. 13 a; Spotswood v. Pendleton, 4 Call, 520.)

It will be remembered that it was formerly stated (*Ante*, Vol. I. p. 43,) that whilst of public statutes the courts must *ex officio* take notice, private statutes must, at common law, be both *pleaded and proved*, and cannot otherwise be adverted to, either by court or jury. (Dwarr. Stats. (Potter's ed.) 53, and n. (1).) And it will also be remembered that we have in Virginia a statute (V. C. 1873, ch. 172, § 1; V. C. 1887, ch. 164, § 3328), declaring that such special acts may be *given in evidence* without being specially pleaded, although it is still necessary to prove them, and they cannot be noticed like public statutes, *ex officio*. (Legrand v. Hamp. Sid. Col. 5 Munf. 324; Somerville v. Wimbish, 7 Grat. 225.)

2<sup>k</sup>. Conveyance by Private Act of the Legislature, *in Virginia*.

Conveyances by private act of the legislature, in Virginia, are subject, so far as they exist, to the same general principles as in England. Previous to the abolition of estates-tail (7th October, 1776), such private acts were not unfrequent. They were, indeed, after 1734, the only means whereby an estate-tail, exceeding the value of £200 sterling, or adjacent to other entailed estates of the same owner, could be aliened, or *docked*. (*Ante*, p. 95.) The simplicity of our property arrangements did not in other cases often demand the interposition of an act of assembly. But since the abolition of estates-tail, in 1776 (V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107, § 2421), and the statute of 1819, taking effect 1st January, 1820, committing to the courts of

chancery power to sell the lands of infants, lunatics, etc. (V. C. 1873, ch. 124, §§ 1, 2 & seq.; V. C. 1887, ch. 117, §§ 2615, 2616 & seq.); and since, also, a more recent statute (of March 15, 1858), conferring upon the courts of chancery power to direct the sale of estates which are subject to contingent limitations, and to invest the proceeds of sale for the use of the person holding the *present interest* in the estate, subject to the future limitations thereof (V. C. 1873, ch. 112, §§ 20 to 24; V. C. 1887, ch. 107, §§ 2432 to 2436; *Ante*, p. 422); private acts have been very little used amongst us. And the constitution of 1869, like that of 1850, discourages, if it does not inhibit, private legislation in all cases. "The general assembly," says the constitution, "shall confer on the courts the power to grant divorces, change the names of persons, and direct the sale of estates belonging to infants, and other persons under legal disabilities; but *shall not, by special legislation, grant relief in such cases, or in any other case of which the courts or other tribunals may have jurisdiction.*" (Const. 1869, Art. V., § 20. See *Ante*, p. 422; *Faulkner v. Davis*, 18 Grat. 651, 667.)

## 2i. King's or Commonwealth's Grants.

King's or commonwealth's grants are also matter of public record. For as the author of that very interesting book, *Doctor and Student*, says (Dial. I., c. 8, p. 31), the king's excellency is so high in the law (and nothing less can be said of the commonwealth), that no *freehold* may be given to the king, nor derived from him, but by *matter of record*. And to this end a variety of offices are erected in regular subordination one to another, through which all the king's (or commonwealth's) grants must pass, and be transcribed and enrolled, that the same may be narrowly inspected by the public officers appointed for the purpose, and wrong be thus prevented, whether to the rights of the subject, or the interests of the State. These grants are contained in charters or letters *patent*, that is, open or unsealed letters, *litera patentes*; so called because they are not *sealed up*, but exposed to open view, with an impression taken from the great seal pendant at the bottom; and are usually directed or addressed, not to one or more designated individuals, but to all persons whomsoever who may be concerned. And therein they differ from certain other letters, sealed also, it may be, with the great seal, but directed to particular persons, and for particular purposes, which, therefore, not being proper for public inspection, are closed up and sealed on the outside, and are therefore called writs *close*, *litera clausa*, and are recorded in the *close-rolls* in England in the same manner as the others are in the *patent rolls*. (2 Bl. Com. 346; Bac. Abr. Prerog. (F.); 2 Lom. Dig. 500 & seq.)

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1<sup>k</sup>. The General Principles Applicable to King's or Commonwealth's Grants; w. c.

1<sup>l</sup>. No *Freehold Estate* in Lands or Tenements can Pass to or from the Crown or Commonwealth save *by Matter of Record*.

See 2 Bl. Com. 346; 2 Lom. Dig. 500.

2<sup>l</sup>. In Virginia Commonwealth's Grants can be Founded only on Some General or Special *Act of the Legislature*.

The legislature with us, and not the executive, is charged with the power to dispose of whatever may be within the gift of the commonwealth, whether of domain, or of the public treasure, or of privilege or franchise. And hence, for every public grant (although the executive functionaries may be the intermediate agents for making it), there must be the authority of a general or special statute. (2 Lom. Dig. 501.)

3<sup>l</sup>. The Construction of King's and Commonwealth's Grants; w. c.

1<sup>m</sup>. King's and Commonwealth's Grants are Construed Most Beneficially for the Crown or Commonwealth unless they are *Founded on Valuable Consideration*.

Words which are ambiguous are to be construed most strongly *against him who uses them*, in order that he may be kept under the strongest inducement to avoid ambiguities, and to express himself with clearness. Hence the general prevailing maxim, *verba chartarum fortius accipiuntur contra proferentem*, deeds are to be construed most strongly against the grantor. (Broom's Max. 456.) But in the case of the commonwealth or the crown, supposing the grant to be *gratuitous*, the words are in truth the words of the *grantee*, only echoed back by the sovereign. It is, therefore, no exception to the *principle* of the maxim, but on the contrary, in pursuance of it, that all king's or commonwealth's grants shall be construed, when *without valuable consideration*, most beneficially for the crown or commonwealth. If founded on valuable consideration, the words are supposed to be, and generally are in fact, the words of the *sovereign grantor*, and then the grant is construed, like the grants of individuals, most favorably to the grantee, for to hold otherwise would hardly consist with the honorable intention of the sovereign. (2 Th. Co. Lit. 607, n. (A.); Molyn's Case, 6 Co. 6 a; Case of Alton Woods, 1 Co. 41 a. n. (R. 2).)

2<sup>m</sup>. King's and Commonwealth's Grants *Include no Incidents*.

A private person's grant includes many things besides what are expressed, if necessary for the operation of the grant, and the enjoyment of the thing granted, agreeably

to the maxim, *cuicumque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit*. Thus, a grant of a piece of ground, surrounded by land of the grantor, passes, as incident to the grant, a right of way to it over the *grantor's land*; and a grant of the profits of land includes free ingress, egress and regress to cut and carry away the profits. (Broom's Max. 362; 2 Bl. Com. 347.) But a king's or commonwealth's grant includes in general, when the grant is *gratuitous*, no incidents, nor enures to any other intent than that which is precisely expressed in the grant. (2 Bl. Com. 347; 2 Th. Co Lit. 607, n. (A).)

This doctrine is believed to be founded on the same consideration as the foregoing (1<sup>st</sup>), and to be limited, therefore, to *gratuitous grants*; so that, if there be a valuable consideration for the grant, necessary incidents are included, as in the case of private persons. Such a conclusion seems not only to result from the fact that in grants for valuable consideration the words are those of the sovereign himself, but it is rendered necessary for his own honor. (2 Lom. Dig. 501; Molyn's Case, 6 Co. 6 a.)

And as for the most part, with us, grants of the commonwealth are founded on valuable consideration, it is believed that the doctrine in Virginia assimilates their construction to that of private grants, both as to the including of incidents, and the interpreting of them most favorably to the grantee. (2 Lom. Dig. 501.)

3<sup>rd</sup>. In Case of False Suggestion, Mistake or Illegality; King's and Commonwealth's *Grants are Void*.

When the false suggestion, mistake or illegality appears on the *face of the grant*, it is absolutely void, and may be declared so to be in whatever court it is adduced as an evidence of title. So, it seems that it may be impeached in a court of law, for any matter which makes it *absolutely void*; as where the State has no title to the thing granted, where the officer had no authority to issue the grant, or where the grantee was dead at the time of issuing it.

But for causes anterior to its being issued, which render it voidable merely, and which are not apparent on its face, it appears to be impeachable only by *scire facias* or bill in equity. (Hambleton v. Wells, 4 Call. 213; White v. Jones, 4 Call. 253; Alexander v. Greenup, 1 Munf. 134; Witherinton v. McDonald, 1 H. & M. 306; Norvell v. Camm, 6 Munf. 238; Warwick & ux. v. Norvell, 1 Rob. 308; Whittington v. Christian, 2 Rand. 353; Polk's Lessee v. Wendal, 9 Cr. 87; S. C. 5 Wheat. 293; Patterson v. Winn, 11 Wheat. 380; Blankenpickler v. Ander-



son, 16 Grat. 62; Randolph v. Longdale Iron Co. 84 Va. 466.)

2<sup>k</sup>. The Manner of Proceeding to Obtain King's and Commonwealth's Grants; w. c.

1<sup>l</sup>. The Manner of Proceeding to Obtain *King's Grants in England*.

The various steps may be seen from 2 Bl. Com. 347, and need here be stated only in a summary way.

w. c.

1<sup>m</sup>. The Warrant from the Crown;

2<sup>m</sup>. Bill Prepared by the Attorney- or Solicitor-General;

3<sup>m</sup>. Subscription (*at the top*) of the *Royal Sign-manual*;

4<sup>m</sup>. Sealing with the *Royal Privy Signet*, kept in the Custody of the Principal *Secretary of State*;

5<sup>m</sup>. Sealing with the Great Seal, kept in the Custody of the *Lord Chancellor*.

2<sup>l</sup>. The Manner of Proceeding to Obtain *Commonwealth's Grants in Virginia*.

We have seen that commonwealth's grants in Virginia (and the same is true generally in the United States), are founded exclusively upon statutes, general or special. With us they relate in practice to *nothing but lands*, and for the most part, *waste and unappropriated lands*; although, of course, the legislature has power to grant anything belonging to the commonwealth. (2 Lom. Dig. 502 & seq.; Wilcox v. Calloway, 1 Wash. 138; Whittington v. Christian, 2 Rand. 353; Levasser v. Washburn, 11 Grat. 584-'5.)

w. c.

1<sup>m</sup>. The Steps to be Taken in Virginia to Obtain a Grant for Waste and Unappropriated Lands.

The steps to be taken to obtain a grant for waste and unappropriated lands in Virginia are as follows: (1), A warrant from the land office; (2), An entry or location by designated limits in the books of the county surveyor of the county where the waste lands are supposed to be; (3), Survey by the county surveyor; and (4), Grant or letters-patent. (2 Lom. Dig. 502 & seq.; V. C. 1873, ch. 39, § 1; Id. ch. 108, §§ 4, 6, 2, 52-'3; V. C. 1887, ch. 104, §§ 2302 & seq.; Id. § 2349; Id. ch. 29, § 675.)

w. c.

1<sup>n</sup>. A Warrant from the Register of the Land Office.

The first step in the proceeding is to obtain a *warrant* from the register of the land office, empowering the party to claim and appropriate the number of acres mentioned in the warrant, of *waste and unappropriated lands* belonging to the commonwealth, *wherever he can find them*. The warrant authorizes him to survey only waste and unappropriated lands, and he undertakes

himself to find lands of that description. The warrant is no appropriation, but only confers a power to appropriate, and the mode pointed out by the legislature is the sole mode which can give title to any particular lands. (2 Lom. Dig. 502-'3; *Wilson v. Mason*, 1 Cr. 45; *Taylor v. Brown*, 5 Cr. 234.)

The warrant, until it is located by entry in the surveyor's book, on specified lands, is *personal estate*; after entry, the interest becomes *real estate*; and the warrant, entry, or survey, may either of them be assigned. (2 Lom. Dig. 503.) But the assignment can only be made *in writing, endorsed on the warrant*, and attested by at least two witnesses. (V. C. 1887, ch. 104, § 2342.)

In order to obtain a warrant, the procedure includes the steps following;

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- 1°. Paying to the State Treasurer the Sum Prescribed by Law.

The price at present prescribed is ten cents *per acre*, for which the treasurer's receipt is taken.

See V. C. 1873, ch. 39, § 1; V. C. 1887, ch. 29, § 675.

- 2°. Delivering Treasurer's Receipt to First Auditor, and Getting his Certificate Thereof.

See V. C. 1873, ch. 39, § 1; V. C. 1887, ch. 29, § 675.

- 3°. Delivering Auditor's Certificate to Register of Land Office, who Thereupon Issues the Land-Warrant.

See V. C. 1873, ch. 39, § 1; *Id.* ch. 108, § 4, &c.; V. C. 1887, ch. 29, § 675; *Id.* ch. 104, §§ 2302 & seq.

- 2<sup>n</sup>. The Entry or Location of the Land, by Designated Limits, in the Land-Book of the County-Surveyor.

The statute directs that the holder of a land-warrant may lodge it with the surveyor of the county in which it is desired to locate it, making his location so *special and precise* that others may be able, with certainty, to *locate their warrants on the adjacent lands*. (V. C. 1873, ch. 108, §§ 6, &c.; V. C. 1887, ch. 104, §§ 2304 & seq.)

The degree of certainty which must characterize the location is illustrated by very numerous cases, for which it must suffice to refer to 2 Lom. Dig. 504 to 507, and to *Harper v. Baugh*, 9 Grat. 508; *McNeel v. Harold*, 11 Grat. 309.

- 3<sup>n</sup>. The Survey by the County Surveyor of the Land Appropriated, and the Return of the Survey to the Register of the Land Office.

See V. C. 1873, ch. 108, §§ 17, &c.; V. C. 1887, ch. 104, §§ 2315 & seq.; 2 Lom. Dig. 507 & seq.

- 4<sup>n</sup>. The Grant of Letters-Patent for the Land.

The grant is, in form, a certificate from the governor of the commonwealth, that the commonwealth has

granted the land by the description contained in the survey, to the patentee. It is under the seal of the State, is attested by the signature of the governor, and counter-signed by the register of the land office. (V. C. 1873, ch. 108, §§ 52, 53; V. C. 1887, ch. 104, §§ 2349, 2350.)

Letters-patent from the commonwealth pass to the grantee the legal estate and seisin of the State. Hence if a patent contains a reservation of a designated quantity of land in favor of a prior claimant, that quantity does not pass by the grant, and if such prior claimant procures a patent for the same before any other claimant, he will be clothed with the legal title. But if that subsequent claimant procures a patent first, the legal title will be vested in him; and the only *legal* redress for the prior claimant is a *repleat*. (Hopkins v. Ward, 6 Munf. 38; Nichols v. Covey, 4 Rand. 365; Carter v. Hagan, 75 Va. 560-61.)

2<sup>m</sup>. The Mode of Repealing or Vacating the Commonwealth's Grants, or Letters-Patent.

The distinction to which reference has already been made (*Ante*, p. 987), must here be recalled, namely, between cases where the cause of vacating the grant is apparent on its face, or renders it *absolutely void*, and cases where the cause is not so apparent, and renders the grant *only voidable*. In the latter class of cases it will be remembered that the repeal and cancellation or avoidance of the patent can be made only by *scire facias*, or *bill in equity*, in the *circuit or corporation court* of the county or corporation wherein the land, or some part of it, lies (V. C. 1873, ch. 108, § 71; V. C. 1873, ch. 154, § 38; V. C. 1887, ch. 104, § 2368; *Id.* ch. 147, § 3055; Va. Const. Art. vi., §§ 14, &c.), whilst, if the objection to the patent is *apparent on its face*, or renders it *absolutely void*, it may be taken notice of in a court of law. (*Ante*, p. 987; 2 Lom. Dig. 514; Blankenpickler v. Anderson, 16 Grat. 62.)

3<sup>m</sup>. *Caveats* to Prevent the Issuing of Grants.

The *caveat* is entered in the land office. It is a *caution* against any grant being issued to the party seeking to appropriate the lands as waste; and sets out plainly and definitely in the *caveat* itself the reasons on which it is founded. The *caveat* is, by the register of the land office, certified to the circuit court of the county in which the land lies; and thereupon the clerk of the court to which it is certified issues a summons requiring the applicant for the grant to appear and defend his right. The court is then to proceed to determine the right of the cause in a summary way, without pleadings in writing, and to impanel a jury, if required by any party, in order to ascertain any material facts not agreed by the parties. If

judgment be *for the defendant*, upon delivery of a certified copy of it into the land office, the *current is vacated*, and the grant issues in accordance with the warrant, location and survey. If it be *for the plaintiff*, upon delivering a certified copy into the land office, together with a plat and certificate of survey, the grant *is issued to him*. (V. C. 1873, ch. 108, §§ 29 to 34 & seq.; V. C. 1887, ch. 104, §§ 2312 to 2314, 2327 to 2338; 2 Lom. Dig. 510 & seq.)

### 3<sup>i</sup>. Fines; w. c.

#### 1<sup>k</sup>. The Nature of a Fine.

A fine is an *amicable composition* of a *collusive suit*, intended to operate *as a conveyance of lands* by means of a solemn *recognition* by matter of record, contained in such collusive suit, of the title of the proposed vendee, which he asserts by the suit to be pre-existing in him, and which the grantor, the defendant in the suit, admits in solemn form upon the record to be so. The proceeding is of unknown antiquity, going back to the first rudiments of the common law, and, as it appears, even antedating the Conquest. It is called fine (*finis*), because it puts an end, not only to the suit thus collusively commenced, but also to all other suits and controversies touching the same subject and upon the same title. (2. Bl. Com. 348-9; 2 Th. Co. Lit. 604 & seq., and n's (1), (2), and (B).)

Previous to 1705, fines appear to have been employed in Virginia, as common recoveries also were, in order to bar or aliene estates-tail. But by act of Assembly of that year (3 Hen. Stats. 320), it was enacted "that it shall not be lawful at any time hereafter for any person or persons whatsoever to levy any fine, or to suffer any recovery to be had, whereby to cut off or defeat any estate in fee-tail \* \* \* within this colony." And instead, a special act of Assembly was directed to be obtained in each case. (*Ante*, p. 95.) Since 1705, therefore, fines, as a mode of conveyance, seem to have been unknown in Virginia.

And yet in respect to conveyances *by married women*, we find a distinct acknowledgment in 1674, by the General Assembly, that "Wee have no *ffines* and recoveries." (2 Hen. Stats. 317.)

#### 2<sup>k</sup>. The Proceedings in a Fine; w. c.

##### 1<sup>i</sup>. The Writ of *Præcipe Quod Reddat*.

This is the writ whereby the collusive suit is commenced by the vendee against the vendor, the writ being a precept to the sheriff, bidding him "command the defendant" to render the premises in question to the plaintiff, in pursuance of his covenant to that effect, or to show, at a day appointed, why he has not done it. (2 Bl. Com. 350; Id. App'x, 449.)

##### 2<sup>i</sup>. The *Licentia Concordandi*, or Leave to Agree the Suit.



As soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of accommodation to the plaintiff, who, accepting them, but having, upon suing out a writ, given pledges to prosecute his suit, which he endangers if he now deserts it without license, he therefore applies to the court for leave to make the matter up, which is readily granted. (2 Bl. Com. 350; Id. App'x, 449.)

3<sup>l</sup>. The Concord of Agreement itself, after Leave Obtained.

This is usually an acknowledgment from the defendant (the intended vendor), that the lands in question are the right of the complainant (the intended vendee). And from this acknowledgment, the party levying the fine (the defendant or vendor) is called the *cognizor*, and he to whom it is levied (that is, the complainant or vendee) the *cognizee*. This acknowledgment is made in open court, or before one of the judges of the court, or before two commissioners appointed for the purpose; and if made out of court, is certified by the judge or commissioners, and recorded. And if the cognizor be a *feme covert*, she is privately examined, whether she does it willingly and freely, or by compulsion of her husband. (2 Bl. Com. 350-'51; Id. App'x, 449.)

By these acts all the essential parts of a fine are completed. The remaining parts may even be carried on after the cognizor's death.

4<sup>l</sup>. The Note of the Fine.

The note of the fine is only an abstract of the writ and the concord, naming the parties, the land, and the agreement, and is enrolled as part of the record. (2 Bl. Com. 351; Id. App'x, 449-'50.)

5<sup>l</sup>. The Foot of the Fine, or *Conclusion of It*.

The foot of the fine, or conclusion of it, includes the whole matter, reciting the parties, the subject conveyed, and when, where, and before whom it was acknowledged or levied. And this general statement is recorded in an office set apart for the purpose, to which all persons concerned may readily find access. And this completes the fine at common law; but by sundry statutes, extending from 27 Edward I., c. 1, to 31 Elizabeth, c. 2, several more solemnities were superadded, by repeated readings in open court, and by *proclamations* or order, to give greater notoriety to such transactions. (2 Bl. Com. 352; Id. App'x, 450.)

3<sup>k</sup>. The Several Kinds of Fines.

Fines are of *four several kinds*, of which it must suffice to say, that the first is an acknowledgment of the right of the *cognizee* to the land, as derived by previous gift from the *cognizor*; the second, an acknowledgment of the right

*merely*, without mentioning the previous gift of the *cognizor*; the third, where the *cognizor*, in order to put an end to disputes, though he acknowledges no precedent right, yet grants the *cognizee* an estate *de novo*; and the fourth, where the *cognizor* recognizes the *precise right of the cognizee*, and the latter thereupon *grants back* again to the *cognizor*, or perhaps to a stranger, some other estate or interest in the premises. (2 Bl. Com. 352-3.)

#### 4<sup>k</sup>. The Purposes for which Fines were Employed.

Fines, while they were in use in England, were employed to bar estates-tail (that is, to convey them in fee-simple), to cut off remainders and reversions dependent thereon, to convey estates and rights of *married women*; and generally to confirm and assure suspicious titles, and put an end to all litigation. (2 Bl. Com. 353-4, and n. (14).) By Stat. 3 and 4 Wm. IV., c. 74 (A. D. 1833), they were abolished, and the simpler and far cheaper method substituted of a *deed enrolled in the court of chancery*. (Wms. Real Prop. 46 & seq.)

#### 5<sup>k</sup>. The Force and Effect of a Fine; w. c.

##### 1. The Force and Effect of a Fine at Common Law.

The effect of a fine at common law is owing to the apparent suit and the judgment therein; and in the case of a married woman to the *pricy examination also*. But the statute *de donis conditionalibus* (13 Edw. I., c. 1), whereby estates-tail were created, *expressly* declared that such estates should not be barred by any fine. Hence, it was not until 4 Hen. VII., c. 24, and especially 32 Hen. VIII., c. 36 (after estates-tail had been determined to be alienable by means of *common recoveries*), that a fine became adequate for the purpose of barring such estates, and remainders and reversions dependent thereon. (2 Bl. Com. 554, 555.)

##### 2. The Force and Effect of a Fine by Sundry Statutes in England.

A number of statutes were from time to time enacted to regulate the force and effect of a fine, of which the principal are 4 Hen. VII., c. 24, and 23 Hen. VIII., c. 33, the tenor of which, and the general effect of all, may be seen, 2 Bl. Com. 352, 354-'5, and Wms. Real Prop. 47.

#### 4<sup>l</sup>. Common Recoveries; w. c.

##### 1<sup>k</sup>. The Origin and Nature of Common Recoveries.

Common recoveries were invented by the ecclesiastics, being one of their several very ingenious devices to evade the statutes of *mortmain*, introduced by them (about A. D. 1279), immediately after the statute 7 Edw. I., Stat. 2. (*Ante*, pp. 592-3.) A common recovery is a *collusive suit*, instituted by the intended grantee against the intended grantor, in which the land in question is supposed to be

*recovered by the grantee.* The sharp-witted inventors derived little benefit from it, the parliament having with unwonted promptness, by statute 13 Edw. I., c. 32 (A. D. 1285), embraced *collusive recoveries* within the statutes of *mortmain* (*Ante*, p. 592), and this method of conveyance seems to have been much neglected for almost two hundred years, when in *Taltarn's case* (12 Edw. IV., A. D. 1473), it was first employed to *bar estates-tail*, and the remainders and reversions dependent thereon, and was thus awakened to fresh life and energy. (2 Bl. Com. 357 & seq.; *Ante*, p. 93.)

2<sup>k</sup>. The Proceedings in Common Recoveries; w. c.

1<sup>l</sup>. The Writ of *Præcipe Quod Reddat*.

This is the writ which institutes the collusive suit brought by the intended grantee against the intended grantor, in order to recover the land in question, as if it were already the property of the grantee. It is a precept to the sheriff, bidding him "command the *tenant of the freehold* in the lands (that is, the grantor) to render to the *demandant* (that is, the grantee) the lands in question," and unless he shall do so, to appear before the court at a designated day, and show wherefore he has not done it. (2 Bl. Com. 357-'8; *Id.* App'x, 450-'51.)

It may be observed, that the suit purports to be a writ of entry *sur disseisin in the post* (3 Bl. Com. 180 & seq.), and that the plaintiff is termed, as in all real actions, the *demandant*, and the defendant, the *tenant*.

2<sup>l</sup>. The Appearance of the *Tenant*, in Obedience to the Mandate of the Writ, and His *Voucher* of a Pretended Vendor to Warranty.

The tenant, upon entering his appearance, calls upon one Morland, who is supposed to have sold the land to the tenant with warranty, to make good such warranty by defending the title. This is called the *voucher* (*vocatio*), or calling of Morland to warranty; and Morland is called the *vouchee*. (*Ante*, p. 713.)

3<sup>l</sup>. The Appearance of the Vouchee, and His Undertaking to Defend the Title.

Morland, the vouchee, being thus summoned, appears, and upon the demandant's briefly reiterating his demand as against him, undertakes to defend the title.

4<sup>l</sup>. Leave to Demandant to *Imparl* (confer) with the *Vouchee*, and the *Vouchee's Default*.

At this stage of the proceeding, the demandant desires of the court leave to *imparl*, or confer with the vouchee in private, which is allowed him of course; and soon afterwards the demandant returns into court, but the vouchee comes not again, but makes default; whereupon he is solemnly called, and still not appearing, his default is recorded. (2 Bl. Com. 358; *Id.* App'x, 451-'2.)

5<sup>l</sup>. Judgment for the Land in Question *Against the Tenant, and for the Latter Over Against the Vouchee.*

Judgment upon default thus of the vouchee is given for the demandant, now called the *recoveror*, to recover the lands in question against the tenant, who is now known as the *recoveree*, and the tenant has judgment to recover of Morland, the *vouchee*, lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter. *Ante*, p. 713. (2 Bl. Com. 358-'9; *Id.* App'x, 452.)

This is called the recompense, or *recovery in value*. But Morland, the vouchee, being always a landless individual (he is usually the crier of the court, who, from being often thus vouched, is called the *common vouchee*), it is plain that the tenant has only a nominal recompense for the lands so recovered against him by the demandant; which lands are now absolutely vested in the *recoveror* by judgment of law, and seisin thereof is delivered by the sheriff of the county; so that this collusive recovery operates merely in the nature of a *conveyance in fee-simple*, from the tenant to the demandant, barring or transferring any estate-tail, or other interest in possession which the tenant may have in the lands, and all remainders or reversions dependent thereon. (2 Bl. Com. 359.)

The recovery above described is with a single voucher only; but sometimes it is with *double, treble*, or farther voucher, as the exigency of the case may require. And indeed, whilst common recoveries were used as a mode of conveyance, it was usual always to have a recovery with double voucher at the least, by first conveying an estate of freehold to any indifferent person against whom the *præcipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee. (2 Bl. Com. App'x, 451-'2.) For if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised; whereas, if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered. (2 Bl. Com. 359; 2 Th. Co. Lit. 615; 1 Prest. Convs. 7 and 125.)

3<sup>k</sup>. Causes of the Efficacy of Common Recoveries as a *Mode of Conveyance*.

The efficacy of a common recovery as a mode of conveyance was due to two causes: (1), The apparent *suit and judgment*, which seemed to ascertain the subject to be the property of the *demandant*, the intended grantee, which suit and judgment were assumed to be *in iuribus*, and were not allowed to be shown to be collusive; and (2), The sup-



posed *recompense in value*, by means of the voucher to warranty, which recompense was, in contemplation of law, held as the lands recovered were held, and in lieu of the same. (2 Bl. Com. 360 & seq.)

#### 4<sup>k</sup>. The Force and Effect of Common Recoveries.

A common recovery, whilst such assurances subsisted, was an absolute bar, not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. (2 Bl. Com. 361; Bac. Abr. Fines and Recoveries, (C).)

#### 5<sup>k</sup>. State of the Law as to Common Recoveries at Present.

In Virginia, common recoveries were frequent, in order to bar estates-tail, prior to 1705, but since that date they have been, like fines, practically unknown. (*Ante*, p. 95, 991; 3 Hen. Stats. 320.) But see *Ante*, p. 991; 2 Hen. Stats. 317. And in England they were abolished by the same statute which abolished fines (3 & 4 Wm. IV., c. 74, A. D. 1833), which substituted in their place a simple deed, executed by the tenant in tail, and enrolled within six months in the court of chancery. (Wms. Real Prop. 46, 48.)

## CHAPTER XXVI.

### OF ALIENATION BY SPECIAL CUSTOM.

#### 3<sup>h</sup>. Alienation by Special Custom.

Conveyances which owe their validity and effect to the *special custom* (that is, the *local law*) of particular places relate exclusively to *copyhold lands*, and such customary estates as are holden in *ancient demesne*, etc. Of these, copyhold estates are in England much the more important. They embrace, indeed, no inconsiderable part of the landed property of England. We have seen (*Ante*, p. 202) that they are held *at the will of the lord*, as defined by the *custom of the manor*, and evidenced by the copy of the rolls or records of the *court of the manor*, or barony; and they are transferred in like manner, according to the *custom of the manor*. (2 Bl. Com. 365 & seq.)

This class of estates can have no existence in Virginia, because manors and manorial courts, which are essential to them, are not found here. Nor can we have here any conveyance which owes its operation to *custom*, in the sense of a *local law*. For a custom must be of *immemorial continuance*, to the contrary of which the memory of man, whether the living or the historic memory, runneth not. But when our ancestors came hither in 1607, they brought with them the *general common law* of England, but, of course, *no local customs*, so that any local custom which is now alleged to exist

within this commonwealth must have originated since 1607, and, therefore, cannot be *immemorial*. (4 *Inst.*, p. 565; *Harris v. Carson*, 7 Leigh, 632; *Mason v. Mayers*, 2 Rob. 697; *Gross v. Criss*, 3 Grat. 262.)

## CHAPTER XXVII.

### OF ALIENATION BY DEVISE.

#### 4<sup>h</sup>. Alienation by Devise.

The last method of conveying real property is by *devise*, or disposition contained in a man's last will and testament, in writing. And in considering this subject it will be convenient, for reasons which will appear in the sequel, to enquire into the nature and attributes, not only of *wills of lands*, which now more immediately are to engage our attention, but also of wills of *personal estate*.

The student is requested to observe, that the word *devise* (from Fr. *deriser*—to speak) means a gift by will of *real property*, whilst the words *legacy* and *bequest* both signify a gift by will of chattels. Hence, *devisee* means one to whom real property is *devised*, and *legatee* one to whom personal property is *bequeathed*. (2 Th. Co. Lit. 636, 646.)

A *will* is a declaration, made in due form of law, of a man's mind or last will of what he would have to be done with his estate, whether real or personal, after his death. The word *testament* is synonymous with it, the two words being indiscriminately used in our law. (Bac. Abr. Wills, &c. (A); V. C. 1873, ch. 118, § 1; V. C. 1887, ch. 112, § 2511.) A will or testament is always in its nature *ambulatory*, that is, revocable during the life-time of the maker; and if truly a *will*, and not partaking of the nature of a *contract*, it cannot be made irrevocable by the most express declaration. (2 Th. Co. Lit. 646; 4 Kent's Com. 520; *Vynior's Case*, 8 Co. 82 a.)

In the discussion of the subject it is proposed to set forth, (1), The original and antiquity of the devises of real property; (2), The statutes touching the making, the revocation, and the republication of wills; (3), The probate of wills; and (4), How wills are void, although duly executed;

W. C.

#### 1<sup>st</sup>. The Original and Antiquity of Wills of Real Property.

Prior to the Norman Conquest, the better opinion seems to be that lands were freely devisable amongst the Anglo-Saxon and Danish people of England, though it would appear to have been rather adopted from the remnant of the Roman laws and customs which they found there, than brought from their own country; for Tacitus, writing of the ancient Germans, says, *successores sui cuique liberati nullum*

*testamentum*. (Germ. XX.) After the Conquest (A. D. 1066), and the introduction of the system of feuds, the power of devising lands ceased, except by the *custom* of particular places; and except also as to *terms for years* in lands, which, on account of their original imbecility and insignificance, were regarded as *personalty* (*Ante*, p. 190), and as such were always, like other chattels, disposable by will. This limitation of the testamentary power, as to freehold estates, proceeded partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in case of a last will, partly from a jealousy of death-bed dispositions, but *principally* from the general restraint of alienation incident to the rigors of the feudal system, as it was *established*, or at least *perfected*, by the first William, about twenty years after his succession (say about A. D. 1086). (2 Bl. Com. 374; 2 Th. Co. Lit. 636, n. (2).)

In the reign of Edward I., the statute of *quia emptores* (18 Edw. I., c. 1, A. D. 1290), removed in great measure this latter bar to the exercise of testamentary power; that is, as to all *freeholders*, except the king's tenants *in capite*, as to whom it was also removed by statute, 1 Edward III., c. 12 (A. D. 1327). But the two former obstructions still continued to operate, and parliament was not moved, either by its own wisdom or the demands of the people of England, to relax or remove the common law restriction in respect to alienating lands by will, until 32 Henry VIII. (A. D. 1541). That the English people, jealous as they are, and have ever been, of their rights of property, should have acquiesced so long in their deprivation of the right to dispose of their lands by will, is a remarkable phenomenon, which is only partially explained by the introduction of *uses*, of which an account has already been given. (*Ante*, pp. 204 & seq.) It will be remembered, that *uses* came into fashion in the latter part of the reign of Edward III. (say about A. D. 1370), and that ere the lapse of many years, declarations of the *use* by *will*, were readily protected and enforced in equity as declarations made by any other sort of instrument were; and we saw that *uses* were not a little recommended to public favor by the fact that they were thus devisable (*Ante*, p. 205); and that through that *medium* the power of devising lands was thus exercised in *effect* and *reality*. But when, in 1536, the famous statute, 27 Henry VIII., c. 10, was enacted, which was designed to abolish *uses* altogether, by transferring the possession or legal estate to the use, and was at first supposed to have accomplished its intended purpose, although in the sequel it proved far otherwise, and *uses* were as easily created as before; when that statute was enacted, and the people found themselves (as was thought), deprived of the

power of devising their lands through the medium of uses, they dealt so potentially with the parliament as, within the then wonderfully short period of five years, to obtain the statute since known as the *statute of wills and devises*, (32 Hen. VIII., c. 1, explained by 34 Hen. VIII., c. 5 (A. D. 1541. 1543); 2 Th. Co. Lit. 636, n. (2).)

The statutes 32 and 34 Hen. VIII. permitted to be devised *all* the testator's *socage* and *two-thirds* of his *chivalry* lands; and 12 Car. II., c. 24 (A. D. 1660), having for the most part converted the chivalry tenures of England into socage tenures, pretty much all the lands in the kingdom became thereby devisable. But by neither of the first statutes of wills was any form or ceremony prescribed, save that the will should be *in writing*; and very many frauds and perjuries having thence resulted, wholesome safeguards and detailed directions were devised and provided by the oft-cited statute of *frauds and perjuries*, 29 Car. II., c. 3, for wills, and also for certain other transactions, of which copious explanations have been presented in several passages of this volume (*Ante*, 660, 843-4). More recently, that section of 29 Car. II., c. 3, which relates to wills of lands (§ 5), has been modified in some of its details by 7 Wm. IV. and 1 Vict. c. 26, and by 15 and 16 Vict. c. 24, and we have substantially incorporated into our statute of wills as well those later English statutes, as 29 Car. II., c. 3, § 5. (V. C. 1873, ch. 118, §§ 2, 3, 4 & seq.; V. C. 1887, ch. 112, §§ 2512 to 2515 & seq.; 2 Th. Co. Lit. 636 & seq., n's (2), (4); 2 Bl. Com. 375 & seq., and notes.)

From what has been said, it is apparent that in every country which derives its jurisprudence from England (as do all these states except Louisiana), the *right to alien* freehold estates in lands at all, and the *mode of alienation*, must depend on *statute law*; and hence the extent of the right, and the mode of exercising it, may be expected to vary, more or less, in the several communities so situated; although, in respect to *wills* of lands especially, the statutes of the American States generally have been derived from a common English original, besides copying from one another, and are, therefore, in structure, and even in terms, closely assimilated.

## 2<sup>i</sup>. The Statute Law Touching the Making, the Revocation, and the Re-publication of Wills.

We have seen that, by the common law, *wills of chattels*, real and personal, were always allowed, and consequently no statute was needed to confer the *right to make* such wills; but experience has, from time to time, demonstrated the necessity, in order to guard against fraud and perjury, of prescribing forms and ceremonies therefor, which were wholly unknown to the common law. Indeed, the law did not, in such cases, even demand *a writing*, but permitted wills of this



character to be by word of mouth merely. The occasion for such statutory safeguards having become more and more apparent, the tendency has been for many years increasing to make the forms and ceremonies more stringent, until at length they differ but little from those required for wills of lands. It will, therefore, be a saving of time, space, and pains, to unite the exposition of the two subjects, notwithstanding it must sometimes lead to divergencies from the main topic of discussion.

The student will soon discover that the statute law principally to be considered under this head is that of Virginia, which, however, is essentially the same as in the other states; but references will occasionally be made to the English statutes, so as to develop the prominent diversities between them and our own. Let us observe the provisions of this statute law in connection with, (1), The making of wills; (2), The revocation of wills; and (3), The re-publication of wills;

W. C.

#### 1<sup>k</sup>. The Making of Wills.

This subject resolves itself into, (1), The making of wills of *lands*, or real property; and (2), The making of wills of *chattels*;

W. C.

#### 1<sup>l</sup>. The Making of Wills of *Lands*, or *Real Property*.

The statute touching the making of such wills in all communities may be analyzed under the heads following: (1), The persons who may make wills of lands; (2), The persons to whom lands may be devised; (3), What real property is devisable; and (4), What ceremonies are prescribed for wills of lands. Let us see what the law is under these several heads, specially in Virginia;

W. C.

#### 1<sup>m</sup>. The Persons who may *Make Wills of Lands*.

The statute with us permits to make a will of lands *every person* who is of sound mind, over the age of twenty-one years, and not a married woman; and a married woman also is permitted to do so as to her *separate estate*, and in the exercise of a *power of appointment*. (V. C. 1873, ch. 118, §§ 2, 3; V. C. 1887, ch. 112, §§ 2512, 2513.)

The diversity between this provision and the result of the several English statutes is not to us important. They permit to make a will of lands all persons (except joint-tenants) who are seised *in fee-simple*, or *pur autre vie* (but not *in fee-tail*), or possessed of copyhold or leasehold estates in lands, tenements and hereditaments, except married women, infants, and persons insane. And married women also may, as to their separate estate, or by virtue of a power of appointment. (2 Bl. Com. 375;

2 Th. Co. Lit. 636 & seq., n's (2), (4); Wms. Real Prop., 187, 207, 278, 332.)

2<sup>m</sup>. The Persons to Whom Lands *may be Devised*.

The persons to whom, in Virginia, lands may be devised are not ascertained by any precise statutory provision, but must be gathered from the general tenor of the law, from which it appears that lands may be devised to *all persons*, without exception, who are *definitely ascertained*. It must be remembered, however, that where the devisee is an *alien enemy*, or a *corporation* not empowered by its charter to acquire and hold lands, the lands are liable to be *forfeited* to the commonwealth, the devisee not being able to *hold*, although capable to *take*; and in the case of a devise to one laboring *under a disability*, as of infancy, insanity, or coverture, the devisee *may disclaim*, after the removal of the disability. (1 *Ante*, pp. 596-7, 655 & seq.; 3 Lom. Dig. 194; Bryan v. Hyre & als. 1 Rob. 102.)

3<sup>m</sup>. What Real Property *is Devisable*.

*Any estate, right, or interest* is devisable to which the testator may be *entitled at his death*, notwithstanding he may become so entitled subsequently to the execution of the will, a will being declared by statute, with reference to the *real* as well as the *personal* estate comprised in it, to *speak and take effect* as if it had been executed *immediately before the death of the testator*, unless a contrary intention shall appear by the will. (V. C. 1873, ch. 118, §§ 2, 11; V. C. 1887, ch. 112, §§ 2512, 2521.)

A will of *personalty* was always understood at common law thus to speak as of the death of the testator; and it is surprising, when wills of *lands* were introduced, that the obvious analogy did not lead to a like construction *as to them*. But adhering rigorously to the *letter* of the statute of wills, which allowed any person "*having manors*," etc., or "*having a sole estate*," etc., to devise them, the English judges held that the deviser must *have the estate* at the time of making his will; for, said they, he cannot devise what *he has not in him* at the time of devising. (3 Lom. Dig. 29; Butler & Baker's Case, 3 Co. 30 b; Harwood v. Goodright, Cowp. 90.) The provision of the Virginia statute above cited (which is taken from 7 Wm. IV. and 1 Vict. c. 26, although after-acquired lands had previously been permitted to pass by our laws, *if contemplated*, (Allan v. Harrison, 3 Call, 289,)) puts wills of lands and of chattels on the same footing in this particular, and makes both speak as at the testator's death. It will be observed, however, that the language of the will is not to be distorted or perverted. It can only be applied to such property as it is fairly applicable to at

the death of the testator. If the will says, "I give all my lands to A," it will embrace any lands that the testator may own at his death, whether he owned them at the date of the will or bought them afterwards. But if it says, "I give *Black-acre* to A," and afterwards the testator sells *Black-acre* and buys *White-acre*, of which he dies seised, *White-acre* does not pass, because the words of the will are not applicable to it. (2 Wms. Real Prop. 192, 349, 332.)

A will *made* prior to 1st July, 1850 (when the Code of 1849 took effect), although the testator may have died afterwards, is to be construed in respect to its effect in passing after-acquired lands as the law was prior to the date named. (*Raines v. Barker*, 13 Grat. 128.) So that, in order to pass such after-acquired lands, they must appear *to be contemplated* (*Allan v. Harrison*, 3 Call, 289); and that they were thus contemplated does not appear from a devise of "the balance of testator's estate," or of "the balance of his property of every description," which forms of expression, therefore, do not pass such lands in wills made prior to 1st July, 1850. (*Raines v. Barker*, 13 Grat. 128; *Gibson v. Carroll*, Id. 136.)

It is germane to the discussion of what real estate is devisable, to advert to the doctrine of *election*, upon which the beneficial effect of a devise to the intended recipient thereof will sometimes depend.

The doctrine of election is founded upon the principle of natural justice that one shall not claim *under*, and at the same time *against* an instrument. He who accepts a benefit in pursuance of any instrument must adopt the whole of it, conform to all of its provisions, and renounce every pretension inconsistent with them.

The principle is applicable alike to deeds and to wills, but it has been more frequently applied in case of the latter. Thus, if A, by will or deed, give to B property belonging to C, and by the same instrument give other property of his own to C, a court of equity will not allow C to avail himself of the gift made to him by A except upon the condition, which the court implies, that he will give effect to all the provisions of the instrument, by renouncing the right to his own property, in favor of B. He must, therefore, make his choice, or as lawyers say, he is *put to his election*, to take either under the instrument or against it. (2 Stor. Eq. §§ 1057 & seq.; 1 Jarm. Wills, (5 Am. ed.) 443 & seq.; 1 Th. Co. Lit. 454, n. (Q.); 1 Pom. Eq. §§ 462 & seq.; *Noys v. Mordaunt*, 2 Vern. 581; *Streatfield v. Streatfield*, Cas. Temp. Talbot, 176; S. C. 1 Wh. & Tud. L. C. 251 & seq., 258 & seq.; *Dillon v. Parker*, 1 Swanst. 359, 381, n. (a), 394, n. (b); *Gretton v.*

Haward, 1 Swanst. 409, 425, n. (a), 433, n. (d); Wilson v. Ld. Townshend, 2 Ves. Jr. 697; Glen v. Fisher, 6 Johns. Ch. (N. Y.) 33, 35; Cauffman v. Cauffman, 17 Serg. & R. (Pa.) 16, 24, 25; McElfresh v. Schley, 2 Gill (Md.), 182, 201, 202; Field v. Eaton, 1 Dessauss. Eq. (S. C.) 283, 286, 287; Cogdell v. Cogdell, 3 Dessauss. 316, 387; Upshaw v. Upshaw, 2 H. & M. 381; Collin v. Janney, 3 Leigh, 389; Kinnaird v. Williams, 8 Leigh, 400; Dickinson v. Dickinson, 2 Grat. 493; Hill v. Huston, 15 Grat. 350; Glenn v. Clark, 21 Grat. 35; Gregory v. Gates, 30 Grat. 89, 90; Penn v. Guggenheimer, 76 Va. 846, &c.

If in the case supposed, C elects to take under the instrument, and consequently to conform to all its provisions, no difficulty arises, as B will take C's property, and C will take the property given to him by A. But if C elects to take *against* the instrument, and at the same time sets up a claim to the property given to him by A, an important question arises whether he thereupon incurs a forfeiture of the whole benefit conferred upon him by the instrument, or is merely bound to make compensation out of it to the person who is disappointed by his election, namely, in the case supposed, to B. It seems to be the better opinion in England that equity has there adopted the more beneficent and reasonable principle of compensation rather than of forfeiture. Mr. Swanston, in his very learned note to *Gretton v. Haward*, 1 Swanst. 441, thus states his conclusion after examining the cases: "The deduction of authorities appears . . . to establish two propositions: (1), That in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints; (2), That the surplus after (making such) compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right." (2 Stor. Eq. §§ 1083 & seq.; 1 Jarm. Wills (5th Am. ed.), 445-6; *Streatfield v. Streatfield*, Cas. Temp. Talbot, 176; *Lady Cavan v. Pulteney*, 2 Ves. Jr. 569; *Welby v. Welby*, 2 Ves. & B. 190, 191; *Dashwood v. Peyton*, 18 Ves. 49; *Ld. Rancliffe v. Parkyns*, 6 Dow. 179; *Ker v. Wanchope*, 1 Bligh, 25.) And in the United States it is believed to be agreed without dissent, that the principle which controls a court of equity in applying the doctrine of election is compensation always, and never forfeiture. (1 Wh. & Tud. L. C. 273; *Cauffman v. Cauffman*, 17 Serg. & R. (Pa.) 16, 24, 25; *Stump v. Findlay*, 2 Rawle (Pa.), 168, 174; *Key v. Griffin*, 1 Richards. Eq. (S. C.) 67, 68; *Gregory v. Gates*, 30 Grat. 90.)



The principle of election has been so much more habitually applied to wills than to deeds, that it may be well to mention some of the more prominent cases which establish its application to the latter, as well as to wills, namely, *Llewellyn v. Mackworth*, Barnardist, Ch. R. 445; *Bigland v. Huddleston*, 3 Bro. C. C. 286, n.; *Moore v. Butler*, 2 Sch. & Lefr. 266; *Birmingham v. Kirwan*, 2 Sch. & Lefr. 450; *Green v. Green*, 2 Meriv. 86.)

In order to raise a case of election there must appear in the will or instrument a clear intention on the part of its author to dispose of that which is not his own. (1 Wh. & Tnd. L. C. 259; *Judd v. Pratt*, 13 Ves. 168; S. C. 15 Ves. 390; *Dashwood v. Peyton*, 18 Ves. 37; *Blake v. Banbury*, 4 Bro. C. C. 21; S. C. 1 Ves. Jr. 514; *Rancliffe v. Parkyns*, 6 Dow, 149, 179; *Dillon v. Parker*, 1 Swanst. 359; *Hall v. Hall*, 1 Bland (Md.), 203; S. C. 17 Am. Dec. 275, 277, note; *Wilson v. Arney*, 1 Dev. & Bat. (N. C.) 376, 377; *Penn v. Guggenheimer*, 76 Va. 846.) And it is immaterial whether he knew that the property was not his own, or by mistake conceived it to be so. In either case, if the intention to dispose of it is manifest, his disposition will raise a case of election. (*Whistler v. Webster*, 2 Ves. Jr. 370; *Thelluson v. Woodford*, 13 Ves. 221; *Welby v. Welby*, 2 Ves. & B, 199; *Stump v. Findlay*, 2 Rawle (Pa.), 168, 174.) But according to the better opinion, the testator's intention must be derived from the terms of the will, and is not to be proved by parol evidence. (1 Jarm. Wills (5th Am. ed.), 451-2; *Blake v. Banbury*, 1 Ves. Jr. 523; *Stratton v. Best*, 1 Ves. Jr. 285; *Rutter v. Maclean*, 4 Ves. 537; *Pole v. Somers*, 6 Ves. 322; *Druce v. Denison*, 6 Ves. 402; *Clementson v. Gandy*, 1 Keen (15 Eng. Ch.), 309.)

Election also requires that there should be a *personal competency* on the part of the author of the attempted disposition to make it; for the doctrine is founded *on intention*, and intention supposes competency. Hence, when an infant, over the age of eighteen, disposes, by his will, of both chattels and lands, which last it is beyond his power to dispose of (V. C. 1873, ch. 118, § 3; V. C. 1887, ch. 112, § 2513), that does not impose upon the devisee of the lands an obligation to give effect to the devise, in order to take the chattels bequeathed to him. And so, when a married woman, exercising a power of appointment, gives to her husband what she has power to dispose of, but then bequeaths to other persons other chattel property to which her power does not extend, the husband may assert his marital rights as to the latter, without prejudicing his claim to the bequest given him by the will. (1 Jarm. Wills (5th Am. ed.), 446-7; *Hearle v.*

Greenbank, 1 Ves. Sr. 298; Rich v. Cochrall, 9 Ves. 270.)

The doctrine of election is applicable as well to cases of appointment under a power, as to other dispositions in one's own right; so that, if one having such power gives benefits out of his own property to the objects of the power, and appoints the subject of the power to strangers, the former will be obliged to elect in favor of the latter. But when the appointment is made to the objects of the power absolutely, with a proviso or condition superadded in favor of strangers to the power, the proviso or condition is *void*, and no case of election arises. (1 Jarm. Wills (5th Am. ed.), 449; Whistler v. Webster, 2 Ves. Jr. 370.)

It seems that in England creditors are not within the doctrine of election, so that they may take the benefit of a devise for the payment of debts, and also enforce their legal claims upon other funds disposed of by the will; for, it is said, a creditor claims not as a *volunteer*, but for a valuable consideration and *ex debito justitiæ*. (2 Stor. Eq. § 1092, and note; 1 Jarm. Wills (5th Am. ed.), 451; Kidney v. Coussmaker, 12 Ves. 154.) This principle in the United States is certainly not universally conceded, and it may perhaps be said that the weight of American authority is opposed to it, at least to the extent to which it is laid down in Kidney v. Coussmaker. (Streatfield v. Streatfield, 1 Wh. & Tud. L. C. 278 '9; Irwin v. Tabb, 17 Serg. & R. (Pa.), 419, 423; Adlum v. Yard, 1 Rawle (Pa.), 163, 171.)

A widow, independently of statute, may be put to her election between her dower and a gift conferred upon her by her husband, when, either by express words or by manifest implication, the donor's intention is demonstrated to exclude her from her legal right to dower. (1 Jarm. Wills (5th Am. ed.), 458 & seq.; 1 Wh. & Tud. L. C. 263, 279; 1 Bish. Marr. Wom. §§ 378 & seq.; Gosling v. Warburton, 1 Cro. (Eliz.) 128; Boynton v. Boynton, 1 Bro. C. C. 445; Birmingham v. Kirwan, 2 Sch. & Lefr. 452.) As the effect depends upon the *intention* of the donor, whether express or implied, few topics in the law present a more bewildering maze of adjudications than those which relate to the application of election to the widow's dower. See Lawrence v. Lawrence, 2 Vern. 365; French v. Davies, 2 Ves. Jr. 592; Strahan v. Sutton, 3 Ves. Jr. 249; Ld. Dorchester v. Earl of Effingham, Coop. 319; Foster v. Cook, 3 Bro. C. C. 347; Bradley v. Dixon, 3 Russ. (3 Eng. Ch.) 192; Taylor v. Taylor, 1 Yo. & Col. (20 Eng. Ch.) 727; Lowes v. Lowes, 5 Hare (26 Eng. Ch.) 501; Birmingham v. Kirwan, 2 Sch. & Lefr. 444; Ellis v.

Lewis, 3 Hare (25 Eng. Ch.), 310; Dowson v. Bell, 1 Keen (15 Eng. Ch.) 761; Brown v. Parry, 2 Dish. 68; Incledon v. Northcote, 3 Atk. 430, 436; Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448; Wood v. Wood, 5 Pai. (N. Y.) 597, 601; Fuller v. Yates, 8 Pai. 325; Sanford v. Jackson, 10 Pai. 266; Timberlake v. Parish, 5 Dana (Ky.), 345; Brown v. Caldwell, 1 Spear Eq. (S. C.) 322; Snelgrove v. Snelgrove, 4 Dessauss. (S. C.) 274, 294; Ambler v. Norton, 4 H. & M. 23, 44; Higginbotham v. Cornwall, 8 Grat. 83; Findlay v. Findlay, 11 Grat. 434; Craig v. Walthall, 14 Grat. 518; Dixon v. McCue, 14 Grat. 540.

The subject of election in the case of dower is closely connected with the law of *jointure*. Our former statutes (modelled after, but not closely copied from, the statute of uses, 27 Hen. VIII., c. 10, §§ 6, 9), defined jointure to be “an estate conveyed *by deed or will*, either *expressly or by arerment*, for the jointure of the wife, *in lieu of her dower*, to take effect *in her own possession*, immediately *on the death of her husband*, and to continue *during her life at the least*, determinable by such acts only as would forfeit her dower at the common law,” and declared that it should be a bar to dower, and provided also that if the conveyance were “before the marriage, and during the infancy of the *feme*, or if it were after marriage, in either case the widow may, at her election, waive such jointure, and demand her dower.” (1 R. C. 1819, p. 405, ch. 107, § 11; 1 Th. Co. Lit. 611; 1 Lom. Dig. 137; *Ante*, p. 175.) Under this state of the law, it was sometimes a troublesome question whether the provision were *intended* to be “in lieu of her dower”; and when the provision did not possess the attributes prescribed by the statute, and yet seemed to have been designed in place of dower, it had in equity the effect of obliging the wife to elect between it and her dower, and was denominated an *equitable jointure*. (*Ante*, pp. 177–8; 1 Th. Co. Lit. 612, n’s (114), (115); 1 Lom. Dig. 147 & seq.) Such questions of equitable jointure are now almost wholly obviated with us, by our present statute law, which enacts that “if any estate, *real or personal*, intended to be *in lieu of dower*, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall *bar her dower* of the real estate or the residue thereof; and any such provision, by deed or will, shall be *taken to be intended to be in lieu of dower*, unless the *contrary intention clearly appear* in such *deed or will*, or in *some other writing signed by the party making the provision*.” (V. C. 1873, ch. 106, § 4; V. C. 1887, ch. 102, § 2270.)

It is well established that no one shall be constrained to make an election until the interests to which the elec-

tion relates are clearly defined, and their relative values ascertained; and an election made before that is done, will, for the most part, be disregarded, at least if it be made under mistaken impressions as to the facts; but only upon the terms (supposing the election to have been unambiguously made), of restoring other persons whose rights are affected by the party's act of election, to the same situation substantially as if that act had not taken place. Accordingly, one who is called upon to elect may file a bill in equity to have all needful accounts taken, and all proper inquiries made. (2 Stor. Eq. § 1098; *Streatfield v. Streatfield*, 1 Wh. & Tud. L. C. 270-71, 289; *Newman v. Newman*, 1 Bro. C. C. 186; *Boynton v. Boynton*, 1 Bro. C. C. 445; *Wake v. Wake*, 3 Bro. C. C. 255; S. C. 1 Ves. Jr. 335, and notes; *Whistler v. Webster*, 2 Ves. Jr. 367; *Pusey v. Desbouverie*, 3 P. Wms. 315; *Buttricke v. Brodthurst*, 3 Bro. C. C. 88; *Kidney v. Coussmaker*, 12 Ves. 136; *Dillon v. Parker*, 1 Swanst. 381, and note; *Leonard v. Crommelin*, 1 Edwards (N. Y.), 210; *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 448, 451; *Hall v. Hall*, 2 McCord Ch. (S. C.) 280; *Snelgrove v. Snelgrove*, 4 Dessauss. (S. C.) 274; *Pinckney v. Pinckney*, 2 Richards. Eq. 219, 237; *Upshaw v. Upshaw*, 2 H. & M. 381, 390, 393; *Craig v. Walthall*, 14 Grat. 524-5; *Hill v. Huston*, 15 Grat. 350.)

When an infant is called on to elect, the election has sometimes been postponed until he comes of age, but usually the court will refer it to a master to enquire what will be most beneficial to him, and upon the master's report, and whatever other trustworthy information can be obtained, the election will finally be determined by the court. (*Streatfield v. Streatfield*, 1 Wh. & Tud. L. C. 272, 289; *Boughton v. Boughton*, 2 Ves. Sr. 12; *Chetwynd v. Fleetwood*, 1 Bro. P. C. 300; *Moore v. Butler*, 2 Sch. & Lefr. 267; *Rushout v. Rushout*, 3 Bro. P. C. 132; *Goodwyn v. Goodwyn*, 1 Ves. Sr. 228; *Bigland v. Huddleston*, 3 Bro. C. C. 285 note; *Gretton v. Haward*, 1 Swanst. 413, and n. (c); *Addison v. Bowie*, 2 Bland. (Md.), 606, 623; *Robertson v. Stephens*, 1 Ired. Eq. (N. C.) 247, 251; *Turner v. Street*, 2 Rand. 404.)

A married woman is certainly not competent, during coverture, herself to make an election, and it seems to be the better practice for the court to make it for her as will be most for her interest, upon the report of the master, and other evidence. (1 Wh. & Tud. L. C. 272, 289; *Gretton v. Haward*, 1 Swanst. 413, note (c); *Earl of Darlington v. Pulteney*, 2 Ves. Jr. 560; S. C. 3 Ves. Jr. 385; S. C. 7 Bro. P. C. 546, 547; *Davis v. Page*, 9 Ves. 350; *Vane v. Ld. Dungannon*, 2 Sch. & Lefr. 133; *Wilson*



v. *Ld. Townshend*, 2 *Ves. Jr.* 693; *Frank v. Frank*, 3 *My. & Cr.* (14 *Eng. Ch.*) 171; *Robertson v. Stephens*, 1 *Ired. Eq.* (N. C.) 247, 251; *Shanks v. Edmundson*, 28 (*Grat.* 812.) In determining the election, the court would doubtless pay much regard to the opinion of the woman's husband, if his interests were not adverse to hers. Indeed, in *Shanks v. Edmundson*, just cited, it is said, perhaps with too little qualification as a general proposition, that the election may be made by the husband, if in making it he acts for himself, or for them both jointly.

Clear proof of an election made must be furnished, and ambiguous acts and conduct will in general not be so construed unless in those cases where the interests of others have been affected by the acts, and require that they should be interpreted to amount to an election. (*Upshaw v. Upshaw*, 2 *H. & M.* 381; *Taylor v. Browne*, 2 *Leigh*, 419; *Kinnaird v. Williams*, 8 *Leigh*, 400; *Dixon v. McCue*, 14 *Grat.* 561-'2; *Craig v. Walthall*, 14 *Grat.* 524-'5; *Harcum v. Hudnall*, 14 *Grat.* 375.)

The proof of an election made may be either *express*, in terms, or it may be, and most frequently is, *implied* from acts and conduct, such as acceptance and acquiescence; but in either case, it must have been with a *knowledge of the party's rights*, and with the *intention of electing*. (*Streatfield v. Streatfield*, 1 *Wh. & Tud. L. C.* 271 & seq.; 2 *Stor. Eq.* §§ 1097-'98; *Dillon v. Parker*, 1 *Swanst.* 380, 386, 387; *Stratford v. Powell*, 1 *Ball & Beat.* 1; *Wake v. Wake*, 1 *Ves. Jr.* 335; *Buttricke v. Brodhurst*, 3 *Bro. C. C.* 90; *S. C.* 1 *Ves. Jr.* 172; *Tibbits v. Tibbits*, 19 *Ves.* 663; *Adsit v. Adsit*, 2 *Johns. Ch.* (N. Y.) 448, 451; *Duncan v. Duncan*, 2 *Yeates* (Pa.), 305; *Cauffman v. Cauffman*, 17 *S. & R.* (Pa.) 25; *O'Driscoll v. Koger*, 2 *Dessauss.* (S. C.) 299; *Snelgrove v. Snelgrove*, 4 *Dessauss.* 300; *Upshaw v. Upshaw*, 2 *H. & M.* 381; *Taylor v. Browne*, 2 *Leigh*, 419; *Kinnaird v. Williams*, 8 *Leigh*, 400; *Dixon v. McCue*, 14 *Grat.* 561-'2; *Craig v. Walthall*, 14 *Grat.* 524-'5; *Harcum v. Hudnall*, 14 *Grat.* 375; *Lewis v. Overby*, 31 *Grat.* 621-'2; *Penn v. Guggenheimer*, 77 *Va.* 850; *Cooper v. Cooper*, 77 *Va.* 205.)

It hardly needs to be said that election once made by a competent party is irrevocable, and that any act of election which will bind the party himself will also bind his representatives claiming under him. (1 *Wh. & Tud. L. C.* 712; 1 *Pom. Eq.* § 516; *Earl of Northumberland v. Earl of Aylesford*, 2 *Ambl.* 657; *Archer v. Pope*, 2 *Ves. Sr.* 525-'6; *Stratford v. Powell*, 1 *Ball & Beat.* 1; *Ardesoife v. Bennet*, 2 *Dick.* 463; *Penn v. Guggenheimer*, 76 *Va.* 850.) But some acts of acquiescence will bind one's representatives when they could not have been insisted on

against the party himself, in his life-time, upon the principle, as *Ld. Hardwicke* observes, that it is inexpedient to “disturb things long acquiesced in in families, upon the foot of rights which those in whose place they stand never called in question.” (*Tomkyns v. Ladbroke*, 2 Ves. 80, 593.) When, however, the party compromised by an ambiguously implied election can compensate the other party, and place him in the same situation as if such acquiescence had not occurred, he or his representatives may for themselves determine the election anew. (1 Wh. & Tud. L. C. 271 '2; *Dillon v. Parker*, 1 Swanst. 385; *Moore v. Butler*, 2 Sch. & Lefr. 268; *Tyssen v. Benyon*, 2 Bro. C. C. 5.) And when the fact of election is doubtful, the court of chancery may send it to a jury to determine the fact. (1 Wh. & Tud. L. C. 272; *Roundel v. Currier*, 2 Bro. C. C. 73; *Dillon v. Parker*, 1 Swanst. 383, note.)

It is not inappropriate in this connection to consider *the effect of clauses of residuary devise*. As the law was in Virginia prior to 1st January, 1787 (under 29 Car. II., c. 3, § 5), a residuary devise, unlike a residuary legacy, did not include those devises which *lapsed*, nor probably those that were otherwise and originally void; but the same devolved upon the *heir at law*. The reason was, that whilst a will of personalty speaks *at the time of the testator's death*, and therefore a residuary legatee takes not only what is undisposed of by the expressions of the will, but also that which in the sequel turns out at the testator's death not to have been effectually disposed of, the will of lands was understood to speak only *at the time of making it*, and so the residuary devisee could take no more than what was *at that time intended for him*; and hence a devise that fails *results to the heir*. (4 Kent's Com. (12th ed.) 540 & seq., and cases cited; 2 Redf. Wills, 115, 117, n. 34; *Durour v. Motteux*, 1 Ves. Sr. 322; *Doe v. Underdown*, Willes, 296; *Cambridge v. Rous*, 8 Ves. 25; *Brown v. Higgs*, 4 Ves. 708, n. b.; *Jones v. Mitchell*, 1 Sim. & Stu. (1 Eng. Ch.) 294; *Van Kleeck v. Dutch Ref.* Ch. 6 Pai. (N. Y.) 600; S. C. on Appeal, 20 Wend. 457; *Rowlett v. Rowlett*, 5 Leigh, 26.)

When by statute in Virginia, taking effect 1st January, 1787, one was allowed to devise after-acquired lands, *provided he plainly contemplated them* (*Turpin v. Turpin*, 1 Wash. 75), it became needful to discriminate, in respect to the doctrine in question, between wills that *did* and those that *did not* contemplate and dispose of such after-acquired lands. In the latter case, that is, wherever the will employed no expressions to the contrary, it was held to relate solely *to the real estate which the deviser had at the time of making the will*, and not to what he acquired

subsequently. (Allen v. Harrison, 3 Call, 305; Raines v. Barker, 13 Grat. 128; Gibson v. Carroll, Id. 136; Smith v. Edrington, 8 Cr. 66; Warner v. Swearingen, 6 Dana (Ky.), 194.) In this latter case, therefore, it is supposed that the heir, and not the residuary devisee, would take all devises that failed, for the same reason as before. But where the will did contemplate *after-acquired lands*, it would seem that the reason upon which the doctrine in question depends would no longer avail to exclude the residuary devisee; and that, by virtue of the residuary clause, he would take, in preference to the heir at law, all such devises as should lapse, or otherwise fail, just as a residuary legatee would, under corresponding circumstances, take lapsed and failing legacies,—unless, indeed, a contrary intention was manifested in the will.

The reasonableness of this distinction and conclusion is, as yet, its principal support. It has, however, received the sanction of Chancellor Kent (4 Kent's Com. (12th ed.) 542), and of Mr. Sumner. (Brown v. Higgs, 4 Ves. 709, n. (b).)

Judge Moncreux's *dictum* in Stone v. Nicholson, 27 Grat. 8, doubtless relates to the present state of the law, as it is by the existing statute, taking effect 1st July, 1850 (V. C. 1873, ch. 118, § 14; V. C. 1887, ch. 112, § 2524.) And yet the distinction which the observation supposes, between the destination of *specific* devises which fail (namely, that they are included in the residuary clause), and of part of the residuary devise itself (which is reckoned never to fall into the *residuum*), would seem to be hardly reconcilable with the terms of the statute, "Such real estate \* \* \* as shall be comprised *in any devise* \* \* \* which shall fail or be void, or otherwise incapable of taking effect, shall be included *in the residuary devise* (if any) contained in such will." It was that very distinction (taken in Frazier v. Frazier, 2 Leigh, 649) that the enactment was apparently designed to obviate, whilst at the same time it declared a conclusion to which, it is apprehended, the courts would have come at all events, as freely in *devises* as in *wills of chattels*, inasmuch as both by statute speak *as at the testator's death*. (V. C. 1873, ch. 118, §§ 2, 11; V. C. 1887, ch. 112, §§ 2512, 2521.)

#### 4<sup>m</sup>. What *Ceremonies are Required* in the Making of Wills of Lands.

These *ceremonies* must be closely noted. They are derived in substance from the English statutes above referred to, and especially from 29 Car. II., c. 3, § 5. A will which does not observe them *in the making*, is *void*. (V. C. 1873, ch. 118, §§ 4 & seq.; V. C. 1887, ch. 112, §§ 2514 & seq.)

The law which, as between different nations or states, determines the mode of making *wills of lands*, is the *lex loci rei sitæ* (the law of the place where the land is situated); and of making wills of *chattels personalis*, is the *lex domicilii* (the law of the testator's domicile). Story, Conf. Laws, §§ 424, 428, 434, 474, 465; *Ante*, p. 635; 3 Min. Insts. 129 '30; V. C. 1873, ch. 118, § 26; V. C. 1887, ch. 112, §§ 2516, 2536; Sill v. Worswick, 1 H. Bl. 665; Phillips v. Hunter, 2 H. Bl. 402; Coppin v. Coppin, 2 P. Wms. 290, 293; Curtis v. Hutton, 14 Ves. 541; U. States v. Crosby, 7 Cr. 115; Clarke v. Graham, 6 Wheat. 597; Kerr v. Mason, 9 Wheat. 566; McCormick v. Sullivan, 10 Wheat. 192.)

The requirements of the statutes of Virginia, which are almost identical with those of the English statutes, 29 Car. II., c. 3, § 5; 7 Wm. IV., and 1 Vict. c. 26, and 15 and 16 Vict. c. 24, are as follows: "No will," says the statute, "shall be valid unless it be *in writing*, and *signed by the testator*, or by some other person in his presence, and by his direction, in *such manner* as to make it *manifest* that the name is *intended as a signature*; and moreover, unless it be *wholly written by the testator*, the signature shall be made, or the will acknowledged, by him in the *presence of at least two competent witnesses*, present *at the same time*; and such witnesses shall *subscribe the will*, in the *presence of the testator*, but *no form of attestation* shall be *necessary*." (V. C. 1873, ch. 118, § 4; V. C. 1887, ch. 112, § 2514; 2 Bl. Com. 376; Wms. Real Prop. 187 & seq.; 2 Th. Co. Lit. 636-'7, n's (2) & (4); w. c.

### 1<sup>n</sup>. The Will must be *in Writing*.

It is not material upon what matter or stuff it be written, whether paper or parchment, linen, leather, stone, or metal, or in what tongue, or whether in print or manuscript, with ink or in pencil, or in what kind of handwriting, or character, so it is legible, and the meaning be capable of being deciphered. Neither is it material whether it be expressed at large, or by mere notes, usual or unusual; or whether sums of money, &c., be written in words or in figures; provided the meaning be free from ambiguity and doubt. (Bac. Abr. Wills (D.), 1; 3 Com. Dig. 36-'7; Masters v. Masters, 1 P. Wms. 425 '6; Dickenson v. Dickenson, 2 Phill. 2 Eng. Ec. 173.)

### 2<sup>n</sup>. The Signature.

The statute, 29 Car. II., c. 3, § 5, did not prescribe where the signature should be placed, and soon after the enactment of the statute, it was determined in the great case of Lemayne v. Stanley (3 Lev. 1), that it was im-



material, if the name were written *by the testator himself*, or by his direction and in his presence, where it appeared, whether at the *top or bottom*, or *in the margin*. This decision (made 33 Car. II., A. D. 1682), was often regretted, but never directly overruled until it was done by statute both in England and in Virginia. It was agreed that the object in requiring the testator's signature was twofold, namely: (1), To *connect him* with the paper; and (2), To afford proof of the *finality*, or *completion* of the testamentary intent. It was admitted, also, that the *first* object was satisfactorily attained by the testator's signature occurring *anywhere in the paper*. But it was insisted that the *second* object was wholly frustrated by allowing the signature to be anywhere else *but at the end*; and in response to the suggestion that the *finality of testamentary intent* was proved by the attestation of the *subscribing witnesses*, it was said that the statute designed *two safeguards*, the attestation of the witnesses, and the *signature also*, and that the courts thwarted the design of the legislature when they dispensed with either. (2 Bl. Com. 376-'77, and n. (9).)

The Virginia courts, like those of England, acquiesced reluctantly in *Lemayne v. Stanley*, until November, 1818, when, in the case of *Selden v. Coalter*, 2 Va. Cas. 553, it was *very gravely doubted* whether the doctrine of that case was applicable to a will *wholly written* by the testator's own hand, which by our statute does not need to be attested by subscribing witnesses at all; for that there would then be no proof whatever on the face of the will, of the *finality of the testamentary intent*; and afterwards, in 1845, in *Waller v. Waller*, 1 Grat. 454, that doubt as to *holograph wills* was not a little strengthened, although the court still admitted that in an *attested will* it must follow *Lemayne v. Stanley*.

Then, in 1850, came the statute (taken from 7 Wm. IV. and 1 Vict. c. 26; see also 15 and 16 Vict. c. 24), requiring, in the terms above-stated, that the signature should be affixed in *such a manner* as to make it *manifest* that the name was *intended as a signature*. See *Ramsey v. Ramsey*, 13 Grat. 664; *Roy v. Roy*, 16 Grat. 418; *Warwick v. Warwick*, 86 Va. 596; 3 Lom. Dig. 70; 1 Jarm. Wills (5th Am. ed.), 105.

*Sealing* is not requisite for a will; and, although some of the early cases leaned to the conclusion that sealing without signing would suffice (*Lemayne v. Stanley*, 3 Lev. 1; *Warneford v. Warneford*, 2 Str. 764), yet that opinion is wholly overruled. (2 Bl. Com. 376, n. (9); 3 Lom. Dig. 37-'8; *Smith v. Evans*, 1 Wils. 313; *Grayson*

v. Atkinson, 2 Ves. Sr. 454, 759; Wright v. Wakeford, 17 Ves. 458-9.) And on the other hand, *making a mark*, with the testator's name, is a sufficient signing. (Baker v. Denning, 8 Ad. & El. (35 E. C. L.) 94; Harrison v. Harrison, 8 Ves. 185, and n. cit.; Addy v. Grix, Id. 504.)

### 3<sup>d</sup>. The Attestation by Subscribing Witnesses.

No attesting witnesses are required by our statute if the will be *wholly written* by the testator, in which case it is said to be *holograph*. And if *wholly written* by the testator, being of sound mind, and *signed by him*, it is valid, notwithstanding there be appended to it an *attestation-clause, unsigned by witnesses*, and another testamentary paper, bearing the same date, and found folded up with the will, and written and signed by the testator, is a valid codicil, although it does not refer to the will. (Perkins v. Jones, 84 Va. 358; Harrison v. Burgess, 1 Hawks (N. C.), 384; Brown v. Beaver, 3 Jones (N. C.), 516; Hill v. Bell, Phill. (N. C.), 122.) But see 1 Redf. Wills, 212 &c. 29; 1 Jarm. Wills (5 Am. ed.), 101 & seq.; Beaty v. Beaty, 1 Add. 154 (2 Eng. Ecc. R. 60); Waller v. Waller, 1 Grat. 482, per Cabell Pres.; Perkins v. Jones, 84 Va., per Lewis Pres.

The witnesses (two or more in number) must be *competent*. The word employed in the statute 29 Car. II., c. 3, § 5, and in our statute down to 1850, was *credible*. However, it was universally agreed that *credible* meant no more and no less than *competent*, so that no progress was made in substituting (as in the later statutes) the one word for the other. But there was a very serious diversity of opinion upon another point, namely, as to the *period* to which the statute designed to refer the witness's competency; whether to the period when he *attested the will*, as Lord Camden thought (Hindon v. Kersey (1765), 1 Bro. Adm'y & Civ. L. 284, n. (24); 4 Burn's Ecc. Law, 88; Bac. Abr. Wills (D.), III.), or to the period when he was *called to prove it*, as Lord Mansfield held (Windham v. Chetwynd, 1 Burr, 414; Lowe v. Jolliffe, 1 W. Bl. 366; Goodtitle v. Welford, 1 Dougl. 141.) This doubt the statute does not resolve. It is extremely probable that with us Lord Camden's opinion would prevail. It seems that it does in England. (Holdfast v. Dowsing, 2 Stra. 1254-5; Hatfield v. Thorp, 5 B. & Ald. (7 E. C. L.) 589; 1 Jarm. Wills (5th ed.), 70.)

We may not pause here to discuss at length what witnesses are or are not *competent*. It must suffice to say that the common law rejects the testimony, (1). Of parties; (2). Of persons deficient in understanding; (3). Of persons wanting in religious belief; (4). Of persons convicted

of *infamous* offences, who have been neither pardoned nor punished; and (5), Of persons *interested*, in favor of their interest. (1 Gr. Ev. §§ 327 to 430.) But in Virginia, great, and it is believed as to some of them, very questionable innovations have been made on the common law in respect to this subject. Thus, it being provided in the constitution (Art. V., § 14) that the opinions of men in matters of religion shall “in no wise affect, diminish, or enlarge their *civil capacities*,” it is held that the effect is to do away with the third disqualification, and that no one is incapacitated from being a witness by reason of his religious opinions. (Perry’s Case, 3 Gr. 602.) *Parties*, also, are made competent, with some qualifications (V. C. 1873, ch. 172, § 21; V. C. 1887, ch. 164, §§ 3345 & seq.); and it is declared as a general rule, that “no witness shall be incompetent to testify *because of interest*.” (Ibid.) However, the same statute proceeds to enact that nothing therein contained shall be construed to alter the rules of the law in force 1st July, 1850, “in respect to the competency of the husband and wife as witnesses for or against each other, during the coverture, or after its determination, nor in respect to *attesting witnesses to wills*, deeds or other instruments.” (V. C. 1873, ch. 172, § 22; V. C. 1887, ch. 164, § 3346, (cl. 1).)

Let us observe here the following particulars; (1), The several classes of witnesses to wills whose competency may come into question; (2), The mode of attestation of *wills proper*, not appointments under a power; and (3), The ceremonies required in case of appointments by will in the exercise of a power;

W. C.

1°. The Several Classes of Witnesses to Wills whose Competency may Come into Question; w. c.

The several classes of witnesses to wills whose competency may come into question are: (1), A devisee or legatee, who is an attesting witness to the will; (2), A creditor who is an attesting witness thereto; (3), An executor who is an attesting witness; and (4), Any other person incompetent as a witness by reason of infancy, &c.;

W. C.

1°. A Devisee or Legatee who is an Attesting Witness to the Will.

If a will be attested by a person to whom, or to whose wife or husband, any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness, but such devise or be-

quest *shall be void*, except that if such witness would be entitled to any share of the estate of the testator, in case the will were not established, so much of his share shall be saved to him as shall not exceed the value of what is so devised or bequeathed. (V. C. 1873, ch. 118, § 19; V. C. 1887, ch. 112, § 2529; *Croft & als. v. Croft, Ex'or, &c.*, 4 Grat. 105.)

But a devisee or legatee who is *not an attesting witness* to a will is not subjected to these terms, but is competent to be examined in support of the will, like any indifferent person, interest being now no disqualification, save in the case of attesting witnesses. (*Martz v. Martz*, 25 Grat. 363 & seq.)

2<sup>p</sup>. A Creditor who is an Attesting Witness to the Will.

If a will *charging any estate with debts* be attested by a creditor, or the wife or husband of a creditor, whose debt is so charged, such creditor shall, notwithstanding, be admitted a witness for or against the will. (V. C. 1873, ch. 118, § 20; V. C. 1887, ch. 112, § 2530.)

3<sup>p</sup>. An Executor who is an Attesting Witness to the Will.

No person shall, on account of his being an executor of a will, be incompetent as a witness for or against the will. (V. C. 1873, ch. 118, § 21; V. C. 1887, ch. 112, § 2531; *Coalter's Ex'or v. Bryan & ux. & als.*, 1 Grat. 87, &c., 94; *Martz v. Martz*, 25 Grat. 363.)

4<sup>p</sup>. Any Other Person Incompetent as a Witness by Reason of Infamy, Interest, or otherwise.

No special provision is made by statute determining *to what period* the incompetency is to relate. As already observed, it is probable that our courts will adopt Lord Camden's view, and consider that if the witness is incompetent at the time of attestation, he is not such a witness as the statute requires, and the will, if it cannot be otherwise proved, is void. (*Id.*, p. 1013, 3<sup>p</sup>; *Holdfast v. Dowsing*, 2 Str. 1254 '5; *Hatfield v. Thorp*, 5 B. & Ald. (7 E. C. L.) 789). If the witness, being competent at the time of attestation, becomes incompetent afterwards, his hand-writing is to be proved, as if he were dead. (3 Redf. Wills, 42 '3.)

As to the capacity to testify in a will-case of a person who is not an attesting witness, see *Martz v. Martz*, 25 Grat. 363 & seq.

2<sup>o</sup>. The Mode of Attestation of Wills Proper, not Appointments under a Power.

Unless the will be wholly written by the testator, the signature shall be made, or the will acknowledged by him in the presence of *at least two competent witnesses*,



*present at the same time*; and such witnesses shall *subscribe* the will *in the presence* of the testator, but no form of attestation shall be necessary. (V. C. 1873, ch. 118, § 4; V. C. 1887, ch. 112, § 2514.)

And here it may be observed that in England, and in several of these states, *three or more* witnesses are required, so that, if the will is designed to pass real property not in Virginia, since it must be executed according to the *lex loci rei sitæ*, it is prudent to have three or more, unless it is known with certainty that the law is satisfied with a less number;

W. C.

1<sup>p</sup>. Two or more Competent Witnesses, Present at the Same Time, are Required.

The witnesses must be present together *at some time*, when the testator acknowledges the signature, or the instrument to be his act, but not necessarily when they *subscribe their names*. (Parramore v. Taylor, 11 Grat. 220; Beane & ux. v. Yerby, 12 Grat. 239, 244-'5; Green & als. v. Crain & als., 12 Grat. 257-'8.)

See, as to the circumstances which must attend the execution of wills, Inglesant v. Inglesant, 10 Eng. Rep. (Moak) 526; Pearson v. Pearson, 4 Do. 677, 680, n's; Morritt v. Douglass, 5 Do. 500, 502, note; Fischer v. Popham, 13 Do. 469; Clark v. Dunnavant, 10 Leigh, 13; Young v. Barnes, 27 Grat. 105; Cheatham v. Hatcher, 30 Grat. 66, 68; Green v. Crain, 12 Grat. 252.

2<sup>p</sup>. The Signature must be Made, or the Will Acknowledged by Testator, *in Presence of the Witnesses*.

It is enough that the testator should acknowledge in the presence of the witnesses that the *act was his* (without designating it *as his will*), he himself having knowledge of the contents of the instrument, and the design that it should be the testamentary disposition of his property. In the absence of any contrary proof, the acknowledgment of the instrument is an acknowledgment of its contents and of its execution. If the paper has been subscribed by himself, such an acknowledgment is a recognition and ratification of his signature; and if his name has been subscribed by another, such acknowledgment is a recognition and ratification of the signature as having been made for him in his presence, and by his direction. Of course, the will must be signed before it is attested. (Rosser, &c., v. Franklin, 6 Grat. 25; Beane & ux. v. Yerby, 12 Grat. 239, 241; Green & als. v. Crain & als. 12 Grat. 257-'8; Wms. Real Prop. 198-'9, n. 1; Bac Abr. Wills, (D.) 2; 3 Lom. Dig. 43 & seq.)

3<sup>d</sup>. Witnesses are to Subscribe the Will *in the Presence of the Testator.*

The statute is peremptory in requiring that the witnesses shall *subscribe their names* in the presence of the testator, and at his request. (V. C. 1873, ch. 118, § 4; V. C. 1887, ch. 112, § 2514.) But it is settled that a subscribing witness may attest a will by making his mark, his name being written by another in his presence and at his request; the validity of the attestation depending upon the signing of the name of the witness by his authority and in his presence, and not upon the fact of his making a mark, or doing some manual act in connection with the signature. (*Jesse v. Parker*, 6 Grat. 57.)

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1<sup>a</sup>. The Object in Requiring Witnesses to Subscribe *in the Presence of the Testator.*

The object is to guard against a supposititious will being fraudulently imposed upon the testator, instead of the real one. (3 Lom. Dig. 51; 4 Kent's Com. 516; 2 Greenl. Ev. § 678.)

2<sup>a</sup>. What is *the Presence Required.*

The idea of *presence* requires the attestation to occur within the range of the testator's vision, and within a reasonable degree of proximity, in case of one who has the faculty of sight, and with *consciousness* on the part of the testator, of the presence of the witnesses, presence meaning *conscious presence*. (*Baldwin v. Baldwin*, 81 Va. 410, 413; *Tucker v. Sandidge*, 85 Va. 570.) In case of a blind man, proximity no doubt is one criterion of presence, but what other circumstance must concur therewith (supposing the attestation to take place in the same room) is not settled by authority, and must be decided when the case occurs. (3 Lom. Dig. 54-5; *Neil v. Neil*, 1 Leigh, 22; *Boyd v. Cook*, 3 Leigh, 32; *Nock v. Nock*, 10 Grat. 119; 1 Redf. Wills, 54, 57-8; 1 Jarm. Wills (5 ed.), 87, n. 2.)

To be *in the same room* with the testator, when witness subscribes the will, is *prima facie* to be in his presence; which, however, may be repelled by proof that the testator was so situated relatively to the witness that he could not see the act of attestation, and could not, without help, place himself in a position to see. If he could see, or could, *without help*, place himself in a position to see, it is immaterial whether he *really did see or not*. (3 Lom. Dig. 52-3; *Neil v. Neil*, 1 Leigh, 6; *Sturdivant v. Birchett*, 10 Grat. 67, 86; *Pollock v. Glassel*, 2 Grat. 439; 1

Redf. Wills, 245 & seq.; Cheatham v. Hatcher, 30 Grat. 56; Baldwin v. Baldwin, 81 Va. 405.)

An attestation not made in the same room is *prima facie* not an attestation in *his presence*. But this also may be repelled by showing that from the position *actually occupied* by the testator, he could plainly see the act of attestation. Hence, where a lady went to an attorney's office to execute a will, and the witnesses having seen her execute it as she sat in her carriage, carried it into the office to attest it, it being proved by a person who was in the carriage with her that, through the window of the office the testatrix might see what passed, it was decreed by Lord Thurlow that the will was well attested. (Casson v. Dade, 1 Bro. C. C. 99; 3 Lom. Dig. 52, &c.) And so where the testator, from the position occupied by him in his chamber, could see the act of attestation through an open door, at a desk in an adjacent room or hall, notwithstanding the paper and the act were partially concealed from him by the intervening persons of the witnesses, the will was held to be well executed. (Nock v. Nock's Ex'or, 10 Grat. 106; Davy v. Smith, 12 Mod. 37 and n. (a).) But where the will, being attested in an adjoining room, the testator, from the place where he *actually was*, could not see the act, but, if he had been so minded, could easily have placed himself in a position to see it, it was determined, but by a divided court, not to be duly attested. (Moore v. Moore's Ex'or, 8 Grat. 307.) The same principle was applied in Coleman's Case, 3 Curt. (7 Eng. Ec. R.) 118, and in Ellis's Case, 2 Curt. (7 Eng. Ec. R.) 225, and in Reynolds v. Reynolds, 1 Spears (So. Car.), 253. See Shires v. Glasscock, 2 Salk. 688; Davy v. Smith, 3 Salk. 395; Doe v. Manifold, 1 M. & S. 294; Winchelsea v. Wauchope, 3 Russ. (3 Eng. Ch.) 441; Tod v. Winchelsea, 2 Car. & P. (12 E. C. L.) 488; 1 Redf. Wills, 246 & seq.)

The case of Sturdivant & al. v. Birchett, 10 Grat. 67, introduces into this subject a novel construction, which, if it be sustained by future decisions, may go far to frustrate the precautions so jealously thrown around the making of wills. In that case the witnesses, for convenience, took the will, after it had been executed by the testator, into another room, *out of his view*, and there *subscribed their names*. They then immediately, within one or two minutes, returned to the testator with the paper; and one of them, in the presence of the other, with the paper

open in his hand, said to the testator, "Here is your will witnessed;" at the same time pointing to the names of the witnesses, which were on the same page, and close to the name of the testator. The testator then took the paper, looked at it, as if examining it, and then folded it up, speaking of it as his will. It was held, by a divided court (*Allen and Daniel*, J.'s, dissenting), that, under these circumstances, the recognition of their attestation by the witnesses to the testator is substantially a subscribing of their names *in his presence*.

3°. Ceremonies Required in Case of *Appointments by Will* in the *Exercise of a Power*.

"No appointment made *by will*, in the exercise of a power, shall be valid unless the same be so executed that it would be valid for the disposition of the property to which the power applies, if it belonged to the testator; and every will so executed, *except the will of a married woman*, shall be a valid execution of a power of appointment *by will*, notwithstanding the instrument creating the power expressly require that a will made in execution of such power shall be executed with some additional or other form of execution or solemnity." (V. C. 1873, ch. 118, § 5; V. C. 1887, ch. 112, § 2515.) A married woman, then, it would seem, must *in all cases* execute a power of appointment *by will*, as a will is required to be executed; and if other or additional forms or solemnities be required by the power, they also must be observed. See *Thorndike & als. v. Reynolds & als.* 22 Gr. 21.

2°. The Making of *Wills of Chattels*; w. c.

1<sup>m</sup>. Who may Make Wills of Chattels.

The same person may make wills of chattels as may make wills of lands, except that with us the age is 18, instead of 21. (V. C. 1873, ch. 118, §§ 2, 3; V. C. 1887, ch. 112, § 2513.)

At common law a will of chattels may be made, if in either case *discretion be actually proved*, by males at 14, and by females at 12. (1 Bl. Com. 463; *Ante*, Vol. I., 501.)

2<sup>m</sup>. Persons to Whom *Chattels may be Bequeathed*.

Chattels may be bequeathed to all persons who are *sufficiently designated*. Nor is there, as in the case of lands, any disability *to hold*, even on the part of *alien enemies*, nor of a *corporation* in any case. (1 Bl. Com. 372; *Id.* 477.)

3<sup>m</sup>. What Chattels are *Bequeathable*.

All chattels are bequeathable to which the testator *may be entitled at his death*; except that, if he is a *married man*, he cannot *by will* deprive his wife of her *parapher-*



*alia* (apparel and ornaments, 2 Bl. Com. 436), nor of her *distributive share* of his personalty, *without her consent*. She may renounce any provision made for her in her husband's will *within one year* from its probate, and then, or if no provision is made for her by the will, she shall have such share of his personal estate as if he had died intestate. (V. C. 1873, ch. 119, §§ 12, 10, 13; Id. ch. 118, § 11; V. C. 1887, ch. 113, §§ 2557 (Cl. 3, 4), 2559; Id. ch. 112, § 2521.)

4<sup>m</sup>. What *Ceremonies* are Required for *Wills of Chattels*.

Wills of chattels, at common law, required *no writing whatever*. However large the value of the chattels, the will might be merely *verbal*, or *nuncupative*, as it was technically called. And this continued to be the law until A. D. 1678, when, by the statute of *frauds and perjuries* (29 Car. II., c. 3), wills of chattels were required to be for the most part *in writing*;

w. c.

1<sup>n</sup>. Doctrine at *Common Law*.

Wills of chattels required *no writing*; but might be in all cases *verbal* or *nuncupative*. (2 Bl. Com. 500 & seq.; Wentworth, Ex'ors, 11, 14; Wms. Pers. Prop. 413 & seq.)

2<sup>n</sup>. Doctrine *by Statute*; w. c.

1<sup>o</sup>. Doctrine *by Statute in England*.

The statute of *frauds and perjuries* (29 Car. II., c. 3, §§ 19–21, A. D. 1678), enacted that *verbal* or *nuncupative wills* of chattels exceeding £30 should be valid in *only three cases*, viz.: in case of—

- (1), *Mariners at sea*;
- (2), *Soldiers in actual service*;
- (3), *Persons in extremis*.

In all other cases (supposing the value to exceed £30), they were required to be *in writing*; but no signing by the testator, nor attestation of witnesses was prescribed. But both these requirements are exacted by statute, 7 Wm. IV., and 1 Vict. c. 26, explained by 15 & 16 Vict. c. 24. (Wms. Pers. Prop. 415–'16; 2 Bl. Com. 500, 501.)

2<sup>o</sup>. Doctrine *by Statute in Virginia*.

In Virginia an enactment similar to 29 Car. II., c. 3, §§ 19–21, existed for many years, until 1835, when the case of *Worsham's Adm'r v. Worsham's Ex'or*, 5 Leigh, 589, occasioned so much uneasiness, by presenting sharply the danger of fraud in such a state of the law, as led to the act of 1834–'5, perfected at the revival of 1849, into its present form. The existing statute enacts that wills of chattels shall be executed with like forms and ceremonies as *wills of lands*, and allows but two

out of the *three exceptions* prescribed by the English statute, namely:

- (1), Wills of mariners *at sea*; and
- (2), Wills of soldiers *in actual service*; which may be still *verbal* or *nuncupative*. (V. C. 1873, ch. 118, § 6; V. C. 1887, ch. 112, § 2516.)

## 2<sup>k</sup>. The Revocation of Wills.

Wills of all kinds are in their nature *revocable* or *ambulatory*, as it is styled, and cannot by the most express words be made otherwise, although, to be sure, a *contract* may be disguised under the name and appearance of a will, which, according to the nature of contracts, will be irrevocable. Originally, in England, even wills of lands might have been revoked *by words only*, the statute of wills (32 & 34 Henry VIII.) being silent as to revocations. (Lawson v. Morrison & al. 2 Am. L. C. 643.) The statute of frauds, however (29 Car. II., c. 3, § 6), provided against the mischief which would have ensued, had the omission continued, by enacting that no *devise* in writing should be revoked, except by some other will, codicil, or writing, or by burning, tearing, cancelling or obliterating the same by the testator, or in his presence, and by his direction. But to these modes of revocation the courts of chancery added, by *construction and implication*, two others, namely, by a subsequent change of estate on the part of the testator, and by a subsequent marriage and birth of a child (or in case of a woman, subsequent marriage alone), which two latter circumstances, however, those courts held to afford a mere *presumption*, which might be repelled, either by other circumstances, or by declarations to the contrary. (3 Lon. Dig. 100, 101; Bac. Abr. Wills (H.) 1.) The subsequent change in the manner of holding the estate (as if he should sell and afterwards buy it back again), operated a conclusive revocation, not on the basis of the testator's intention, which was wholly immaterial, but on the ground that the statute of wills did not enable one *to devise what he had not at the making of the will*, and the subsequent sale and re-purchase was regarded, logically enough, as a new acquisition.

In Virginia our statutes have adopted a similar policy by prescribing the modes of revoking wills, only they have declared what shall be *implied* as well as *express* revocations of wills. (V. C. 1873, ch. 118, §§ 7 to 10, 17, 18; V. C. 1887, ch. 112, §§ 2517 to 2520, 2527, 2528.) The subject may accordingly be considered under the two-fold division of, (1), Express revocations; and (2), Implied revocations; W. C.

### 1<sup>l</sup>. Express Revocation of Wills in Virginia.

"No will or codicil, or any part thereof," says the statute, "shall be revoked, unless under the preceding section

(that is, impliedly, by *marriage*, with some qualification), or by a *subsequent will or codicil*, or by some *writing declaring an intention to revoke* the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence, and by his direction, *cutting, tearing, burning, obliterating, cancelling, or destroying* the same, or the signature thereto, with the *intent to revoke*." (V. C. 1873, ch. 118, § 8; V. C. 1887, ch. 112, §§ 2517, 2518.) Although, notwithstanding this emphatic language, the statute itself in subsequent sections (§§ 17, 18; V. C. 1887, ch. 112, §§ 2527, 2528), provides for an implied revocation, qualifiedly, in addition to that wrought by marriage, namely, by the subsequent birth (after the making of the will) of children, who are pretermitted thereby, as we shall presently see, in connection with implied revocations.

See *Lawson v. Morrison & al.* (2 Dall. 286), 2 Am. L. C. 638, 643, & seq., in which most of the cases touching the revocation of wills are cited;

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1<sup>m</sup>. Express Revocations by *Subsequent Will or Codicil*, in Writing, *Executed like a Will*.

See V. C. 1873, ch. 118, § 8; V. C. 1887 ch. 112, § 2518.)

A subsequent will or codicil, duly executed, operates as a revocation of a former one in all cases where it contains an express clause revoking all former wills, or where it makes a different and incompatible disposition of the land devised by the former one. (3 Lom. Dig. 102.)

The intention to revoke is what gives effect to the revocation, and therefore, where such an intent appears, the subsequent will or codicil will operate a revocation of the prior will, notwithstanding such subsequent will, etc., may be void from *disability in the devisee* to take, as where it is to the *poor* of the parish of C., or to an *unincorporated association*, etc., in which cases the devise is ineffectual by reason of the uncertainty of the intended beneficiaries. Hence, also, if there be no clause of express revocation in the subsequent will, and the disposition of the property be not inconsistent with the former will, there is no revocation of the former, but both are good. (3 Lom. Dig. 102-3; *Coward v. Marshall*, 2 Cro. (Eliz.) 721.)

From the principle just stated it follows that, although it appears in proof, and be found, that there was a subsequent will, but it does not appear what were its contents, or whether it even revoked the previous will, or made a disposition of the property incompatible therewith, there is no revocation, not even though it be found that the

disposition was different, but in what particulars is unknown. (3 Lom. Dig. 103-4; *Hitchins v. Basset*, 2 Salk. 592, and n. (a), and cases cited in note; *Goodright v. Harwood*, 3 Wils. 497, 511, & seq. See *Glascock v. Smithers*, 1 Call, 479; *Bates v. Holman*, EXOR. & C., 3 H. & M. 502; *Hylton v. Hylton*, 1 Grat. 161.)

2<sup>m</sup>. Express Revocation of Wills by *Declaration in Writing Declaring such an Intent, and Executed like a Will.*

The statute, 29 Car. II., c. 3, makes a difference between the mode of executing *a will* (as to which § 5 requires that the witnesses should *subscribe in the presence of the testator*), and a revocatory *declaration in writing*, as to which § 6 requires that the deviser should sign in the presence of the witnesses, without requiring that the witnesses should *subscribe in the testator's presence*. And this difference led to some subtle distinctions. Thus, it was held that whilst a will might be revoked by a *written declaration*, although the witnesses did not subscribe in the testator's presence, yet it would not be revoked by an instrument intended to *operate as a will*, and containing a clause of revocation, which the attesting witnesses did not subscribe in the testator's presence; and that, not being valid as a will, for which it was designed, it could not be treated as a good *writing* to revoke the first will, it being the sole purpose of such a writing to revoke or destroy a previous will, and not to make a new disposition of property. (3 Lom. Dig. 108-9; *Onions v. Tyrer*, 1 P. Wms. 344; S. C. 2 Vern. 741.)

A similar embarrassment arose, with a like result, while a diversity existed (as was the case in Virginia for some years subsequent to 1834-'5) between the ceremonies prescribed for making wills and revocations of wills of chattels. Under that state of the law, a testator who had made a will of chattels proposed to revoke it by what was intended as a new will, making a different disposition of the property, and containing a clause of revocation. But the latter instrument was not duly executed as a will, although if it had been a mere writing of revocation, it would have been sufficient. It was held that it could not operate in the latter way. (*Barksdale v. Barksdale*, 12 Leigh, 535. See *Bates v. Holman*, EXOR., 3 H. & M. 502.)

Our present statute obviates, as we have seen, all diversities of this kind, requiring the revoking declaration to be executed like a will, just as the revoking will or codicil is. (V. C. 1873, ch. 118, § 8; V. C. 1887, ch. 112, § 2518.)

3<sup>m</sup>. Express Revocations of Wills by Testator, or Some Person in his Presence, and by his Direction, *Cutting,*



*Tearing, Burning, Obliterating, Cancelling, or Destroying the Same, or the Signature thereto, with the Intent to Revoke.*

See V. C. 1873, ch. 118, § 8; V. C. 1887, ch. 112, § 2518.

In order, by this means, to effect the revocation of a will, there must be done some one of the acts specified, however slight it may be, and with the *specified intent*. Mere words and directions, how pointed and peremptory soever, will not suffice. (3 Lom. Dig. 113, 114, 122; Pemberton v. Pemberton, 13 Ves. 290; Malone v. Hobbs, 1 Rob. 346; Bates v. Holman, 3 H. & M. 502; Boyd v. Cook, 3 Leigh, 32; Doe v. Harris, 6 Ad. & El. (33 E. C. L.) 209.)

Hence, where a blind man orders his will to be destroyed, and believes that it is destroyed accordingly, but no act is done towards its destruction, it is not a revocation. (Boyd v. Cook, 3 Leigh, 32.) And so, where a testator destroyed a codicil, and directed a will in another person's custody to be also destroyed, but no act towards it was done, it was no revocation of the will. (Malone v. Hobbs, 1 Rob. 346.)

On the other hand, any of the acts mentioned, however slight they may have been, if accompanied by the *intent to revoke*, and the testator, with that intent, has done *all he designed to do*, in pursuance of his purpose, the revocation is thereby accomplished; but not if he abandons his purpose before he completes the act which he designed. (3 Lom. Dig. 116-17; Bibb v. Thomas, 2 Wm. Bl. 1064; Doe v. Perkes, 3 B. & Ald. (5 E. C. L.) 489.)

And where a will is found after the testator's death, among his repositories, mutilated or defaced, it is presumed to have been done by himself, and done *animo revocandi*. (3 Lom. Dig. 124.) So also, where the testator has his will in his own custody, and after his death it cannot be found, the presumption is that he destroyed it himself. And if there be duplicates in the hands of different persons, and that copy in his own custody be not found after his death, all are revoked, for all together constitute but one will. (3 Lom. Dig. 124; Lawson v. Morrison, 2 Am. L. C. 653 & seq.; Appling v. Eades, 1 Grat. 286.)

It appears that if a testator who has duplicates of his will *in his possession*, cancels or destroys one of them, and preserves the other in its original condition, the presumption is in favor of a revocation; but it may be rebutted by evidence that such was not the intent. (Pemberton v. Pemberton, 13 Ves. 310; Roberts v. Round, 3 Hagg. (5 E. E. R.) 548; Utterson v. Utterson, 3 Ves. & B.

122.) But where he destroys or cancels the *only copy* in his possession, the presumption of revocation is so strong that nothing short of the most direct and positive evidence will justify the inference that an outstanding duplicate is not within the scope of the revoking intention. (*Rickards v. Munford & al.* 2 Phil. (1 Eng. Ec. R.) 23; *Calvin v. Fraser*, 2 Hagg. (4 Eng. Ec. R.) 266.)

Revocation of every sort depends on *intention*, to be derived, when the revocation is by subsequent will or declaration in writing, from the *words*, interpreted according to law; and when by the cancellation or destruction of the will from the surrounding circumstances, and the act done. And although, when the revocation is by *words* contained in writings, parol evidence is not admissible to alter their meaning, yet it may often be employed to prove circumstances which will rebut the *prima facie* inferences to be gathered from words or conduct, showing that the imputed intention did not exist, or that it really applied to something else, and not to the instrument cancelled, destroyed, or revoked. Thus, if the revocation appear to have been founded on a misapprehension of existing circumstances, as upon a mistaken impression in respect to the death of a former legatee, whether it be derived from words or acts, the revocation is inoperative. This principle receives an apt illustration in the case of *Campbell v. French*, 3 Ves. Jr. 321. A testator residing in London, by will dated August, 1790, gave a legacy of £500 each to the grandson and granddaughter of his sister, the parties being described as residing in Virginia, and 5th January, 1791, added a codicil revoking the bequest, the legatees "*being all dead.*" The legatees were not dead, and Lord Chancellor Loughborough held that the legacies were not revoked. See also, *Moresby's Case*, 1 Hagg. (3 Eng. Ec. R.) 378; *Evans v. Evans*, 10 Ad. & El. (37 E. C. L.) 228; and *Lawson v. Morrison*, 2 Am. L. C. 648 '9.

And so, when any of the words or clauses in a will are erased, merely for the purpose of substituting others which cannot legally take effect, the purpose of revocation will be considered subsidiary to that of substitution, and both will fail of effect together. (*Short v. Smith*, 4 East. 419; *Locke v. James*, 11 M. & W. 901; *Rippin's Goods*, 2 Curt. (7 Eng. Ec. R.) 332.)

## 21. Implied Revocations of Wills in Virginia.

In England, as we have seen, implied revocations of wills arose, not out of the terms of the statute of frauds (29 Car. II., c. 3, §§ 5, 6), but in spite of very positive provisions in that statute to the contrary, out of the construction of the courts of chancery. The courts, both of law and equity, from the time of the enactment of the statutes

of wills (32 & 34 Hen. VIII.), had assimilated wills of lands to *conveyances*, and were, therefore, by that construction, obliged to consider them as embracing, not such lands as the testator might own *at his death* (as was the construction of wills of chattels), but such only as he possessed *at the date of the will*. Hence, if at any time after making his will, he sold the lands then owned by him, the will could no longer be applicable to them, although he should afterwards re-acquire them, and die seised thereof. And so, any alteration of the testator's estate after the making of the will would have in like manner the effect to defeat the will, at least *pro tanto*, that is, to the extent of the alteration. Thus arose one of the instances of implied revocation. (3 Lom. Dig. 132 & seq.; Lawson v. Morrison, 2 Am. L. C. 668 & seq.; Bac. Abr. Wills, (H.) 1.) And this implication long existed under the Virginia statute (Hughes v. Hughes' Ex'or, 2 Munf. 209; King's Ex'ors v. Sheffey's Adm'r, 8 Leigh, 619); but since 1st July, 1850, we have a provision (taken from 7 Wm. IV. and 1 Vict. c. 26, § 23), that no conveyance or other act, subsequent to the execution of a will, shall, unless it be an act by which the will is revoked, prevent its operation with respect to such interest in the estate comprised in the will as the testator may have power to dispose of by will at the time of his death. (V. C. 1873, ch. 118, § 10; V. C. 1887, ch. 112, § 2520.)

Another *constructive* revocation the courts of equity derived, notwithstanding the peremptory language of the statute of frauds (29 Car. II., c. 3, § 6), from considerations of *domestic duty and convenience*, where, after the making of the will, the testator, if a *woman, married*, or if a *man, married and had a child born*. This, however, was founded upon a mere presumption of a purpose on the testator's part to put the will aside, in order to provide for persons who had become thus intimately connected with him; and in the woman's case, upon the additional consideration that a will is in its nature ambulatory, and as after marriage she could not change it, if it were not revoked by the marriage, it would be practically not a will, but a grant. (3 Lom. Dig. 125, 132; Bac. Abr. Wills, &c. (H.) 1; Sprague v. Stone, 2 Ambl. 721; Phaup & als. v. Wooldrige & als. 14 Grat. 334.) Seeing, therefore, that the implication is founded upon a *presumption* of intention, the courts held that it might be repelled, as we have seen, by showing that no such intention existed, either by express declarations, or by circumstances, as that the wife and children were adequately provided for otherwise. (Bac. Abr. Wills, (H.) 1; 3 Lom. Dig. 126-27 & seq.; Wilson v. Rootes, 1 Wash. 140; Yerby v. Yerby, 3 Call, 289. But see

Doe v. Lancashire, 5 T. R. 49; Marston v. Roe, 8 Ad. & El. (35 E. C. L.) 14; Phaup v. Wooldridge, 14 Grat. 331; Lawson v. Morrison, 2 Am. L. C. 665 & seq.)

The *principle* of this latter constructive revocation is incorporated into the Code of Virginia, but as we shall see, with material modifications. (V. C. 1873, ch. 118, §§ 7, 17, 18; V. C. 1887, ch. 112, §§ 2517, 2527, 2528.)

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1<sup>m</sup>. Revocations of Wills in Virginia, *Implied from Marriage*.

Every will made by a man or woman, says the statute, shall be revoked by *his or her marriage*, except a will made in exercise of a *power of appointment*, when the estate thereby appointed *would not*, in default of such appointment, pass to his or her heir, personal representative, or next of kin. (V. C. 1873, ch. 118, § 7; V. C. 1887, ch. 112, § 2517 [taken from 7 Wm. IV., and 1 Vict. c. 26, § 18].)

Under this statute, marriage by itself, apart from the birth of issue, operates an *absolute* and not a merely *presumptive* revocation of the will, save in the excepted cases. Indeed, the later, if not the better opinion, prior to the enactment of the statute of 7 Wm. IV., and 1 Vict. c. 26, § 18, was that the revocation was absolute, and incapable of being repelled by any proof of intention on the testator's part not to alter his will. Neither the English nor the Virginia statute admits of any doubt on this point. Save in the excepted cases, the revocation wrought by marriage is invariable and without qualification. (Phaup & als. v. Wooldridge & als. 14 Grat. 332; Lawson v. Morrison, 1 Am. L. C. 765 & seq.)

The instance excepted stands on obvious grounds. The purpose of the revocation is to provide for the consort and family; but in the case supposed, if the appointment were revoked, the estate appointed would not enure to the benefit of the consort and family; and so, the design of the revocation failing, none takes place.

2<sup>m</sup>. Revocation of Wills in Virginia, *Implied from the Birth of Subsequent Children*, Pretermitted but not Disinherited.

The provision of our statute upon this subject is as follows: "If any person die leaving a child, or his wife *enccinte* of a child which shall be born alive, and leaving a will made when such person had *no child living*, wherein any child he might have is not provided for or mentioned, such will, except so far as it provides for the payment of the debts of the testator, shall be construed as if the devises and bequests therein had been limited to take effect, in the event that the child shall die under the age of twenty-one years, unmarried and without issue." (V. C. 1873, ch. 118 § 17; V. C. 1887, ch. 112, § 2527.)



And again: "If a will be made when the testator *has a child living*, and a child be born afterwards, such after-born child, or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate, towards raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute ratably, either in kind or in money, as a court of equity in the particular case may deem most proper. But if any such after-born child or descendant, die under the age of twenty-one years, unmarried and without issue, his portion of the estate, or so much thereof as may remain unexpended in his support and education, shall revert to the person to whom it was given by the will." (V. C. 1873, ch. 118, § 18; V. C. 1887, ch. 112, § 2528.)

These provisions contemplate two cases, namely, (1), Where there are *no children* at the date of the will; and (2), Where there *are children* at the date of the will;

w. c.

1<sup>n</sup>. Where there are *no Children* at the Date of the Will.

The will, except so far as it provides for the testator's debts, shall be construed as if the devises and bequests therein had been limited to take effect in the event that the child shall die *under the age of twenty-one years, unmarried and without issue*. (V. C. 1873, ch. 118, § 17; V. C. 1887, ch. 112, § 2527.)

See 3 Lom. Dig. 139 & seq.; Yerby v. Yerby, 3 Call, 334; Savage v. Mears & ux. 2 Rob. 570.

2<sup>n</sup>. Where there are *Children* at the Date of the Will, and *Others are Born Afterwards*.

Such after-born child, or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate; towards raising which portion the legatees and devisees shall, out of what is given them, *contribute ratably*. But if such after-born child, or descendant, die under twenty-one, unmarried, and without issue, his portion, or so much thereof as may remain unexpended in his support and education, shall revert to the person to whom it was given by the will. (V. C. 1873, ch. 118, § 18; V. C. 1887, ch. 112, § 2528.)

The statute providing for pretermitted children born in the *testator's life-time*, but after the making of the will, having been first enacted December 5th, 1794 (1

Stats. at Large, 303), is not applicable to the case of a testator who made his will and died prior to that date, as in October, 1794. In such a case, a child so situated was considered, in *Savage v. Mears & ay.* 2 Rob. 570, to be wholly disinherited, and left portionless. In *Armistead v. Dangerfield*, 3 Munf. 20, the after-born child was *posthumous*, and was, therefore, within the statute as it then was (1 Stats. at Large, 89); and a course was adopted by the court, in order to raise such child's portion, exactly conformable to that now prescribed by the statute above cited,

### 3<sup>k</sup>. The Re-publication of Wills in Virginia.

What is meant precisely by the *publication* of a will is not entirely clear. It is supposed to be the declaration by which a person designates that he means to give effect to a paper as his will, although it does not seem to be necessary that he should describe it as being his will; and his *silently* signing it, and procuring witnesses duly to attest it according to the statute, would doubtless be a sufficient declaration. (*Moodie v. Reid*, 7 Taunt. (2 E. C. L.) 355; *Lawson v. Morrison*, 2 Am. L. C. 675.)

Prior to the statute 29 Car. II., c. 3 (which in terms placed the *re-publication* of wills on the same footing as their execution), any act or expression was sufficient to set up even a revoked will (not physically destroyed), which showed an intention to treat the will as a valid and subsisting instrument. Thus, in that state of the law, the subsequent verbal "*allowance*" of a will was held a sufficient re-publication to pass after-acquired lands, if the terms employed adequately comprehended them, as was also a parol declaration that after-acquired lands should go with others previously devised. Re-publication, apart from and prior to the statute of frauds, was in fact the converse of a revocation, and, like it, was open to the whole range of parol evidence. (*Beckford v. Parnecott*, 2 Cro. (Eliz.) 493; *Barnes v. Crowe*, 2 Ves. Jr. 497; *Lawson v. Morrison*, 2 Am. L. C. 674 & seq.)

The statute of wills, in Virginia, seems undoubtedly to contemplate that the re-publication of wills shall be accompanied by the same formalities as the original execution of them.

Re-publication is of two kinds, express and constructive. *Express*, where the testator repeats those ceremonies which are required for the valid execution of a will, with the avowed design of re-publishing it, which appears to be in all cases required in Virginia (V. C. 1873, ch. 118, §§ 9, 22; V. C. 1887, ch. 112, §§ 2519, 2532); *constructive*, where a testator, for some other purpose, makes a codicil to his will, in which case the effect of the codicil, independently of

statute, if it contains no internal evidence of a contrary intention, is to re-publish the will, and thus bring it down to the date of the codicil. (3 Lom. Dig. 153 & seq.; Lawson v. Morrison, 2 Am. L. C. 676.) The code which took effect 1st July, 1850 (adopted from 7 Wm. IV. and 1 Vict. c. 26, § 22), as also the Code of 1887, seems to be intended to modify the doctrine as to codicils, by enacting that when a will is revived by a codicil, it shall be so revived only to the extent to which an intention to revive the same is shown. (V. C. 1873, ch. 118, § 9; V. C. 1887, ch. 112, § 2519; 3 Lom. Dig. 173.)

It is a vexed question whether, if a subsequent will revokes a former will, and be itself revoked, the former is thereby revived; and upon that point a reasonable distinction appears to be taken between those acts of revocation of the first will which are not essentially testamentary in their nature, but absolute (*e. g.*, by cancellation or destruction, etc., or by revocatory declaration in writing), and those which are contained in *subsequent wills*, etc., which in their nature are ambulatory and revocable; the better opinion being, as it seems, that the effect of an absolute or unconditional revocation is final, and cannot be annulled or varied by any evidence of a subsequent change of intention, short of a re-publication or re-execution; whilst if the revocation be by a *subsequent will*, its own ambulatory and revocable character is communicated to all acts of which it is made the medium, and that, therefore, the cancellation or other revocation of a *revoking will* is to be regarded as a revival of that which it revoked. (Burtinshaw v. Gilbert, 1 Cowp. 49; Goodright v. Glazier, 4 Burr. 2512; S. C. 1 Cowp. 87; Walton v. Walton, 7 Johns. Ch. R. 258; Lawson v. Morrison, 2 Am. L. C. 660 & seq.)

This question is effectually put at rest in Virginia by the statute just referred to, which declares that “no will, or codicil, or any part thereof, which shall be *in any manner* revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive the same has been shown.” (V. C. 1873, ch. 118, § 9; V. C. 1887, ch. 112, § 2519; 3 Lom. Dig. 152; 1 Lom. Ex. 131 '2; 1 Jarm. Wills (5 Am. ed.), 145 '6; Major v. Williams, 3 Curt. (7 E. E. R.) 432; Rudisill v. Rhodes, 29 Grat. 151; Corr v. Porter, 33 Grat. 278.)

Re-publication of a will has a two-fold effect: first, To give the will all the effect of a will made at the time of its re-publication; and secondly, To set up and re-establish a will that has been revoked. (3 Lom. Dig. 153; Corr v. Porter, 33 Grat. 278.) As with us, wills, in respect to the *property they dispose of*, speak as of the testator's death



(unless the contrary intention appear from the will), there is less frequent occasion than formerly to re-publish a will in order to make it comprehend *more or other property* than it would otherwise do (supposing the phraseology to be unchanged); but in *respect of persons* who are to take there is no such provision, so that, as to them, re-publication may be as desirable as ever. (V. C. 1873, ch. 118, § 11; V. C. 1887, ch. 112, § 2521; 3 Lom. Dig. 174 & seq.)

3<sup>l</sup>. The Probate and Registry of Wills in Virginia; w. c.

1<sup>k</sup>. The Necessity or Advantage of Probate.

*Probate of a will* is the official proof made before the proper and appointed tribunal of the due execution of the will, ascertaining it to be the genuine and lawful expression of the last wishes of the deceased in respect to his property; whereupon it is ordered to be recorded as and for the *last will of the decedent*, and the original is deposited and preserved in the clerk's office of the *court of probate*. (2 Bl. Com. 508; Rob. Forms. 285.)

The student will observe that the construction of the will is not submitted to the court of probate. The sole subject for its consideration is, whether the paper in question contains the last authentic expression of the decedent's wishes touching the disposition to be made of his property after his death; and whether the testator is competent to make such a will. The meaning of the paper, or whether it has any meaning at all, must be determined by other tribunals.

Wills of *chattels* must always be admitted to probate, in order to avail anything to the parties who claim under them. Until they thus receive the sanction of the proper court, they cannot be recognized in any court of law or equity. (1 Lom. Eq. 215; Id. 197 '8; 2 Bl. Com. 508; Hensloe's Case, 9 Co. 38 a; Graysbrook v. Fox, 1 Plowd. 281; Monroe v. James, 4 Munf. 194; V. C. 1873, ch. 126, § 1.) But as to a *will of lands*, probate is not indispensable. Such will may, in every case where there is occasion to use it in evidence, be formally proved to have been executed as the statute requires, and that will suffice; but it must be proved afresh in each case. (1 Lom. Ex. 250; Bagwell v. Elliott, 2 Rand. 199, 200; Morrison v. Campbell, 2 Rand. 217; Wills v. Spraggins, 3 Grat. 555; Schultz v. Schultz, 10 Grat. 358.)

But although there be no absolute necessity to cause a will of lands to be admitted to probate, provision is made therefor by our statutes (although until recently there was none in England; Wms. Real. Prop. 190 '91), and with us there is a great expediency in doing so: (1st). Because when once proved, it can never afterwards be questioned *collaterally* at all, nor *directly*, save within two years, allowing a short time longer for certain disabilities: (2dly). Because



an office copy of the will is as available in evidence as the original; and (3rdly), Because the original will thenceforward be kept in the clerk's office, which is a safer place of deposit than any private repository. (See *Post*, 1040; V. C. 1873, ch. 118, § 37; V. C. 1887, ch. 112, §§ 2544, 2545, 2547.)

2<sup>k</sup>. Within what Time a Will should be Recorded.

A will ought to be submitted to the court for recordation as soon as may be convenient after the testator's death, for the reason, amongst others, that the executor can exercise none of the powers of executor until he qualifies as such by taking an oath, and giving bond in the court in which the will, or an authenticated copy thereof, is *admitted to record*, except that he may bury the testator, and preserve the estate, which any stranger might do. (V. C. 1873, ch. 126, § 1; V. C. 1887, ch. 119, § 2636.)

Seeing, then, that the administration of the estate cannot commence until after the probate, it is more important than it was at common law that no unnecessary delay should occur therein; for at common law the executor might, before probate, do almost all the acts incident to his office (which properly concerns chattels only), except only filing a declaration in an action, in which he was obliged to make *profert* of the letters of probate, although whatever he did was only valid supposing it to be ratified and confirmed afterwards by the probate. (1 Lom. Ex. 185-6, 190; *Monroe v. James*, 4 Munf. 194.)

It may seem superfluous to say that no probate can take place *during the life-time of the testator*; yet, according to Swinburne, the great authority upon the subject of wills, upon the petition of the *testator himself*, the testament may be recorded and registered amongst other wills, but it is not to be delivered forth *with a probate*, because it is of no force so long as the testator lives; who also may revoke or alter the same at any time before his death; an idea which seems to have been borrowed from the Roman law. (Swinb. Wills, Pt. VI., § XIII.; 1 Lom. Ex. 204.)

The will of a person who has been long absent from the country may be proved, if he be generally believed to be dead, and the executor will take upon himself to swear that he believes him to be so. (1 Lom. Ex. 205; Swinb. Wills, Pt. VI., § XIII.) With us, in Virginia, if a person who has resided here go from, and do not return to, the State for *seven years successively*, he shall be presumed to be dead, unless proof be made that he was alive within that time. But any one injured by such presumption, if it prove to be unfounded, is to be restored to the rights of which he was deprived by reason of it. (V. C. 1873, ch. 172, §§ 47, 48; V. C. 1887, ch. 164, §§ 3373, 3374.)

3<sup>k</sup>. By Whom a Will should be Submitted for Probate.

Most naturally a will is submitted for probate by the executor named in it, especially a will of chattels; but it may be propounded *by any one interested*—even by slaves liberated thereby. (Winn v. Bob & al. 3 Leigh, 140; Ben Mercer & als. v. Kelso's Adm'r & als. 4 Grat. 106; Schultz v. Schultz, 10 Grat. 358, 369.)

Any one in whose hands it is may be constrained to produce it. (V. C. 1873, ch. 118, § 25; V. C. 1887, ch. 112, § 2535.)

4<sup>k</sup>. In what Courts Wills are Presented for Probate.

In Virginia, the courts of probate are the county and corporation, and the circuit courts. (V. C. 1873, ch. 118, § 23; V. C. 1887, ch. 112, § 2533.) Their local jurisdiction of probates we are now to note; observing that the courts of the several counties and corporations have cognizance in the order following :

W. C.

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- 1<sup>1</sup>. The Circuit, County, or Corporation Court of the County or Corporation wherein the Decedent has a *Mansion-House, or Known Place of Residence*.

See V. C. 1873, ch. 118, § 23; V. C. 1887, ch. 112, § 2533.

- 2<sup>1</sup>. The Courts of the County or Corporation (if he has no such Mansion-House or Place of Residence) wherein *any Real Estate Lies* that is Devised or Owned by Decedent.

See V. C. 1873, ch. 118, § 23; V. C. 1887, ch. 112, § 2533.

- 3<sup>1</sup>. The Courts of the County or Corporation (if there be no such Real Estate), wherein the *Decedent Died*, or wherein *he has Estate*, that is, of course, *Personal Estate*.

See V. C. 1873, ch. 118, § 23; V. C. 1887, ch. 112, § 2533; Hudgin's Case, 2 Leigh, 248; Fisher v. Bassett & al. 9 Leigh, 119; Burnley's Rep. v. Duke, 2 Rob. 102.

The locality of many descriptions of chattels, particularly of *choses in action*, &c., is purely conventional, the things having in themselves *no natural locality*. Rules, however, have for ages been established in England which assigns a locality, it is believed, to every subject of property. See 1 Lom. Ex. 201 '2; Bac. Abr. Ex'ors. &c. (E.); Wentw. Off. Ex'or, 108-'9.

Thus movable and tangible chattels generally are of the county or corporation where they are at decedent's death.

The stocks of joint-stock companies belong where the chief office is situated and shares are transferred.

Judgments, decrees, recognizances, and other debts of record, belong where the record is kept, that is, at the seat of the court.

Bonds, mortgages, and *specialties* generally, belong

where they happen to be at *decedent's death* ; and if not then in the *State*, they are believed to belong where the *debtor resides*. (*Ex parte* Barker, 2 Leigh, 719; Fisher v. Bassett, 9 Leigh, 119.)

Promissory notes, bills of exchange, and all simple contract demands, belong to the county or corporation where the *debtor resides*. (Fisher v. Bassett, 9 Leigh, 119); and lastly,

Demands against the commonwealth belong to the county or corporation wherein is the *seat of government*. (Hudgin's Case, 2 Leigh, 248.)

Before passing from the subject of courts of probate, it should be observed, that in England, for several centuries, and until recently, the courts of probate have been the *ecclesiastical courts*, namely, the court of the *ordinary*, that is, the *bishop's court*, unless the decedent left *goods* above the value of five pounds (called *bona notabilia*), in several dioceses, in which case the jurisdiction, to admit his will to record, was exercised by the *prerogative court* of the archbishop of the province (3 Bl. Com. 95 to 98; Id. 66; Wms. Real Prop. 306 & seq.). But by statute 20 and 21 Vict. c. 77, &c., amended by 21 and 22 Vict. c. 95 (A. D. 1858), the jurisdiction of the ecclesiastical courts over wills is abolished, and a court is established called the "*Court of Probate*," with a principal registry in London, and district registries throughout the kingdom, in which all wills of *personal estate* are now required to be proved. (Wms. Pers. Prop. 431-'2.) The same statute also makes provision for the citation before the same court of the testator's heir at law, and his devisee, where a contest is *expected* touching the validity and due execution of a *will of lands*, and for the final determination in that court of the issue *devisavit vel non*. (Wms. Real Prop. 201.)

5<sup>k</sup>. In what Manner Wills are Admitted to Probate; w. c.

1<sup>1</sup>. The General Mode of Proceeding.

See V. C. 1873, ch. 118, §§ 28 to 36; V. C. 1887, ch. 112, §§ 2536 to 2546.

In England the proceeding is either in *common form* when the will is admitted to probate upon the oath of the executor alone; or in *solemn form, per testes*, when the will is proved by the oath of the witnesses thereto, which is of necessity resorted to when the will is disputed.

In Virginia, we know nothing of this English practice of proving wills in *common form*. We do, indeed, exact from the executor an oath such as is required in England, "that the writing admitted to record contains the true last will of the deceased, as far as he knows or believes;" but this with us is no more than the executor's *oath of office*, in no wise contributing to the proof of the will, and indeed is not



administered until the will has been fully proved. [V. C. 1873, ch. 126, §§ 4, 3; V. C. 1887, ch. 119, §§ 2638, 2640.]

Forms of entries of orders of court admitting wills to probate may be seen Rob. Forms, 285 & seq.; Sands' Forms, 305. Several are presented in Note below.\*

At common law there are *special letters* of administration granted wherever, from infancy, absence, a contest about the will, or other cause, the management of the estate cannot *immediately* be committed to the executor. These special letters are called letters of administration *durante minore aetate*, *durante absentia*, or *pendente lite*, as the case may be. Or else, letters are granted to some discreet person *ad colligendum bona defuncti*, that is, to collect the effects of the deceased and take care of them. (2 Bl. Com. 503, 505.)

In Virginia, a statutory provision is made for the appointment of a *curator* of a decedent's estate in any of the cases above stated, whose commission being by early statutes almost identical with the power conferred by letters *ad colligendum*, authorizing the recipient only to take care of, collect and preserve the goods of the deceased has

\*NOTE.—1. *Form of Order of Probate, when one Executor Qualifies, and Leave is Reserved for his Co-executor to do Likewise.*

Virginia:

County Court of A. County:

The last will and testament of L. D., deceased, was proved in court by the oaths of G. B. and R. F., attesting witnesses thereto, and is ordered to be recorded. And on the motion of E. X., one of the Executors therein named, who took the oath of an Executor, and together with J. S. and V. L., his sureties, entered into and acknowledged their bond, in the penalty of \$20,000, conditioned as the law directs, certificate is granted them for obtaining letters of probate of the said will, in due form. And leave is reserved to P. N., the other Executor named in the said will, to join the said probate, and qualify as Executor when he shall see fit.

2. *Form of Subsequent Order Joining the other Executor in the Probate.*

Virginia:

County Court of A. County:

On the motion of P. N., the other Executor named in the will of L. D., deceased, who took the oath of an Executor, and together with U. K. and G. H., his sureties, entered into and acknowledged a bond, in the penalty of \$20,000, conditioned as the law directs, certificate is granted him to be joined with E. X., the Executor previously qualified, in the probate of the said will.

3. *Form of Order of Probate, where Executor Renounces, and Administration with the Will Annexed is Granted.*

Virginia:

County Court of A. County:

The last will and testament of L. D., deceased, was proved according to law, by the oaths of G. B. and R. F., attesting witnesses thereto, and is ordered to be recorded. And E. X., the Executor named in the said will, having appeared in court, and refused to take upon himself the burden of the execution thereof, on motion of M. T., who made oath according to law, and together with J. S. and V. L., his sureties, entered into and acknowledged a bond in the penalty of \$20,000, conditioned as the law directs, certificate is granted the said M. T. for obtaining letters of administration on the said decedent's estate, with his will aforesaid annexed, in due form.



gradually been moulded so as to enable the *curator* not only to collect the debts and to collect and preserve the other personal estate of decedent, and to receive the rents and profits of real estate disposed of by the will, but also to *pay debts*, subjecting him to be sued therefor, like an executor or administrator, and requiring him, upon the qualification of an executor or administrator, to account for, and to deliver to such executor or administrator such estate as he has in his hands, or is liable for. (V. C. 1873, ch. 118, § 24; V. C. 1887, ch. 112, § 2534; Wynn's Ex'or v. Wynn's Adm'rs, 8 Leigh, 264; Wilson's Curator v. Shelton's Adm'r, 9 Leigh, 342.)

But although in Virginia we do not prove wills *in common form*, we yet have two modes of probate, both, however, *in solemn form, per testes*; the one *ex parte*, which is the old common law method; the other *inter partes*, wherein the parties are summoned to contest the will; which latter originates in Virginia in a statute. (V. C. 1873 ch. 118, §§ 34 to 37; Id. §§ 28 to 33; V. C. 1887, ch. 112, §§ 2544 to 2547; Id. §§ 2538 to 2543);

w. c.

1<sup>m</sup>. Proceeding to Admit Wills to Probate *Ex Parte*.

This proceeding is without notice or summons to any one, the evidence being heard and the cause decided *by the court*, and not by a jury. But any one interested may make himself a party to the proceeding, and oppose or promote it. (V. C. 1873, ch. 118, §§ 34 to 37; V. C. 1887, ch. 112, §§ 2544 to 2547; Smith v. Jones, 6 Rand. 33; Boyd & al. v. Cook, Executor, &c. 3 Leigh, 42.)

2<sup>m</sup>. Proceeding to Admit Wills to Probate *Inter Partes*.

This proceeding, which is purely statutory, must take place in the *circuit or corporation court alone*, and not in the county court, upon summons obtained from the clerk of the court, convening all parties concerned. The court may require all testamentary papers of the decedent to be produced, and, if *any party* interested *asks it*, shall order a trial by jury, to ascertain whether any, and if any, which of the papers produced be the will of the decedent; or, if no jury trial be asked, shall itself proceed to decide the question of probate. (V. C. 1873, ch. 118, §§ 28 to 33; V. C. 1887, ch. 112, §§ 2538 to 2543.)

2<sup>l</sup>. The Proof to be Offered upon Submitting the Will to Probate; w. c.

1<sup>m</sup>. The Proof to be Offered in Case of *Original Wills*.

In case of original wills, the *best evidence* (which must ever be produced, if it be not impracticable), is the testimony of the *subscribing witnesses*, if to be had, or at least of *one of them*, if he is able to prove the fact of the due attestation by the others. (Holdfast v. Dousing, 2 Str.

1254-'55; *Pollock v. Glassell*, 2 Grat. 439; *Johnson v. Dunn*, 6 Grat. 627; 3 Redf. Wills, 42.) If the subscribing witnesses reside out of the State, or are in confinement under legal process in another county or corporation, or are unable from age, sickness, or infirmity, to attend the court, their depositions may be taken, and read with the same effect as if given in court; or, instead of such depositions, the next best evidence (which also must be resorted to if the witness be dead), is proof of the hand-writing, not of the testator, but of such *subscribing witness or witnesses*. (V. C. 1873, ch. 118, § 27; V. C. 1887, ch. 112, § 2537; *Nalle v. Fenwick*, 4 Rand. 585; *Smith v. Jones*, 6 Rand. 33; 1 Lom. Ex. 222, 229. See 3 Redf. Wills, 42.) And it is believed that, if one of the subscribing witnesses become, after the attestation, incompetent as a witness (*e. g.*, by being convicted of an infamous offence), the proceeding is the same as if he were dead; that is, his hand-writing may be proved, or the other attesting witness may prove, if he can, the due execution of the instrument, and its due attestation by himself and the other; and if his testimony is satisfactory, that is, convincing, it is conceived to be sufficient. (*Johnson v. Dunn*, 6 Grat. 627; *Pollock & ux. v. Glassell, &c.*, 2 Grat. 461; *Longford v. Eyre*, 1 P. Wms. 741; *Pow. Dev.* 637-'8; 2 Greenl. Evid. § 694; 1 Lom. Ex. 220-'21; 3 Redf. Wills, 42.)

The witnesses need not have *seen the testator sign*; it is sufficient if he acknowledges *the will or the signature* to them. (V. C. 1873, ch. 118, § 4; V. C. 1887, ch. 112, § 2514; *Dudley v. Dudley*, 3 Leigh, 436; *Rosser v. Franklin*, 6 Grat. 25; *Beane & ux. v. Yerby*, 12 Grat. 239; *Green & als. v. Crain & als.* 12 Grat. 257-'8; Wms. Real Prop. 198-'9, n. 1; *Bac. Abr. Wills*, (D.) 2; 3 Lom. Dig. 43 & seq.) It is not necessary, indeed, that the writing should have a testamentary form, or even that the deponent himself should be conscious that he had performed a testamentary act, or that he should intend to perform such act. A deed-poll, or an indenture, a bond, a marriage settlement, a letter, a promissory note, and the like, may each and all be valid as a will, if the paper contains a certain and final disposition of property to take effect *after the maker's death*. Nor does it prevent the writing from operating as a will that the maker designed it to be provisional only, and intended to make a more formal or a different disposition of his property, if in fact the intention was not fulfilled, and the writing was never revoked in any of the modes required by law. It is necessary, however, that the writing, whatever it be, should have been designed by him as an *actual disposition* of

property, to *take effect after his death*, not to be a mere expression of what he *intended or expected* to do. It must satisfactorily appear from the whole evidence that he intended the very paper propounded to contain the contemplated posthumous disposition, or else it must be rejected, however correct in form, however comprehensive in detail, however conformable to the otherwise declared intentions of the party, and although it may have been signed by him with all due solemnity. (1 Lom. Ex. 33, 34; Sharp v. Sharp, 2 Leigh, 262; Waller v. Waller, 1 Grat. 454, 478 & seq.; Hocker v. Hocker, 4 Grat. 277; McBride v. McBride, 26 Grat. 480 & seq.; Cody v. Conly, 27 Grat. 319 & seq.)

Such acknowledgment of his signing suffices even in case of a blind man, or one unable to read, to prove *prima facie* that it has been read to him, if he appears to be *acquainted with its contents*, notwithstanding there be *no proof* that it was read to him. (Boyd v. Cook, Ex'or, &c., 3 Leigh, 42; Barton v. Robins, 3 Phillim. (1 Eng. Ec. R.) 442, n. (b); Fincham v. Edwards, 3 Curt. (7 Eng. Ec. R.) 62. But see 1 Lom. Ex'ors, 227.) The witnesses may have wholly forgotten the transaction, yet if they can state that the signatures affixed are theirs, and that they would not have attested had they not believed all things to be regular (notwithstanding one of them did not know what the law required), it supplies sufficient *formal proof* of the execution of the will. (Clarke & al. v. Dunnivant, 10 Leigh, 13; Young v. Barner, 27 Grat. 106; 1 Lom. Ex'ors, 221-'2.) In *holograph* wills (wholly written by testator's own hand), it seems one witness to the handwriting of the testator, uncontradicted and unimpeached, is sufficient to establish the will. (Redford v. Peggy, 6 Rand. 316; Sharp v. Sharp, 2 Leigh, 254; Waller v. Waller, 1 Grat. 478.)

The court must be satisfied, not only of the execution of the will in the manner prescribed by law, but also that the testator is of sound mind, over twenty-one years of age, and not a married woman, or if a married woman, that the property willed is her separate property, or that she has a power of appointment in reference thereto, and moreover, that the testator was acquainted with the contents of the paper-writing, and had fully and intelligently assented thereto. To be sure, this in general is all presumed as soon as the execution of the will is proved; but if any question is made in respect to any of these particulars, whatever reasonable doubt arises must be resolved before the will can be admitted to probate. The *onus probandi* lies in every case upon the party propounding the will; and he must satisfy the conscience of the court

that the writing propounded is the last will of a free and capable testator. And it is particularly to be observed, that if a party writes or prepares a will under which he takes a benefit, that is, a circumstance which ought generally to excite the suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. And with peculiar force do these principles apply where the writer of the will, to whom the benefit is to accrue under it, is the testator's *legal adviser*, although even in such a case, the bequest or devise to him is not *necessarily* invalid. (Barry v. Buttin, 1 Curt. (6 Eng. Ec. R.) 637; Riddell v. Johnson's Ex'or, &c., 26 Grat. 152, 177-'8; Tucker v. Sandidge, 85 Va. 569, 570; 1 Redf. Wills (4 ed.), 31. And so where the testator is blind or illiterate, his knowledge of the contents of the will ought to be shown otherwise than by his mere acknowledgment and execution of it, as by its having been read to him, or by his manifesting in some way an acquaintance with its provisions, etc. (1 Lom. Ex. 227-'8; Boyd v. Cook, 3 Leigh, 42; Barton v. Robins, 3 Phill. (1 Eng. Ec. R.) 442, n. (b); Fincham v. Edwards, 3 Curt. (7 Eng. Ec. R.) 63; Longchamp v. Fish, 5 Bos. & P. 419, 420.) And although the testator labor under no legal incapacity to do a valid act, yet if the whole transaction, taken together with all the facts, mental weakness being one of them, shows that the act of making the testament was not attended with the consent of his understanding and will, it is void. (Greer v. Greer, 9 Grat. 330.)

What nervousness of temperament and eccentricity of disposition, manners, and habits, is consistent with a sound disposing mind and memory is strongly illustrated by the cases of *Merceer v. Kelso*, 4 Grat. 106, and of *Lee v. Lee*, 4 McCord (S. C.), 183, S. C. 17 Am. Dec. 722; and what influence is or is not of that improper character which will invalidate a will, may be seen from *Parramore v. Taylor*, 11 Grat. 220; *Whitesel v. Whitesel*, 23 Grat. 906; *Lee v. Lee*, 4 McCord (S. C.), 183; *Marsh v. Tyrrell*, 2 Hagg. (4 Eng. Ec. R.) 84; *Bird v. Bird*, Id. 142; *Lamkin v. Babb*, 1 Lee (5 Eng. Ec. R.), 1; *Mountain v. Bennet*, 1 Cox, 355; *Williams v. Goude*, 1 Hagg. (3 Eng. Ec. R.) 577; 1 Redf. Wills, 515 & seq.; 3 Rob. Pr. (1st ed.) 342.

When the sanity of the testator is in question, the opinion of a witness upon the subject depends for its weight upon the capacity of the witness to judge, and his oppor-



tunity. Physicians are deemed especially worthy of confidence on such questions, both because they are generally persons of cultivated minds and habits of close observation, and because, also, from their education and pursuits, they have been led to bestow special attention on such subjects, and are able, therefore, to discriminate more accurately. And especial weight is due to the testimony of a physician who has attended the patient through the disease which is suggested to have disordered his mind. (*Barton v. Scott*, 3 Rand, 403; *Heatham v. Hatcher*, 30 Grat. 65; *Montague v. Allan*, 78 Va. 597.)

The influence which is to avoid a will must possess, it is said, the following traits:

(1), It must be such as to destroy the free exercise of the testator's volition, and thus render his act obviously more the offspring of the will of others than of his own;

(2), It must be an influence specially directed towards the object of procuring a will in favor of particular parties; and,

(3), It must mislead him to the extent of making a will essentially *contrary to his duty*. (1 Jarm. Wills (5 Am. ed.), 36 & n. (b), n. 1; 1 Redf. Wills, 524-'5 & seq.; *Hugenin v. Baseley*, 2 Wh. & Tud. L. C. Pat. II., p. 430; *Young v. Barner*, 27 Grat. 103 & seq.; *Hartman v. Strickler*, 82 Va. 237; *Carter v. Carter*, Id. 641; *Simmerman v. Sanger*, 29 Grat. 24.)

2<sup>m</sup>. The Proof to be Offered in Case of *Wills Already Proved* in Another Jurisdiction.

When an authenticated copy of the will with the certificate of probate thereof in the foreign court, is offered for probate in Virginia, the court to which it is offered shall *presume*, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate, as a *will of personalty* in the State or country of the *testator's domicile*, and shall admit the copy as a *will of personalty* in Virginia. And if it appears from *such copy* that the will was proved in the foreign court of probate to have been so executed as to be a *valid will of lands* in this State, by the law thereof, the copy may be admitted to probate as a *will of real estate*. (V. C. 1873, ch. 118, § 26; V. C. 1887, ch. 112, § 2536.)

This enactment is founded upon a well understood principle of universal public law, that a will of personal property, wheresoever situated, must be made according to the forms and solemnities required by the law of the *testator's domicile*, whereas a will of lands must conform to the requirements of the law of the place where the property is *locally situated*. The *lex domicilii* governing in the one case, and the *lex loci rei sitæ* in the other.

(Story's Conflict of Laws, §§ 424, 428, 434, 465, 474; *And.*, p. 1011.)

6<sup>k</sup>. Effect of the Probate of Wills.

See V. C. 1873, ch. 118, §§ 33 to 35; V. C. 1887, ch. 112, §§ 2543 to 2545.

Let us note, (1), The effect of the probate in proceedings *ex parte*; (2), The effect of the probate in proceedings *inter partes*;

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1<sup>l</sup>. The Effect of the Probate in Proceedings *Ex parte*.

Any one interested, who was *not a party* to the proceedings, may, *within two years*, proceed by bill in equity to impeach or establish the will, on which bill a *trial by jury shall be ordered*, to ascertain whether any, and if any, how much, of what was so offered for probate be the will of the decedent. If no such bill be filed within that time, the sentence shall be *for ever binding*, saving to any infant *one year after age*, and to a non-resident of the commonwealth, unless *personally summoned or actually appearing*, two years *after sentence*. (V. C. 1873, ch. 118, §§ 34 to 35; V. C. 1887, ch. 112, §§ 2544, 2545.)

By this latter provision, the legislature seems clearly to have designed to allow to the non-resident two years *in addition* to the two generally allowed; but the phraseology used hardly admits of that construction, and is understood to restrict such non-resident to *two years after sentence*.

This jurisdiction of the court of chancery is so independent of that of the court of probate, that formerly, when county courts had chancery jurisdiction, a bill might have been filed in the *county court*, in chancery, to impeach a bill previously admitted to record in the *circuit court*, as a court of probate (*Ford v. Gardner*, 1 H. & M. 72); and although the statute excludes from the privilege of filing a bill any one who has been a party to the proceeding in the court of probate, yet such a party, it is said, may still be admitted to file a bill on the ground *of a fraud*, to the existence of which he was a stranger at the time of the probate. (S. C.) And the word "*proceeding*" in the statute means the *entire* proceeding, including the order admitting the will to probate, or rejecting it; so that although one enters himself as a contestant in the court of probate, yet if afterwards he withdraws from the contest, and the will is admitted to probate, he is not thereby precluded from filing his bill in equity. (*Dillard v. Dillard*, 78 Va. 208.)

The student will observe that, after the lapse of the time prescribed, the probate cannot be called in question, how erroneous soever the sentence may be. (*Nalle v. Fenwick*, 4 Rand. 585; *Street v. Street*, 11 Leigh, 498; *Schultz*

v. Schultz, 10 Grat. 358; Robinson v. Allen, 11 Grat. 785; Parker v. Brown, 6 Grat. 554; Norvell v. Lessueur, 33 Grat. 224.) But where it appears from the record of the court of probate that on the same day the court took action treating a will, admitted in general terms, as a will of *personalty only*, and this construction is acquiesced in and acted on for many years, the order admitting the will to probate must be interpreted accordingly, and be regarded as admitting the will only as a *will of chattels*. (Norvell v. Lessueur, 33 Grat. 222.)

A bill filed for the purpose of impeaching a will need only say, in general terms, that the writing admitted to probate is *not the will of the deceased*. (Malone's Adm'r v. Hobbs, 1 Rob. 346.) And when the question is decided, no further proceedings can be had in that case. (Coalter's Ex'or v. Bryan & als. 1 Grat. 18.)

Upon a bill filed to set up a will alleged to have been lost or destroyed accidentally, upon proof of the contents, there should be an issue awarded to be tried by a jury, just as when the effort is made to impeach a will admitted to probate (Brent v. Dold, Gilm. 211-'12), and in all cases the issue may be made up without feigned pleadings, in the *very words of the statute* (that is, "whether any, and if any, how much, of the writing which was so offered for probate, be the will of the decedent"). And it may be as well tried at the bar of the chancery court as in a court of law, the party sustaining the will being plaintiff, and entitled to open and conclude the cause. (Coalter's Ex'or v. Bryan, &c., 1 Grat. 18.)

It belongs to the subject of the "Effect of Probate" to remark that the certificate of probate (in contradistinction to formal letters of probate), granted by a court of this State, and attested by the clerk, will enable the executor to act, and may be given in evidence in *any court in Virginia* (Dickinson v. McCraw, 4 Rand. 158), but not beyond the limits of the commonwealth, any more than probate in a foreign court will of itself confer any authority here. (Burnley's Adm'r v. Duke, 1 Rand. 108.)

In respect to the jurisdiction of the court of probate, if it be a court where by law matters of probate are cognizable, the probate, although the facts do not warrant the proceeding in that county or corporation, is generally not *void*, as was at one time thought (Barker's Case, 2 Leigh, 719), but *voidable* only, the particular state of facts which would have authorized the court to act being a matter to be enquired into and determined by the court, whose decision, if erroneous, is *voidable* merely, and *not void*. And meanwhile, until the sentence is revoked on citation of the personal representative in the same court, or *reversed and*



*annulled* in an appellate court (1 Lom. Ex'ors, 353, 355 & seq.), the court actually having jurisdiction must forbear to act, and the authority conferred by the voidable probate is rightful and complete. (Fisher v. Bassett, 9 Leigh, 119; Burnley's Rep. v. Duke & als. 2 Rob. 129; Andrews v. Avory, 14 Grat. 236; Schultz v. Schultz, 10 Grat. 358; Cox v. Thomas, 11 Grat. 323; Hutcheson v. Priddy, 12 Grat. 85.) If, however, the supposed testator be alive, or if being dead he has already a will admitted to probate in Virginia, and an executor or personal representative qualified under it, the last probate is *void*. (Griffith v. Frazier, 8 Cranch, 9; Andrews v. Avory, 14 Grat. 236 & seq.)

It follows from what has been said, that where the sentence is *voidable* only, until it is, as above explained, revoked, reversed, or otherwise annulled, the lawful acts of the representative constituted in pursuance of the sentence, are valid, in respect to persons who do not collude with him, but themselves act *bona fide*, such as purchase from him for value and in good faith. At least, it is so when the sentence is revoked by citation in the same court, or annulled otherwise than by reversal in an appellate court. In this latter case, as the appeal is a further prosecution of the same suit, and suspends the authority of the representative, it seems to be otherwise. (1 Lom. Ex'ors, 363, 364; Bac. Abr. Ex'ors (E.), 12, 13; Parkman's Case, 6 Co. 18 b; Blackborough v. Davis, 1 Salk. 38; S. C. 1 Ld. Raym. 684; Gaines v. Chew, 2 How. 643, 649; Patterson v. Gaines, 6 How. 601; Gaines v. N. Orleans, 6 Wal. 715-'16; Foulke v. Zimmerman, 14 Wal. 115.)

2<sup>d</sup>. The Effect of the Probate in Proceedings *Inter Partes*.

In such proceeding any sentence or final order shall be a bar to a bill in equity to impeach or establish such will, unless on such a ground as would give to a court of equity jurisdiction over other judgments at law, saving, as before, to any infant *one year after age*, and to a non-resident of the commonwealth, unless personally summoned, or actually appearing, *two years after sentence*. (V. C. 1873, ch. 118, §§ 33, 35; V. C. 1887, ch. 112, §§ 2544, 2545.)

7<sup>k</sup>. Probate of a Will in the *Court of Chancery*.

The jurisdiction of courts of equity touching the probate of wills is, in Virginia, practically confined virtually to the cases already mentioned (*Ante*; pp. 1040-1), where, after an *ex parte* probate, any party interested, who was not a party to that proceeding, is allowed, "within *two years*, to proceed, by bill in equity, to impeach or establish the will; on which bill a trial by a jury shall be ordered, to ascertain whether any, and if any, how much, of what was so offered for probate be the will of the decedent. If no such bill be



filed within that time, the sentence or order shall be *forever binding*." (V. C. 1887, ch. 112, § 2544.)

In England, until the statute 20 & 21 Vict. ch. 77 (A. D. 1857-'8), there was no jurisdiction whatever to admit a will of land to probate. The only way to test the validity of such a will was by an ejectment between the heir and the devisee; and, supposing the devisee to be in possession, he must await an action to be brought by the heir. For this reason, to enable the devisee to test the validity of the will at once, and to relieve him from the cloud hanging indefinitely over his title from the heir's adverse claim, equity allows a suit to be maintained against the heir, for the purpose of establishing the will, and that although the heir may have brought ejectment to recover the land, and although the will creates no trusts, but gives the devisee a purely legal estate, the suit being in the nature of a bill *to quiet title*. (3 Pom. Eq. § 1158, n. 3.) No such reason exists in Virginia, provision being made by statute with us for the probate as well of wills of lands as of personalty (V. C. 1887, ch. 112, § 2533). As, however, there is no *obligation* to admit a will of lands to probate, it is apprehended that it is still competent for the devisee to file his bill in equity for the purpose, if he is so minded, however inexpedient it might be. Mr. Pomeroy, however, expresses the opinion that the doctrine is general, if not universal, throughout the States, that a court of equity will not recognize nor act upon a will of *land or of personalty*, until it has been admitted to probate. (3 Pom. Eq. § 1158, n. 3; *Id.* § 1154.)

See 2 Stor. Eq. §§ 1445 & seq.; 1 Lom. Ex'ors, 347-'8 & seq.

#### 8<sup>k</sup>. Necessity for Disclaimer of Title by Devisee.

The devise, by force of the statute of wills, immediately upon the testator's death, *vests the title in the devisee*, irrespective of his consent. If, therefore, he does not choose to accept the testator's bounty, he must, by the appropriate means, *divest* himself of the estate already vested in him. By the statute of conveyances (V. C. 1873, ch. 112, § 1; V. C. 1887 ch. 107, § 2413), the appropriate means, if the estate devised be a *freehold, an inheritance, or a term exceeding five years*, is by deed. (3 Lom. Dig. 193; *Bryan v. Hyre & al.* 1 Rob. 94, 105; *Suttle v. R. F. & Pot. R. R. Co.* 76 Va. 254.)

#### 4<sup>i</sup>. How Wills may be Void, *though Executed in Due Form*.

A will, though executed in due form, may still be void and of none effect in the several cases following, viz.:

1, Where the devise is to the *testator's heir*, to take as he would take as heir;

2, Where the person to whom, or the object for which, the devise is made is *not sufficiently designated or ascertained*;

3, Where *fraud or force* has been used with the testator, so that his will has not been freely exercised;

4, Where the devise would *result in injury to the rights of third persons; e. g., creditors of testator;*

5, Where the devise is *too remote;*

6, Where the devisee *dies before the testator.* See 3 Lom. Dig. 176 & seq.;

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1<sup>k</sup>. Where the Devise is to the *Testator's Heir*, to Take in Like Manner as he would Take as Heir.

The law forbids a testator to devise lands *to his heir*, to take them in like manner *as he would take them as heir*, in order to prevent *title by descent* from being confounded with *title by purchase*. Such confusion, in feudal times, would have affected the tenure of lands, and at a later period would have impaired the interests of creditors, certain of whom could charge with their debts lands descended, but not lands devised, except in pursuance of a comparatively modern statute (3 & 4 Wm. & M. c. 14), known as the statute of *fraudulent devises*.

The test by which we may determine the applicability of the doctrine to any particular case is to *strike out the devise to the heir*, and if he would still take the same interest as the will gives him, the *devise is void*. Hence, in order that the doctrine may apply, the devisee must be the *sole heir* to the lands devised; for if he is only one of several co-heirs, although the very same share be given him as he would take by descent, he does not take it in the same way; for, as co-heir, he would take it *in co-parcenary* with his fellows (*Ante*, pp. 502 & seq.); whereas, as devisee, he would take it *in severalty*, if it was devised to him alone (*Ante* p. 466); and, if devised to him along with others, he would take as joint-tenant, or tenant in common. (*Ante*, pp. 466 & seq.; *Id.* 494 & seq.) In like manner, a devise to *several co-heirs* is not within the doctrine, but is good, because, as devisees, they will take as joint-tenants, or tenants in common; whereas, as heirs, they will take as *co-parceners*. (3 Lom. Dig. 178 & seq.; 2 Th. Co. Lit. 646, n. (B.); Biedler v. Biedler, 87 Va. 300.)

2<sup>k</sup>. Where the Devise is to an *Uncertain Person*, or for an *Uncertain Object*.

See 1 Jarm. Wills (5 Am. ed.), 356, 357 'S & seq., 370 & seq., 376 & seq., 383 & seq.

Thus a devise to "*the Roman Catholic congregation at R.*" (Gallego's Ex'or v. Atto, Gen'l. 3 Leigh, 450); or to "*the Baptist Association that for common meets at P.*" (Baptist Association v. Hart, 4 Wheat. 372); those bodies respectively, being unincorporated, is void for the *uncertainty of persons* designed to be benefited. See also, Brooke v.

Shacklett, 13 Grat. 309; Seaburn v. Seaburn, 15 Grat. 425; Roy v. Rowzie, 25 Grat. 607 & seq.

On the other hand, a devise for the *erection and endowment* of a seminary of learning, independently of statute (Lit. Fund v. Dawson, 10 Leigh, 148), or “*for the benefit of the trade of the town of A.*” (Wheeler v. Smith & als. 9 How. 55), is void for the *uncertainty of the objects*. (*Ante*, pp. 251 & seq.; Id. 656.)

In Virginia, by statute (suggested by the case of the Lit. Fund v. Dawson), it is provided that gifts and devises for *literary or educational purposes* within this State (other than for the use of an unincorporated theological seminary), shall be valid, whether made to a body corporate or unincorporated, or to some natural person, with some cautious reservations. (V. C. 1873, ch. 77, §§ 2 & seq.; V. C. 1887, ch. 65, §§ 1420 & seq.; *Ante*, pp. 253–’54; Kelly v. Love, 20 Grat. 129 & seq.; Virg’a v. Levy, 23 Grat. 40; Kinnaird v. Miller, 25 Grat. 113 & seq.; Roy v. Rowzie, 25 Grat. 599.)

And so, if in any other wise, the person or the object contemplated by the testator be uncertain, the will is void. (Gibson v. Gibson, 28 Grat. 44, 48.)

It must be remembered, however, that in respect to trusts for the use or benefit of *religious congregations* and benevolent associations, a material change has of late occurred in the policy of Virginia, confined however to *deeds*, and not extending to wills. See V. C. 1873, ch. 77, §§ 8 to 12; V. C. 1887, ch. 64, §§ 1398 to 1409; V. C. 1860, ch. 76, §§ 8 & seq.; Seaburn v. Seaburn, 15 Grat. 426 & seq., 432; *Ante*, p. 253; 1 Min. Insts. 539 & seq.

In England, very much more indulgence is manifested to *indefinite charities* than to other indefinite gifts and devises; and this diversity was long attributed, not to the common law, of which some thought the statute 43 Eliz. c. 4, merely declaratory, but to the terms of that statute, which most supposed to have introduced a new doctrine. It was under this latter view of the law that the earlier Virginia cases (Gallego’s Ex’or v. Atto. Gen. 3 Leigh, 450; Baptist Assoc’n v. Hart, &c. 4 Wheat. 472, &c.), were adjudicated. But upon an investigation of the ancient records of the court of chancery in the Tower of London, in 1831 and afterwards, it was discovered that in very many cases prior to the statute 43 Eliz. c. 4, a similar discrimination in favor of charities had prevailed in equity, and that 43 Eliz. was little more than affirmatory of the common law. Virginia, notwithstanding this development of the mistake upon which her earlier cases had proceeded, yet did not think fit to recede from the doctrine those cases had established; still holding that vague and indefinite charities, like other indefinite disposi-



tions of property, are in general void. (*Id.*, p. 217; *Wheeler v. Smith*, 9 How. 80; *Brooke v. Shacklett*, 13 Grat. 309-'10 & seq.; *Seaburn v. Seaburn*, 15 Grat. 426; *Roy v. Rowzie*, 25 Grat. 607-'8 & seq.) Of late, however, a disposition is manifested to discard all the previous determinations of the Virginia courts, unanimous and unvarying as they are for more than half a century, and to adopt instead, at this late day, the doctrine of *Vidal v. Girard*, 2 How. 196-'7 (Prot. Ep. Ed. Soc. v. Churchman, 80 Va. 755.)

In Pennsylvania, where no previous doctrine had been recognized, the supreme court of the United States, in the great *Girard* will case, conceived itself bound to adopt, as the doctrine of the common law, the discrimination in favor of vague and indefinite charities, brought to light through the medium of the ancient records referred to above; and accordingly, that court held *Girard's* munificent provision for the creation and endowment of a great seminary of learning, to be called by his own name, to be valid, and directed his scheme to be carried out in conformity to his will. (*Vidal v. Girard's Ex'or*, 2 How. 196-'7; 3 Lom. Dig. 16, 181, &c. 189 & seq.) It must be observed, that the question in all cases is not whether the *trustee* be ascertained, but whether the *beneficiary*, or *beneficial object*, be certain; for it is an established maxim of a court of equity *never to suffer a trust to fail for want of a trustee*, so that if the trustee is not designated with sufficient certainty, supposing the person or object designed to be benefited is sufficiently described, equity will supply a trustee. (2 Stor. Eq. §§ 976, 1059 & seq.; *Charles & als. v. Hunnicutt*, 5 Call, 312.)

3<sup>k</sup>. Where *Fraud, Force, or Undue Influence* has been Used with the Testator, so that *his Will* does not Appear to have been *Freely Exercised*.

Where physical constraint is employed, of course the will is invalid. But it is in like manner void wherever it appears that the testator's freedom of volition has been impaired in consequence of his imbecility, some deception practised upon him, his undue confidence, his over-weening affection, or otherwise. (3 Lom. Dig. 182-'3; *Greer v. Greer*, 9 Grat. 330; *Parramore v. Taylor*, 11 Grat. 220; *Whitesel v. Whitesel*, 23 Grat. 906; *Simmerman v. Songer*, 29 Grat. 24; *Id.*, p. 1039; 1 Jarm. Wills (5 Am. ed.), 35 & n. 1; 1 Redfield Wills (4th ed.), 508 & seq., 524, 535, 537.)

The principles controlling the doctrine of undue influence are necessarily vague, because of the extreme difficulty,—not to say impossibility,—of defining such influence. The cases also are numerous and various almost beyond parallel; and if one should become familiar with them all, it would tend but little to disclose any salient principle which would resolve the next case.



It is believed that the doctrine may be fairly summarized in the propositions following, namely:

(1), Undue influence, in order to avoid a will, must annul the testator's freedom of purpose, and render the instrument the offspring of the will of others, rather than of his own;

(2), Honest intercession, argument and persuasion addressed to the testator's understanding, conscience or affection, not controlling his will in opposition to his judgment or inclination, and not coupled with fraud or imposition, will not amount to undue influence, though urged beyond the bounds of strict propriety;

(3), Influence gained by kindness and affection will not be regarded as undue, if no imposition nor fraud be practised, even though the testator be induced thereby to make an unequal or even an unjust distribution of his property;

(4), The influence, in order that it shall be undue, must be exerted specifically, upon the *very act of making a will*.

These propositions are sustained by an immense array of cases which may be found in *Small v. Small*, 4 Greenl. (Maine), 220; S. C. 16 Am. Dec. 257, 259, 261, 262, *note*.

See also, *Clark v. Fisher*, 1 Paige Ch. (N. Y.), 171; S. C. 19 Am. Dec. 402 & *note*; *Davis v. Calvert*, 5 Gill & J. (Md.) 269; S. C. 25 Am. Dec. 282; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526; S. C. 34 Am. Dec. 340, 354, *note*; *Flood v. Flood*, 3 Strobb. (S. C.) 44; S. C. 49 Am. Dec. 629, &c.; *Woodward v. James*, 3 Strobb. (Law) 552; S. C. 51 Am. Dec. 49 &c.; *Potts v. House*, 6 Georgia, 324; S. C. 50 Am. Dec. 355; *Montague v. Allan*, 78 Va. 592; *Hartman v. Strickler*, 82 Va. 234 &c.

4<sup>k</sup>. Where the Devise would Result in *Injury to the Rights of Third Persons*.

*e. g.*, *Creditors*. Thus, it is provided that all of a decedent's real estate shall be liable to pay his debts of all kinds; nor can he by his will any otherwise affect this disposition than by directing the order in which the debts shall be discharged. (V. C. 1873, ch. 127, § 3; V. C. 1887, ch. 120, §§ 2665 to 2669.)

5<sup>k</sup>. Where the Devise is *too Remote*.

A devise is too remote when it is so limited that it is not *obliged* to take effect, if at all, within the period of *a life or lives in being, and ten months* (the period of *gestation*), and *twenty-one years afterwards*. Thus, a devise "to A in fee-simple, and upon the failure of his heirs at any future time, to Z in fee," is too remote as to the limitation to Z, which, therefore, is void; for it is not to take effect until the ultimate extinction of the line of heirs of A, which may be postponed for centuries. (*Ante*, pp. 437, 438 & seq.; 1 Jarm. Wills (5 Am. ed.), 250 & seq.)

6<sup>k</sup>. Where the Devisee *Dies before the Testator*.

Where the devisee dies before the testator, the devise is liable to become void, or, according to the proper technical phrase, *to lapse*;

W. C.

1<sup>l</sup>. Doctrine Touching *Lapse of Devises at Common Law*.

The general doctrine, at common law, is that a devise lapses in all cases where the devisee dies before the testator. And if the devise be to several, as *tenants in common*, and one of them dies in the testator's life-time, his share lapses. (*Frazier v. Frazier*, 2 Leigh, 649.) Where, however, the devise is to several persons *jointly*, and one of them dies in the testator's life-time, his share *does not lapse, but survives*; for although such joint devisees are not *joint-tenants* until the testator's death, yet the gift to them is a gift *pur mie et pur tout* (per totum et per nihil; scilicet, per totum *conjunctim*, et per nihil *separatim*), and so if one should<sup>l</sup> die, whereby, as he has nothing *separately*, his interest ceases to exist, the other or others are entitled to the *whole* as at first, but with no one to share it with them. And as the parties have not become *joint-tenants*, the statute abolishing survivorship (V. C. 1873, ch. 112, § 18; V. C. 1887, ch. 107, § 2430), does not apply. (*Humphrey v. Tayleur*, 1 Ambl. 138; *Skipwith v. Cabell's Ex'or*, 19 Grat. 788; *Davy v. Kemp*, O. Bridgm. Judgm'ts, 384; *Wythe's Rep.* (Minor's ed.) App'x, 363, &c. *Ante*, p. 471; 3 Lom. Dig. 185, 186, n. (2); 1 Jarm. Wills (5 Am. ed.), 340-41.)

2<sup>l</sup>. Doctrine Touching *Lapse of Devises in Virginia*.

"If a devisee or legatee die before the testator, *leaving issue who survives the testator*, such issue shall take the estate devised or bequeathed as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will." (V. C. 1873, ch. 118, § 13; V. C. 1887, ch. 112, § 2523.)

It would seem that this statute would not be applicable where, independently of it, no lapse would occur; and that, therefore, it could not be invoked where the devise is to several *jointly*, as under the preceding head, and one of them dies in testator's life-time, leaving issue, which survives the testator. For in such a case, independently of the statute, by the force and effect of the joint-taking, *per nihil separatim, et per totum conjunctim*, the share of the party deceased would survive to the survivor or survivors. (*Supra*, l. 1; 1 Jarm Wills (5 Am. Ed.), 354.)

## CHAPTER XXVIII.

## OF THE RULES FOR THE CONSTRUCTION OF COMMON ASSURANCES.

5<sup>g</sup>. The Rules for the Construction of Common Assurances.

Having now considered the several species of common assurances, whereby a title to lands may be transferred from one man to another, it will be proper, in conclusion of this head, and of the whole subject of the rights which relate to real property, to take notice of a few general rules and maxims which have been laid down by courts of justice for the construction and exposition of every sort of common assurance; and, indeed, of writings of all kinds, including statutes.

The importance of fixed and determined rules of interpretation is manifest. In construing deeds and wills, the language of which, owing to the inaccurate use of terms and expressions, so frequently fails to convey the views and intentions of the parties, it is plain that such rules are necessary in order to insure just and uniform decisions; and they are not less necessary when it becomes the duty of courts to elucidate the intricacies and ambiguities of legislative enactments, which result from ideas not sufficiently precise, from views too little comprehensive, or from the acknowledged imperfections of language. It will be discovered that the maxims and rules which are thus laid down are not arbitrary, but are all suggested, or at least justified, by sound sense and a rigorous logic. Thus, the two rules of most general application in construing writings are, (1), That they shall, if possible, be so interpreted *ut res magis valeat quam pereat*, so that they shall have some effect rather than none; and (2), That such a meaning shall be given to them as may carry out and most fully effectuate the intention of the parties; and surely nothing could be devised more reasonable, appropriate, and just than these leading principles. (Broom's Max. 413 & seq.)

The most prominent rules of interpretation may be thus enumerated, namely:

(1), The construction should be *reasonable* and agreeable to common understanding, and as near the *apparent intent* of the parties as the rules of law will admit;

(2), Where the *intention is clear*, too minute a stress is not to be laid on the strict signification of words, nor on grammatical propriety;

(3), The construction should be upon the *entire instrument*, and not merely on disjointed parts of it; so that *every part of it* (if possible) may take effect;

(4), Words are to be construed most strongly against *the user of them*;

(5), Where the words bear two senses, that most agreeable to law shall be preferred;



(6), Where two clauses are irreconcilably repugnant, in a deed, the *first*, and in a will, the *last*, prevails:

(7), Ambiguities in writings cannot in general be explained by *parol testimony*;

(8), *Falsa demonstratio non nocet*, mere false description, does not necessarily make an instrument inoperative;

(9), *Expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another; and

(10), Devises, and wills generally, are to be *most favorably* expounded according to the will of the testator, if *consistent with the rules of law*.

It will be necessary to enlarge somewhat upon each one of these rules;

W. C.

1<sup>h</sup>. The Construction of Assurances and other Writings should be *Reasonable* and Agreeable to Common Understanding, and as Near the *Apparent Intent of the Parties* as the Rules of Law will Admit.

The law maxims applicable to the subject are "*verba intentioni debent inserrvire*," and "*benigne interpretamur chartas propter simplicitatem laicorum*." (2 Bl. Com. 379; Broom's Max. 414.)

The doctrine of the rule in question is well expressed by Lord Hobart, in *Clanrickard v. Sidney*, Hob. 277 b., where he says that judges should be "curious and almost subtile, *astute* (which is the word used in the Proverbs of Solomon, in a good sense, when it is to a good end) to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act." And we have many instances of its application in the books, both old and new, as in *Bredon's Case*, 1 Co. 76 a; *Crossing v. Scudamore*, 2 Lev. 10; *Loves v. Goddard*, 3 Cro. (Jac.) 61; *Webb v. Hearing*, Id. 415-16; *Moseley v. Mottoux*, 10 M. & W. 533; *Rowletts v. Daniel*, 4 Munf. 473; *Watts v. Cole*, 2 Leigh. 662.

In accordance with this principle, deeds, and much more wills, are construed to operate according to the intention of the parties, *if by law they may*; and if they cannot in one form, they shall, if possible, operate in that which by law will effectuate the intention: *Quando res non valet ut ago, valeat quantum valere potest*. And in later times the judges have gone further than formerly, and have had more consideration for the substance—than to the mere manner of passing it. (*Osman v. Sheafe*, 3 Lev. 372; *Chester v. Willan*, 2 Saund. 96 b, n. (1); *Smith v. Packhurst*, 3 Atk. 136; Cases cited *Cholmondeley v. Clinton*, 2 B. & Ald. 4 E. C. L.) 637.) For instance, a deed intended for a release, if it cannot operate as such, may amount to a grant of the re-



version, or to a surrender, and the like; or, by the statute of grants, to a grant of the lands themselves. So a deed of *feoffment*, in fee-simple, which is expressed to be for valuable consideration, or for consideration of natural love and affection, although for want of livery of seisin it cannot operate as a feoffment, shall yet be a good bargain and sale, or covenant to stand seised. (Shepp. Touchst. 82-'3; Broom's Max. 416; Chester v. Willan, 2 Saund. 96 b, n. (1); Crossing v. Scudamore, 2 Lev. 9, 10; Rowletts v. Daniel, 4 Munf. 473; Watts v. Cole, 2 Leigh, 662; Scott v. Scott, 18 Grat. 150.)

In the light of the same general principle, the general usage and understanding of the country are important aids in interpreting the transactions of men which are dubious in their signification. (Harris v. Nicholas, 5 Munf. 483; Ryland v. Butler, 18 Grat. 323.) Covenants also may be implied according to the apparent intent of the parties. (White v. Toncray, 5 Grat. 179.) So legal presumptions and rules of construction, which would otherwise prevail, yield to an intention satisfactorily expressed in the instrument itself; and, indeed, in the face of such expression of intent, have no application. (Tebbs v. Duval, 17 Grat. 349, 361.) This latter proposition is, indeed, no more than the expression or application of a very general and a very wholesome maxim of interpretation, namely, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*,—it is not allowable to interpret what has no need of interpretation, nor will the law make an exposition against the express words and intent of the parties. (Broom's Max. 477-'8; 1 Th. Co. Lit. 459 & seq.)

The object of the construction of assurances being always to arrive, if possible, at the *intention* of the maker, words and rules of interpretation are treated as only subservient thereto. It will be desirable to present several illustrations of this subordination of words to the *manifested intent*, the books abounding in them.

Thus a *residuary* bequest which contains an enumeration of certain chattels, and then gives "all the estate not before devised, *including my gig and saddle horses*," is not a disposition of the general *residuum*; but shall be construed to include only property *of the same kind* as the articles enumerated. (Minor v. Dabney, 3 Rand. 191; Trafford v. Berrige, 1 Eq. Cas. Abr. 201, pl. 14; Timewell v. Perkins, 2 Atk. 103; Cavendish v. Cavendish, 1 Cox. 77; Rawlings v. Jennings, 13 Ves. 46.) But this general rule prevailing in the courts of equity that in construing wills, and doubtless other instruments as well, general words following a specific enumeration are to be limited in their operation to matters *ejusdem generis*, must always be kept in subordination to the intention of the user of the words, and will not be applied in apparent contra-

vention thereof. (1 Redfield Wills, 441; *Swinfers v. Swinfers*, 29 Beav. 207.)

And where a life-estate is *expressly given* in the first instance, but the life-tenant is allowed freely and at will to dispose of and use the whole property, *what is left* at his death only being limited over, the *intention* is understood to have been to give a *fee-simple*, which passes accordingly, and the subsequent limitation over is void as a remainder, because limited after a fee-simple, and as an executory limitation for the *uncertainty* as to what will be included in it, and moreover and especially for repugnancy. (*Riddick v. Cohoon*, 4 Rand. 551 '2; *Burwell v. Anderson*, 3 Leigh. 355-'6 & seq.; *May v. Joynes*, 20 Grat. 692, 715; *Ide v. Ide*, 5 Mass. 500; *Jackson v. Bull*, 10 Johns. (N. Y.) 19; *Jackson v. De Lancey*, 13 Johns. 552; *Jackson v. Robins*, 15 Johns. 169; *S. C.* 16 Johns. 584, 589; 2 Jarm. Wills (5th ed. Bigelow), 268, n. 1; *Post*, 1073.)

So words which, at first view, might seem to express the *condition* upon which the disposition is to become operative, may, upon the intention derived from the context, coupled with the circumstances, be interpreted to refer only to the *contingency* or *occasion* which suggested or led to the making of the disposition; to which last conclusion the mind naturally leans, since every disposition of property is presumed to be absolute, unless the intention to make it conditional *clearly appears* on the face of it. (*Skipwith v. Cabell*, 19 Grat. 782; *Cody v. Conly*, 27 Grat. 320 323; *Parsons v. Lanoe*, 1 Ves. Sr. 189; *Sinclair v. Hone*, 6 Ves. 608; *Tarver v. Tarver*, 9 Pet. 174; *Damon v. Damon*, 8 Allen (Mass.), 192; 1 Redf. Wills, 177 & seq.)

In like manner, as a general rule, in a devise or bequest to several persons, in terms indicating that they are to take equally, as tenants in common, they take *per capita*; and the same rule prevails where the devise or bequest is to one who is living, and the children of another who is dead; and that without regard to the relations of the parties to each other. Thus, where property is given to "my brother A, and to the children of my brother B," A takes a share only equal to *each* of the children of B. So where the gift is to A's and B's children, or to the children of A and the children of B, the children of both take as individuals *per capita*. (2 Jarm. Wills (5th ed. Bigelow), 194 & seq.; *Brewer v. Opie*, 1 Call. 212; *Crow v. Crow*, 1 Leigh. 74; *McMasters v. McMasters*, 10 Grat. 275.) And yet this general rule yields to the manifestation of a different intent, collected from the whole will. Indeed Mr. Jarman observes that it "will yield to a very faint glimpse of a contrary intention in the context." (2 Jarm. Wills (5th ed. Bigelow), 195.) Thus, the mere fact that the annual income, until the distribution of the capital,

is applicable *per stirpes*, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital; and so where the share of one *stock* or *stirps*, in the event of its failure before the period of distribution, was given over to the others *per stirpes*. And where a residue was given to the children of a testator's son and daughters, A, B, C, and D, it was held to be divisible *per stirpes*, by reason of a gift over of the share of the son, or any of the daughters (who had previous life interests) dying without leaving issue, to the *survivors* and their issue. By this clause the testator showed he did not intend a distribution *per capita*, since in that case, the whole residue would, by force of the original gift, have gone among the *children* of those who had children, in equal shares. (2 Jarm. Wills, (5th ed. Bigelow), 195; Hawkins v. Hamerton, 16 Sim. (39 Eng. Ch.) 410; Smith v. Streatfield, 1 Mar. 358; Bolger v. Marshall, 5 Ves. 509.)

The general rule was departed from, and the division made *per stirpes*, and not *per capita*, on the ground of slight manifestation of intention, in Hamletts v. Hamlett, 12 Leigh, 350, 369; Gilliam v. Underwood, 3 Jones Eq. (N. C.) 100; Lockhart v. Lockhart, 3 Jones Eq. 205; Alden v. Beall, 11 Gill & Johns. (Md.) 123; Lackland v. Downing, 11 B. Mon. (Ky.) 32.)

In Hoxton v. Griffith, 18 Grat. 574, 580–582, the devise was of land, to be *equally divided* between E and the children of H, namely: L, S, W, M. and W. E and H were the nephew and niece of the testatrix, to whom she was equally attached. H was dead when the will was made. By *another clause*, the will gives *other property* to be divided between E and the *surviving* children of H, and says: should any of the children of H die without heirs, the property left them shall be divided among the *survivors*. It was held that, notwithstanding the general rule, yet upon the *apparent intent*, under the circumstances, E should take one moiety of the land, and the children of H, *all together*, the other moiety.

Pursuing the general principle of giving effect to the *intent*, it is held that in a devise to several persons for life, with remainder to *their children*, the effect of the remainder depends on whether the tenants for life take with or without survivorship. If they take with survivorship, the whole estate goes over at one period, that is, at the death of the last surviving life-tenant, and the remainder devolves upon the children *per capita*; but if the life-tenants take without survivorship, the share of each one, upon his decease, goes over immediately, without waiting for the other shares; and consequently the remainder vests in the children of each life-tenant *per stirpes*, as if it had been limited to the children of the life-tenants *respectively*. (2 Jarm. Wills (5th ed. Bige-



low), 196; *Perry v. White*, Cowp. 780 '81; *Flinn v. Jenkins*, 1 Colly (28 Eng. Ch. R.), 365-'6; *Booth v. Vickers*, Id. 6, 12; *Doe e. d. Patrick v. Royle*, 13 Ad. & El. N. S. (66 E. C. L.), 100, 114.)

- 2<sup>h</sup>. Where the *Intention is Clear*, too Minute a Stress is not to be Laid on the *Strict Signification* of Words, nor on *Grammatical Propriety*.

Sundry maxims express this principle, as "*Qui haret in litera, haret in cortice*," "*Mala grammatica non vitiant chartam*," and one already cited under the preceding head, namely, "*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*." (2 Bl. Com. 379; Broom's Max. 534-'35.)

Neither false English nor bad Latin will avoid even a deed, and much less a will, where the meaning of a party is apparent. Thus the word "and" has in many cases been read "or," and *vice versa*, when the change was rendered necessary by the context; "*if* he should die" has been construed "*when* he should die," and "*hereinafter*" been read "*hereinbefore*." (Broom's Max. 535; 3 Lom. Dig. 196 '7, 204; *Janney v. Sprigg*, 7 Gill (Md.), 197 (48 Am. Dec. 557, 565, *note*); 2 Jarm. Wills (5th ed.), 503 and n. 1, 505; 1 Redf. Wills, 473, 481 & seq.; *Ganey v. Hibbert*, 19 Ves. 129; *Stelbing v. Walkey*, 2 Bro. C. C. 85; *Effinger v. Hall*, 81 Va. 94, 98; *East v. Garrett*, 84 Va. 523.) And when, in the context of a will, the testator has explained his own meaning in the use of certain words, that should be the guide, without resorting to lexicographers to determine their abstract signification, or to adjudged cases to discover what they have been decided to mean under different circumstances. (3 Lom. Dig. 197; *Carnagy v. Woodcock*, 2 Munf. 234.) In short, where there is a manifest general intent, the construction should be such as to effectuate it, though by that construction some particular or subordinate intent may be defeated, or the literal import of the words be departed from. It is not admissible, by adhering to the letter, to defeat the manifest object and design of the instrument. (3 Lom. Dig. 196 '7; *Doe v. Laming*, 2 Burr. 1108; *Hodgson v. Ambrose*, 1 Dougl. 341; *Hill, &c., v. Huston*, 15 Grat. 360; *Stokes v. Van Wycke*, 83 Va. 724; *Price v. Cole*, Id. 343; *Finlay v. King's Lessee*, 3 Pet. 347, 377.) Moreover, since no illegal intent can be carried into effect, the construction ought to be such as, if possible, to make the intent *consistent with the rules of law*; for otherwise every man would prescribe a new law for himself, and property would become indeterminate and insecure. (3 Lom. Dig. 196; *Hodgson v. Ambrose*, 1 Dougl. 340 '1, &c.)

It is in conformity with these principles that, if the testator uses legal or technical phrases *only*, his intention should be construed by legal rules; and if he use common words,



that his intention should be regulated according to the common understanding thereof. (Kenyon v. McRoberts, 1 Wash. 100; Hodgson v. Ambrose, 1 Dougl. 341.) But whilst technical words are presumed to be used according to their technical signification, unless the contrary appears (for the courts have no right to suppose that the party did not understand the meaning of the words he employed, or that he did not mean what the words properly import); yet where other expressions are used in conjunction with such technical words, which plainly indicate what the intention was, and that it was not in accordance with the technical signification, the intention will control the legal operation of the words. (Hodgson v. Ambrose, 1 Dougl. 341; Jesson v. Doe, 2 Bligh. 1; 3 Lom. Dig. 196.)

Agreements especially (but the same proposition is true of all written instruments), are always to be construed according to the evident intent of the parties, appearing from the writing itself, without a rigid adherence to the letter. (Freshwater v. Eaton, 1 Stra. 49; Hawkins v. Berkeley, 1 Wash. 206.) And clear and unambiguous provisions are not to be controlled by mere inferences and arguments derived from other passages of the instrument, themselves uncertain and ambiguous. (Rayfield v. Gaines, 17 Grat. 1.)

3<sup>h</sup>. The Construction should be upon the *Entire Instrument*, and not Merely on Disjoined Parts of it, so that *Every Part* of it (if possible) may Take Effect.

The substance of this rule is conveyed by the maxims, *ex antecedentibus et consequentibus fit optima interpretatio*, and *verba debent intelligi cum effectu, ut res magis valeat quam pereat*. In interpretation, the context is one of the best guides, and no word (if possible) but what may operate in some shape or other. (2 Bl. Com. 379-'80; Cobbs v. Fountaine, 3 Rand. 487.)

It is a plain dictate of good sense, in order to arrive at the meaning and intention of the parties, not to fix the attention exclusively on any one clause, but to take the whole together, surveying every part of the instrument, and endeavoring so to construe it that every part shall have some effect, if that be practicable, rather than be wholly inoperative. Of this principle of interpretation many instances present themselves in respect both to deeds and wills, but especially as to wills. (Tabb v. Archer, 3 H. & M. 399; Randolph v. Randolph, Ibid; Lucas v. Duffield, 6 Grat. 456; Parker v. Warley, 9 Grat. 477; Cheshire v. Purcell, 11 Grat. 771.) Thus, even two separate instruments, made at the same time, and for the same general object, are to be construed together. (French v. Townes, 10 Grat. 513; Anderson v. Harvey, Id. 386.) And introductory words, nay expressions contained in the clause of attestation, may and do assist in showing the intention,

and sometimes very controllingly. Thus, the word *estate*, occurring in the introductory part of the will, may be transposed thence to the devising part, and there be made to enlarge the interest indefinitely devised to a person from a life-estate to a fee-simple. (Kennon v. McRoberts & ux, 1 Wash. 106 & seq.; Beachcroft v. Beachcroft, 2 Vern. 690; Tanner v. Wise, 3 P. Wms. 294; Ibbetson v. Beckwith, Cas. Temp. Talb. 157; Grayson v. Atkinson, 1 Wils. 133; Davies v. Miller, 1 Call, 132; Watson v. Powell, 3 Call, 308; Wyatt v. Sadler's Heirs, 1 Munf. 537; Goodrich v. Harding, 3 Rand. 283; Lucas & ux. v. Duffield, 6 Grat. 456; Wright v. Denn, 10 Wheat. 304.) Indeed, it has been suggested in more than one case that the use thus made of introductory words in interpreting the devising part of wills, has been in Virginia carried farther than English precedents warrant. (Wright v. Sadler's Heirs, 1 Munf. 542 & seq., pr. Roane, J.; Engle v. Burns, 5 Call, 478, pr. Roane, J.; 3 Lom. Dig. 197.)

Covenants are in like manner construed as dependent or independent, the one of another, not according to their relative collocation or arrangement, or the technical words employed, but according to the intention of the parties and the good sense of the case. (Pordage v. Cole, 1 Saund. 320, n. (4); Boone v. Eyre, 1 Hen. Bl. 254, 273, note; Broom's Max. 419-'20; Reno's Ex'ors v. Davis, 4 H. & M. 283; Wyatt v. Sadler's Heirs, 1 Munf. 537, and n. (1.); Bream v. Marsh, 4 Leigh, 25, 26; Todd v. Summers, 2 Grat. 167.)

The law deservedly attaches particular importance to the maxim that all transactions are to be so construed *ut res magis valeat quam pereat*; and that not only in respect to the leading parts, but also as to the very words taken singly, not one of which ought to be rejected if it can have a possible meaning. (Shelton's Ex'ors v. Shelton, 1 Wash. 59; Wooten v. Redd, 12 Grat. 196.)

It may be proper to add, in concluding the discussion of this third rule of construction, that a proviso appended to one clause of an instrument (*e. g.*, a statute or a will) does not limit another unless it plainly appear on the whole that it was so intended. (Callaway v. Harding, 23 Grat. 542; Barksdale v. White, 28 Grat. 227 & seq.) Indeed, in respect to deeds and wills, it is a settled rule of construction, that if an estate is conveyed, or interest given, or benefit bestowed, in one part, by clear, unambiguous, explicit words, upon which no doubt could be raised to destroy or annul that estate, interest, or benefit, it is not sufficient to raise a mist or doubt from other terms in another part of the instrument. The terms to rescind or cut down the estate or interest before given must be as clear and decisive as the terms by which it was created. (Thornhill v. Hall, 8 Bligh. 88, 107; Collet v. Lawrence, 1 Ves. Jr. 269; Blake v. Bunbury, 1 Ves. Jr. 195, n. 4; Moo-

bury v. Marye, 2 Munf. 453 ; Rayfield v. Gaines, 17 Grat. 1 ; Barksdale v. White, 28 Grat. 227-'8 ; Stark v. Lipscomb, 29 Grat. 326.)

4<sup>h</sup>. Words are to be Construed most Strongly *Against the User of Them.*

This rule is often expressed as if it were confined to the *grantor in a deed*. But the principle upon which the rule is founded is that, in order to induce men to express themselves plainly, they are laid under the penal consequence that whatever ambiguity occurs in expressions proceeding from themselves shall be resolved *adversely to them*. This indeed is the import of the maxim applicable to the subject, *Verba chartarum fortius accipiuntur contra proferentem*. If it were not so, it might be expected that men would affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction on them, and to take the chances of having it sustained. (2 Bl. Com. 380 ; Broom's Max. 456 & seq.)

Thus, if tenant in fee-simple grants to any one an *estate for life* generally, it shall be construed an estate for the life of the grantee (2 Bl. Com. 380 ; 1 Th. Co Lit. 620) ; and if it be doubtful on the face of the deed whether it includes one or two adjacent lots, both being the property of the grantor, both shall pass (Carrington v. Goddin, 13 Grat. 587.) In like manner, if two tenants in common grant a rent of \$20 *per annum* out of their land, the grantee shall have \$20 from each ; but if they make a lease, and reserve \$20, they shall have only \$20 between them. (1 Th. Co. Lit. 720 ; Broom's Max. 458.) A distinction, however, must be here observed between an indenture and a deed-poll ; for the words of an indenture, executed by both parties, are to be considered as the words of them both ; for though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll, executed by the grantor, they are the words of the grantor alone, and shall be taken most strongly against him. (2 Bl. Com. 380.)

This rule, being one of some strictness and rigor, is in general the last to be resorted to, and is never to be relied on but where all other rules of exposition fail (2 Bl. Com. 380) ; and it is, moreover, to be taken in subordination to the next following rule (5<sup>h</sup>). Thus, if one, tenant for his own life (*e. g.*, tenant by the curtesy), were to grant an estate for life, it would be interpreted to be for the grantor's own life ; for to suppose it to be for the grantee's life, as in the former instance, would be to make ambiguous words work a wrong, when they would as well bear an interpretation entirely consistent with right, an interpretation which the fifth rule forbids. (1 Th. Co. Lit. 620.)



- 5<sup>b</sup>. Where the Words Bear Two Senses, that *Most Agreeable to Law shall be Preferred*.

A fair illustration of this rule is found in the case cited in the foregoing paragraph, namely, where a person, tenant for *his own life*, grants an *estate for life*, without saying for whose life. This principle of interpretation requires, as we have seen, that it shall be construed to be not for the life of the grantee, which would be an estate that he has no right to create, but for his (the grantor's) own life, which is within his competency. (2 Bl. Com. 380; 1 Th. Co. Lit. 620.)

- 6<sup>b</sup>. Where Two Clauses are Irreconcilably Repugnant, in a Deed the *First*, and in a Will the *Last*, Prevails.

It will be observed, in the application of this maxim, that the clauses are supposed to be absolutely *incapable of being reconciled*; and that if, by any admissible construction the repugnancy can be avoided, there can be no occasion to invoke the rule under consideration. Thus, if in different clauses of a deed or will the same subject be given to different persons, the clauses are not irreconcilably repugnant, for the persons may take as joint-tenants, or as tenants in common, according to the terms in which the grants or devises are conceived; and such, according to the better opinion, notwithstanding Lord Coke (2 Th. Co. Lit. 646) countenances a contrary doctrine, seems to be the preferable interpretation. (2 Th. Co. Lit. 646, n. (12); Ridout v. Paine, 3 Atk. 493; Parramour v. Yardley, 2 Plowd. 541, n. (d); Price v. Cole, 83 Va. 343, 345.)

If, however, the repugnancy is in no admissible way capable of being reconciled, nothing remains but to apply this rule, and to hold that in a deed *the first*, and in a will *the last*, prevails (Wykham v. Wykham, 18 Ves. 421; Barksdale v. White, 28 Grat. 227 & seq.); although such a method of interpretation, seeing that the whole of both classes of instruments must be considered together, and are executed at the same moment of time, can be justified only by rigorous necessity.

- 7<sup>b</sup>. Ambiguities in a Writing cannot, in General, be Explained by Parol Testimony.

Parol *contemporaneous* evidence is, in general, inadmissible to contradict or vary the terms of a valid written instrument. (1 Greenl. Ev. § 275.) The writing is the only outward and visible expression of the meaning of the parties, and to allow it to be varied or contradicted by verbal testimony of what passed at or before its making, would be to postpone the more certain and reliable mode of proof, to the more precarious and less trustworthy; to prefer the less good to the *best evidence*. (Starkie's Ev. (Sharswood) 651; 1 Greenl. Ev. §§ 276, 282; Post p. 1069; Rutland's Case, 5 Co. 25 b; Woolam v. Hearn, 7 Ves. 211 c. & notes. 218-19; Gatewood v.



Burns, 3 Call, 194; Tabb v. Archer, 3 H. & M. 399; Puller v. Puller, 3 Rand. 83; Miars v. Bedgood, 9 Leigh, 361, 368, 372; Crawford v. Jarratt's Adm'r, 2 Leigh, 630; Harris v. Carson, 7 Leigh, 632; Watson v. Hurt, 6 Grat. 633, 644; Townes v. Lucas, 13 Grat. 710; Colhoun v. Wilson, 27 Grat. 639-40, 645 & seq.)

The rule applies as well to simple contracts *in writing* as to wills and specialties, extending, indeed, to *all writings* of every description. (1 Greenl. Ev. §§ 276, 287, 289; Hiscocks v. Hiscocks, 5 M. & W. 363, 367, pr. Ld. Abinger, C. B.) It is directed only against the admission of any other evidence of the *language* employed in the writing than that which is furnished by the writing itself. (1 Greenl. Ev. § 277; Crawford v. Jarrett's Adm'r, 2 Leigh, 630.)

The principle in question does not forbid the proof by parol of the surrounding *circumstances*, in order more perfectly to understand the intent and meaning of the parties, so that the court may be placed as nearly as possible in the situation of the party whose written language is to be interpreted, and may understand his relations to persons and things around him, or, indeed, may be made acquainted with *all extrinsic circumstances* tending to show what persons or what things were intended, where the language is alike applicable to several; but not if the description be wholly inapplicable to the thing said to be designed. (1 Greenl. Ev. §§ 277, 282, 288, 288 a, 290, 291, 295 a; Miller v. Travers, 8 Bingh. (21 E. C. L.) 244; Doe v. Needs, 2 M. & W. 129; Mackey v. Fuqua, 3 Call, 19; Shelton v. Shelton, 1 Wash. 53; Kennon v. McRoberts, 1 Wash. 96; Trigg & ux. v. King's Rep., 1 Rand. 252; Crawford v. Jarrett, 2 Leigh, 630; Wootten v. Redd, 12 Grat. 196; Walker v. Christian, 21 Grat. 294.)

Nor does it exclude the testimony of *experts*, to aid the court either to decipher the instrument when in unknown characters, or to translate it from a foreign tongue, or to make it intelligible by explaining the proper local or technical meaning of particular words; but not to prove that, in any individual case the words were used in other than their ordinary and proper sense. (1 Greenl. Ev. §§ 280, 295, 298.) For the rule excludes all parol evidence of intention, whether direct or by way of inference. (1 Greenl. Ev. § 282 a; Skipwith v. Cabell, 19 Grat. 758; Wootten v. Redd, 21 Grat. 196.)

The rule admits proof to identify and shows who are the real parties to the transaction (1 Greenl. Ev. § 282 a; Wadsworth, &c. v. Allen, 8 Grat. 174); to ascertain the nature and qualities of the subject to which the writing refers (1 Greenl. Ev. § 286; Crawford v. Morris, 5 Grat. 90; Emerick v. Taverner, 9 Grat. 220); and, as we have seen, to show the situa-

tion of the maker of the instrument in all his relations to persons and things around. (1 Greenl. Ev. §§ 282 & 283; Wadsworth v. Allen, 8 Grat. 174; Wootten v. Redd, 12 Grat. 196.)

Also, to show a reasonable and fair usage or custom, with reference to which the parties probably contracted, or expressed themselves; but in Virginia only where the language is ambiguous, not where the usage or custom, which it is sought to establish, is inconsistent with the terms of the writing (Wigglesworth v. Dallison, 1 Dougl. 201; Hutton v. Warren, 1 M. & W. 466; Harris v. Carson, 7 Leigh, 639; Mason v. Moyers, 2 Rob. 613; Gross v. Criss, 3 Grat. 250); nor when it is in conflict with the settled rules of law. (Dodd v. Farlow, 11 Allen (Mass.), 426 [87 Am. Dec. 727, 729 & note]; Dickinson v. Gay, 7 Allen, 34, 37, [83 Am. Dec. 656]; Frith v. Barker, 2 Johns. (N. Y.) 327; Woodruff v. Merchants Bank, 25 Wend. 673; Beirne v. Dord, 1 Seld. 95; Simmons v. Law, 3 Keyes, 219; Barnard v. Kellogg, 10 Wal. 390 & seq.; Reed v. Richardson, 98 Mass. 216 [93 Am. Dec. 157, & note.].)

Also, to show that the instrument is invalidated by fraud, or other illegality, or if not under seal, by want of valuable consideration, or by a mistake in point of fact; or that, whilst it purports to be an absolute conveyance, it was, in fact, intended as a mortgage (1 Greenl. Ev. §§ 284, 296, 304; Ross v. Norvell, 1 Wash. 14; Flemings v. Willis, 2 Call, 54; Jones v. Robertson, 2 Munf. 187; Stratton v. Minnis, Id. 329; Alexander & Co. v. Newton, 2 Grat. 266; Brent v. Richards, Id. 534, 543; Shepherd v. Henderson, 3 Grat. 367); or that there was a resulting, implied, or constructive trust. (Aute, pp. 217 & seq.; Borst v. Nalle, 28 Grat. 434 & seq.; Bank of United States v. Carrington, 7 Leigh, 566; Sprinkle v. Hayworth, 26 Grat. 391-'2.)

Also, to contradict or explain the writing in its *recital of facts*, where the party is not estopped to deny them, as in receipts and other papers which contain such recitals. (1 Greenl. Ev. § 305; Brent v. Richards, 2 Grat. 539, 543; Harvey v. Skipwith, 16 Grat. 410.)

Also, to *rebut an equity*, by showing an intention adverse to a presumption which would otherwise arise; as that two legacies of which the sums and expressed motives exactly coincide, are *cumulative*; that a portion is an ademption of a legacy; that a portion is satisfied by a legacy, etc. These presumptions may be all repelled by parol evidence; in respect to which it has been well said, that it is not in this case so much adducing parol evidence to contradict or explain a writing as to show that the writing *means what it says*. (1 Greenl. Ev. § 296; Jones v. Mason, 5 Rand. 577; Kelly v. Kelly, 6 Rand. 176; Moore v. Hilton, 12 Leigh, 2; Haus-

brough's Ex'ors v. Hooe & ux. 12 Leigh, 316; Strother v. Mitchell, 80 Va. 149, 154; V. C. 1873, ch. 118, § 12; V. C. 1887, ch. 112, § 2522.)

Also, to *discharge* a written agreement *totally*, supposing it to be not under seal, even though a writing be necessary, in pursuance of the statute of parol agreements, to the validity of the transaction which is thus abrogated. (1 Greenl. Ev. § 303; *Aute*, p. 860; Phelps v. Sealy & als. 22 Grat. 585 & seq.)

Also, to set up a *new and distinct* agreement upon a *new consideration*, whether as a substitute for the old, or in addition to and beyond it. (Stark. Ev. (Sharswood), 655, n. c; 1 Greenl. Ev. §§ 303 '4; Flemings v. Willis, 2 Call, 5.)

Also, to enlarge the *time* of performance of a simple contract, or to change the *place*, even, it would seem, in cases within the statute of frauds or parol agreements (Stark. Ev. (Sharswood), 724-'5, & n. o), or to show a waiver and abandonment of it. (1 Greenl. Ev. § 304.)

Also, to explain a *latent ambiguity*. There are, as Lord Bacon observes, two sorts of ambiguities: *patent*, such as appears on the face of the writing, and is apparent to all who read or hear it; and *latent*, when the ambiguity is brought to light by extrinsic circumstances, none appearing upon the face of the instrument, but as Lord Bacon expresses it, "there is some collateral matter out of the deed that breedeth the ambiguity." (Bac. Max. Reg. XXIII.) A *patent ambiguity*, inherent in the words, and incapable of being dispelled, either by any legal rules of construction applied to the instrument, or by evidence showing that terms in themselves unmeaning or unintelligible are capable of receiving a known conventional signification, can never be explained by parol testimony; but a *latent ambiguity*, which is raised by extrinsic facts, may in like manner be resolved by the proof of like facts. Lord Bacon states the leading maxim upon the subject to be *ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*. (Bac. Max. Reg. XXIII.; Stark. Ev. (Sharswood), 652 & seq.)

"*Ambiguitas patens*," says he, "is never holpen by averment," for the reason, as he explains, that it would introduce into the construction and effect of writings an uncertainty which would breed infinite disputes and confusion. "But if it be *ambiguitas latens*," he adds, "then otherwise it is; as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be that I have two manors, both of South S. and North S., this ambiguity is matter in fact (*latent*), and therefore shall be holpen by averment, whether of them was that the party intended should pass." (Bac. Max. Reg. XXIII., Stark. Ev. (Sharswood),



625 & seq., 653, & n. (1); 1 Jarm. Wills (5 Am. ed.) 429 & seq.; 1 Lom. Dig. 212 & seq.; Broom's Max. 468 & seq.; Crawford v. Jarrett, 2 Leigh, 630; Wootten v. Redd, 12 Grat. 196; Hawkins v. Garland, 76 Va. 149; Senger v. Senger, 81 Va. 687; Gord v. Needs, 2 M. & W. 140 &c.; *Id.* 141, note; Hiscocks v. Hiscocks, 5 M. & W. 368 & seq.)

- 8<sup>b</sup>. Mere False Description does not Make a Writing Inoperative, when, *after Rejecting what is False*, Enough Remains to Ascertain the Person or the Subject Intended.

This idea is frequently expressed by the maxim, *Falsa demonstratio non nocet cum de corpore constat*. Its applications have been numerous enough to illustrate it amply. Thus, under a lease of "all that part of Blenheim Park situated in the county of Oxford, now in the occupation of one S., lying" within certain specified limits, "with all the houses thereto belonging, which are in the occupation of said S.," a house within the limits designated, but not in the occupancy of S. was held to pass. (*Doe v. Galloway*, 5 B. & Ad. (37 E. C. L.) 43.) So by a devise of "the farm called Trogue's Farm, now in the occupation of C.," the whole farm was held to have passed, although it was not all in C.'s occupation (*Goodtitle v. Southern*, 1 M. & S. 299.) And where land was described in letters patent as lying in the county of M., and further described by reference to natural monuments or marked lines, so as to ascertain its identity, notwithstanding the subject lay not in the county of M., but in that of H., yet the mistake as to the county was deemed not to effect the validity of the grant; although it was admitted that if the subject had been so inaccurately described as to render its identity wholly uncertain, the grant would for that reason have been void. (*Boardman, &c. v. Lessees of Reed, &c.* 6 Pet. 345; *Wootten v. Redd*, 12 Grat. 196.) Thus also, where a testator devised all his "*freehold houses* in Aldersgate street," when in fact he had no freehold, but had *leasehold* houses there, it was held that the word "freehold" should rather be rejected than the will be totally void. (*Day v. Trigg*, 1 P. Wms. 286.) And it may be observed in passing, that, independently of statute, it is a long-established rule, that when a testator, having both freehold and leasehold lands in a particular place, devises "*all his lands*" in that place, only the freehold lands shall pass, although, if he had had no freehold lands there, leasehold lands would pass. (*Rose v. Bartlett*, 4 Cro. (Car.) 292; *Minnis & als. v. Aylett*, 1 Wash. 302.) This doctrine, however, is with us qualified by a statute taken from 7 Wm. IV., and 1 Vict. c. 26, which enacts that a "devise of the *land of the testator*, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe



a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include his leasehold estates, or any of them to which such description shall extend, as well as freehold estates, unless a contrary intention shall appear by the will." (V. C. 1873, ch. 118, § 15; V. C. 1887, ch. 112, § 2525.)

On the other hand, where a testator devised all his freehold and real estates "in the county of Limerick and in the city of Limerick," and he had no real estate at all in the county of Limerick, and in the city only a small estate inadequate to meet the charges in the will, the bulk of his real property being in the county of Clare, it was held that the devisee could not be allowed to show by parol evidence that the estates in the county of Clare were inserted in the devise to him contained in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that the conveyancer did, by mistake and without authority, strike out the words "county of Clare;" and that a fair copy of the will, so altered, was sent to the testator, who, after keeping it by him for some time, executed it without adverting to the alteration. To allow parol evidence for such a purpose, it was justly considered, would amount to the making, *by parol*, of a new devise for the testator. (*Miller v. Travers*, 8 Bing. (21 E. C. L.) 244.) And so it is well established, that where a complete *blank* is left for the name of the devisee, or the thing devised, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. (*Hunt v. Hoss*, 3 Bro. C. C. 311; *Doe v. Chichester*, 4 Dow P. C. 65.)

The principles which control the application of parol evidence to explain a *latent ambiguity*, and to *correct a false description*, are so plainly set forth in the case just cited (*Miller v. Travers*), by Tindal, C. J., that it will be expedient to transcribe some sentences of his judgment.

"It may be admitted," says he, "that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, '*Ambiguitas verborum latens verificatione suppletur.*'" See *Atkinson's Lessee v. Cummins*, 9 How. 486.

"But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other. \* \* The first class is when the

description of the thing devised, or of the devisee, is alone upon the face of the will; but upon the death of the testator it is found that there is more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases, respectively, parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. (Bac. Max. XXIII.; *Counden v. Clerke*, Hob. 32 a; *Altham's Case*, 8 Co. 155.) The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person intended to take, is true in part, but not true in every particular. As where an estate is devised called A, and is described as being in the occupation of B, and it is found that though there is an estate called A, yet the whole is not in B's occupation; or where an estate is devised to a person whose surname or Christian name is mistaken, or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence;" or as it is expressed in the rule, provided that, after rejecting what is inaccurate and inapplicable, there yet remains on the face of the writing enough to ascertain the identity of the thing or person referred to. See *Broom's Max.* 490, 492-3.

9<sup>b</sup>. The *Express Mention* of One Thing Implies the *Exclusion* of Another.

This rule is conveyed by two maxims, not precisely synonymous, but both importing the principle enunciated by the rule, namely, *expressio unius est exclusio alterius*, and *expressum facit cessare tacitum*. We find instances of its application in leases for years, in which the word *demise* implies a covenant for quiet enjoyment, but liable to be superseded by any express covenant of title. (*Ante*, p. 759; *Shepp. Touchst.* 160; *Broom's Max.* 505.) By reason of this rule it is that a clause of attestation of a will which recites some, but not all of the particulars required, is bad, whilst if general, it imports an attesting of all the requisites. (*Doe v. Burdett*, 9 Ad. & El. (36 E. C. L.) 936, affirmed in the house of lords expressly on this ground; *Broom's Max.* 508, n. om.) So, a general acknowledgment (in writing) repels the bar of the statute of limitations, an *absolute* promise being *implied* therefrom; but if there be an *express* promise which is conditional, as to pay "as soon as I can," the principle *expressum*

*facit cessare tacitum* applies, and it must appear that the condition was fulfilled (as in the case supposed, the ability of the defendant to pay), before the obligation can be insisted on. (Tanner v. Smart, 6 B. & Cr. (13 E. C. L.) 603; Edmunds v. Downes, 2 Cr. & Mees. 463-'4, and note; Irving v. Veitch, 3 Mees. & W. 112.) See Broom's Max 509 & seq.

10<sup>h</sup>. Devises, and Wills Generally, are to be *Most Favorably Expounded, According to the Will* of the Testator, if *Consistent with the Rules of Law*.

Less regard is had to the technical rules of limitation in wills than in deeds *inter vivos*, and other instruments, because for the most part a man puts off making his will until the last moment, when he often cannot obtain the aid of counsel, or, as the phrase is, when he is *inops consilii*. Hence, if any material advantage is to be derived from the right of devise, a liberal construction must be indulged, and notwithstanding it tends to uncertainty and litigation, the rigorous requirements of technical phraseology must be relaxed in respect of wills. (2 Bl. Com. 381; 3 Lom. Dig. 195)

*Intention* is the *polar star* in the construction of all writings, but with peculiar emphasis in the interpretation of wills. The leading maxim is *quod ultima voluntas testatoris perimplenda est secundum veram intentionem*. But that intention is to be collected from the words of the whole instrument justly interpreted (*ex visceribus testamenti*), having regard to the circumstances of the testator, and the relation in which he stood to the parties claiming under the will, and the subjects disposed of by it, and not to oral declarations, or other extrinsic proof of a meaning not to be found in his written words. (Kennon v. McRoberts, 1 Wash. 96; Wyatt v. Sadler's Heirs, 1 Munf. 537; Mooberry v. Marye, 2 Munf. 453; Calloway v. Langhorne, 4 Rand. 181; Land v. Otley, 4 Rand. 213; Wootten v. Redd, 12 Grat. 196; East v. Garrett, 84 Va. 537; Stokes v. Van Wycke, 83 Va. 924; Broom's Max. 425; 3 Lom. Dig. 196.) Thus, technical words are presumed to be used technically, unless the contrary appears on the face of the will (3 Lom. Dig. 197; Finlay & al. v. King's Lessee, 3 Pet. 346), and words of definite legal signification are to be understood to bear their proper sense. (Findley's Executors v. Findley, 11 Grat. 438, and cases there cited.) Hence, as the word *children*, where no other words are joined with it, has, in general, no other meaning but *issue in the first degree* (except where the rule in Wild's case, 6 Co. 17 a, intervenes, which is founded on peculiar reasons), it is, even in a will, a word of *purchase*, and not of *limitation*. (Moon v. Stone, 19 Grat. 130.)

So words of survivorship (*e. g.*, devise to A for life, and afterwards to his *surviving children*,) are in Virginia construed, as they were in England until 1795, in the absence



of any manifestation of a contrary intent, to have relation to the *death of the testator*, as thereby the subsequent limitation the sooner becomes *vested*. (Wilson v. Bayly, 3 Bro. P. C. 195; Stringer v. Phillips, 1 Eq. Cas. Abr. 203; Rose v. Hill, 3 Burr. 1881; Roebuck v. Dean, 2 Ves. Jr. 205; Perry v. Woods, 3 Ves. Jr. 204; Maberly v. Strode, 3 Ves. Jr. 450; Brown v. Bigg, 7 Ves. 279; Garland v. Thomas, 4 Bos. & Pul. 82; Edwards v. Symonds, 6 Taunt. 213; Long v. Prigg, 8 B. & Cr. (15 E. C. L.) 206; 2 Jarm. Wills (5th Am. ed.), 722 & seq.; Hansford v. Elliott, 9 Leigh. 79, 89; Martin v. Kirby, 11 Grat. 69; Brent v. Washington, 18 Grat. 529; Corbin v. Mills, 19 Grat. 472; Stokes v. Van Wycke, 83 Va. 732, &c.; Doe v. Considine, 6 Wal. 475.)

The later English cases, say since about the beginning of the present century, have preferred the rule which holds the words of survivorship to have relation to the period of *distribution*, whether that be at the testator's death, or at a subsequent period. And especially does this construction prevail in respect to *personal estate* in the English courts. (2 Jarm. Wills (5th Am. ed.), 727 & seq.; Brograve v. Windler, 2 Ves. Jr. 634; Newton v. Ayscough, 19 Ves. 534; Hoghton v. Whitegreaves, 1 Jas. & W. 146; Daniell v. Daniell, 6 Ves. 297; Wordsworth v. Woods, 2 Bear. (17 E. C. R.) 25; Cripps v. Wolcott, 4 Madd. 12 (Am. ed.); Pope v. Whitcombe, 3 Russ. (3 Eng. Ch.) 124; Gibbs v. Tait, 8 Sim. (11 Eng. Ch.) 132; Browne v. Ld. Kenyon, 3 Madd. (Am. ed.) 212; Neathway v. Reed, 30 M. & G. (52 Eng. Ch.) 18.)

In pursuit of the intention, where it is manifest, notwithstanding the rule that every word must have effect if possible, words may be rejected and supplied (3 Lom. Dig. 300 to 302; Lynch, &c. v. Hill, &c., 6 Munf. 114; Smith v. Loyd, 16 Grat. 311; Peyton v. Harman, 22 Grat. 645); expressions may be rectified, as by reading the words "*if he should die*" as if they were "*when he should die*," or "*hereinafter*" as if it were "*hereinbefore*," or the word "*and*" as if it were "*or*," and *vice versa* (3 Lom. Dig. 203 & seq.); and, indeed, in no case can the manifest intent be defeated by adhering *to the letter* of the will. (Hill v. Huston, 15 Grat. 350; East v. Garrett, 84 Va. 523.)

Adjudged cases may be argued from, if they establish general rules of construction, to find out the intention of the testator. And where once a court of justice has determined the meaning of certain words or forms of expression, the same effect will in all future cases be annexed to them, unless the context or the extrinsic circumstances shall require a different interpretation; for the great object in questions of property is certainty; and, as Lord Mansfield remarks, in Hodgson v. Ambrose, 1 Dougl. 337, more benefit is derived from adhering to even an erroneous or hasty determination,



which has got into practice, than from overturning it. But, except to prove the ascertained meaning of certain words or forms of expression, it has been sensibly observed that, in disputes upon wills, cases seldom elucidate the subject, which, depending on the intention of the testator, to be collected from the will and from the relative situation of the parties, ought to be decided upon the state and circumstances of each case. (*Baddeley v. Leppingwell*, 3 Burr. 1541; *Smith v. Bell*, 6 Pet. 68 74, &c.) This remark received the approval of *Pendleton, P.*, in *Shermer v. Shermer's Executors*, 1 Wash. 271-'2; and he added that, within his observation, adjudged cases more frequently are produced to disappoint than to illustrate the intention.

A testator has a right to dispose of his property as he pleases, provided he *violates no rule of law* in his disposition thereof; but, unless his purpose is very clear, he ought not to be understood to intend to disregard the ties of kindred. Hence, the court leans against such a construction of doubtful words as would leave a daughter destitute of provision (*Carrington v. Bell*, 6 Munf. 374); and an heir at law can be disinherited only by the plainest words, and they such words as do not merely import that the heir shall not have the estate, but such as clearly appoint *some one else to take it*. (3 Lom. Dig. 198; *Denn v. Gaskin*, Cowp. 661; *Boisseau v. Aldridges*, 5 Leigh, 234, 243.)

On the other hand, if the testator's disposition of his property is adverse to the rules or the policy of the law, the will is void; and the plainer the intent, of course the more certain is the sentence of nullity. (*Rucker v. Gilbert*, 3 Leigh, 8; *Wynn v. Carrell*, 2 Grat 229.) Hence, *perpetuities*, that is, future limitations, which are not *obliged* from their terms, to vest within the period of a life or lives in being, and the period of gestation (not more than ten months), and twenty-one years afterwards, are void (3 Lom. Dig. 209-'10; *Ante*, p. 437 & seq.); that is, so far as such a limitation creates a perpetuity, it is void; but it manifests the anxious solicitude of the law to give effect to *wills*, that where the subject is real estate of inheritance, and it is sought to limit it for successive lives *for ever*, in the same family, as to H. M. for life, and then to his first son for life, and so to the first son of that son for life, etc., whilst the attempt thus to create a perpetuity is vain, yet, as was observed by Lord Chancellor Cowper, in *Humberston v. Humberston*, 1 P. Wms. 332, so far as is consistent with the rules of law, it ought to be complied with; and so all the sons already born were decreed to take estate for their lives; but where the limitation is to the first son unborn, it is in him, *ut res valeat*, an estate-tail, and would be with us a fee-simple; the gift to the sons or children of an unborn person being construed to be part of the gift to the

parent, and to confer on him an estate-tail. (*Wild's Case*, 6 Co. 17 a.) This is one exemplification of the doctrine of *cy pres*, whereby, when there is a *general and also a particular intention* apparent in a will, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention. Other much more questionable instances of the same general doctrine are described by Judge Story, 2 Stor. Eq. §§ 1169-70, 1176 to 1182.

In respect to the introduction of extrinsic parol testimony to aid in the interpretation of wills, the same general principles are applicable as in the case of other writings, as explained, *Ante*, pp. 1059 & seq., and 1062 & seq. The case of *Goblet v. Beechey*, 3 Sim. (6 Eng. Ch.) 24, will afford the means of elucidating these principles, especially as applicable to wills, in a very thorough manner. Joseph Nollekens, an eminent statuary in London, by his will and certain codicils thereto, had bequeathed one or more legacies to Alexander Goblet, one of his workmen, who had been in his employment upwards of thirty years, and for whom he entertained a great regard; and then gave to other persons the residue of his property, which he enumerated as consisting, in part, of "marbles, busts, *models*," etc. Then, by the eleventh codicil to his will, he gave "all the marble in the yard, the tools in the shop, *bankers*, *mod*, tools for carving, the rasp in the drawer," etc., to Alexander Goblet. The essential question was, what was meant by the word *mod*, Goblet insisting that it meant *models*, which were worth upwards of £700. And Vice Chancellor Sir L. Shadwell allowed the parol evidence of sculptors to be adduced to show that, in their opinion, the word was intended for *models*, and decreed in favor of Goblet. Upon appeal, however, to Lord Chancellor Brougham, he reversed the decree, upon the ground that *models* having been distinctly and expressly bequeathed previously, that bequest could not be revoked by the imperfectly written word *mod* in a subsequent codicil, as to the meaning of which there was not an entire unanimity of opinion amongst the witnesses examined. He did not appear, however, to disapprove the introduction of parol evidence in the cause, as touching the signification of the word *mod*, although he dissented from the result at which the vice chancellor had arrived under the influence of that testimony. And he allowed, without hesitancy, the parol evidence which had been adduced to prove that the word *bankers* meant the benches or solid pieces of wood upon which the sculptor places blocks of marble for the purpose of being carved. See *Goblet v. Beechey*, 2 Rus. & My. (13 Eng. Ch.) 624. The case, therefore, itself is instructive; but amongst those who were casually present at the first hearing of the cause, in July, 1826, before Vice Chancellor Sir John Leach, was James Wigram, Esq. afterwards Sir

James Wigram, and vice chancellor), whose attention being arrested by the novelty and interest of the question involved, proceeded, for his own improvement merely, to make a professional study of the general topic of the doctrine touching the admission of *extrinsic evidence in aid of the exposition of wills*, and five years afterwards he published his observations in a small tract, under the title of "An Examination of the Rules of Law Respecting the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills," which has ever since maintained its place as the most authoritative exposition extant of the doctrine in question. Sir James Wigram has digested his examination of the subject into *seven propositions*, which, with the exception and qualifications thereto, he establishes and illustrates successively, by abundance of cases. These propositions are as follows:

PROPOSITION I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptance, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed. (Wigram's Essay, 15, 16.)

PROPOSITION II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular secondary sense be tendered. (Wigram's Essay, 17 & seq.)

PROPOSITION III. Where there is nothing in the context of a will from which it is apparent that the testator has used the words in which he has expressed himself in any other than their strict primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable. (Wigram's Essay, 42 & seq.)

PROPOSITION IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare*



what the characters are, or to inform the court of the proper meaning of the words. (Wigram's Essay, 48 & seq.)

PROPOSITION V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words. (Wigram's Essay, 51 & seq.)

PROPOSITION VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (*except in certain special cases*, see Prop. VII.), will be void for uncertainty. (Wigram's Essay, 83 & seq.)

PROPOSITION VII. Notwithstanding the rule of law which makes a will void for uncertainty where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person or thing* intended, where the description in the will is insufficient for the purpose.

These cases may be thus defined: When the object of a testator's bounty, or the subject of disposition (*i. e.*, the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, parol evidence is admissible to prove which of the persons or things so described was intended by the testator. (Wigram's Essay, 101 & seq.)

Let us now consider some illustrations of the liberality which prevails in the interpretation of wills, in consequence of which (amongst other instances) there may arise, (1), An estate *in fee-simple* without *words of inheritance*; (2), An estate *in fee-tail*, without express *words of inheritance*, or of *procreation*; (3), An estate of any quantity by *implication merely*; and (4), Cross-remainders *by implication only*;

W. C.

1<sup>i</sup>. An Estate in Fee-Simple may be Created by Will, *without Words of Inheritance*.

It will be remembered that, at common law, in order to create an estate of inheritance of any kind, and *a fortiori*,



in order to create a fee-simple, the most perfect of all estates of inheritance, the word *heirs*, in conveyances to natural persons, is, for feudal reasons, indispensable, and can be supplied by no paraphrase whatsoever. (*Ante*, pp. 83 &c.; 1 Th. Co. Lit. 493 & seq.) But when wills were introduced by the statute of wills, 32 and 34 Henry VIII., a more liberal construction prevailed, the *intention* became the polar star by which the interpretation was determined, and technical language was, as we have seen, not insisted on; any words sufficing to create a fee-simple which clearly showed such to be the testator's intent. (*Ante*, p. 84; 1 Th. Co. Lit. 497 & seq., & notes; 2 Bl. Com. 108, & n. (11).)

To us in Virginia, the distinction is less important, in consequence of a statutory provision enacted first in 1785, to take effect 1st January, 1787, which, as it now stands, declares that "where any real estate is conveyed, devised, or granted to any person without any words of limitation, such devise, conveyance or grant shall be construed to pass the fee-simple, or other the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance or grant." (V. C. 1873, ch. 112, § 8; *Humphrey v. Foster & ux.* 13 Grat. 686.)

- 2<sup>i</sup>. An Estate in Fee-Tail may be Created by Will *without Express Words of Inheritance or of Procreation.*

The word "heirs" is, at common law, for the most part, necessary in order to create an estate-tail, because it is an estate of *inheritance*; but no particular words of *procreation* are requisite; that is, words showing of *whose body* the issue is to be begotten. Thus, a grant by *deed* of feoffment of land to a man and the *issue of his body*, or to *his issue*, or to *his seed* or *offspring*, will pass only an estate *for life*, for lack of the proper words of inheritance. (*Ante*, pp. 90, 91.) But in a devise, any words denoting an intention to give an estate-tail, will pass such an estate, notwithstanding there be neither express words of inheritance nor of procreation. Thus, a devise to "a man and his issue," or "to a man and his *offspring*," or "to a man and *his children*," or "to a man and *his sons*" (he having, in the last two cases, *no children at the time*), will create in him an estate of this character. (*Ante*, p. 84; *Wild's Case*, 6 Co. 17 a; *Davie v. Stephens*, 1 Dougl. 324; *Wood & ux. v. Bacon*, 1 East. 259; *Seale v. Barter*, 2 Bos. & Pul. 485; *Wharton v. Gresham*, 2 W. Bl. 1083; *Bramble v. Billups*, 4 Leigh, 90; *Thomason v. Anderson*, 4 Leigh, 122; *Pullen v. Mullin & ux.* 12 Leigh, 434, 439.) And so an estate-tail may arise in a will, as a fee-simple also may, by *mere implication*, as we shall presently see. (1 Th. Co. Lit. 547-'8, & n. (N).)

It can hardly be needful to remind the student that what

in England is a fee-tail, is by our statutes in Virginia (V. C. 1873, ch. 112, § 9; *Ante*, p. 96), converted into *fee-simple*.  
 3<sup>l</sup>. An Estate of any Quantity, whether of Inheritance, or for a Less Interest, may be Created in a Will, *by Implication merely*.

Instances of estates thus arising *by implication* abound in the books. But let it be observed, that in construing a will conjecture must not be taken for implication. The implication which is to prevail must be not merely a possible but a *necessary implication*, which means not natural necessity, but so strong a probability of intention, that an intention contrary to that imputed to the testator would be absurd, and therefore cannot be supposed. (2 Bl. Com. 381-2 & n. (25); 1 Th. Co. Lit. 547, n. (N.); *Wilkinson v. Adam*, 1 Ves. & B. 466; *Coryton v. Helyar*, 2 Cox. 348.)  
 W. C.

1<sup>k</sup>. A Fee-simple may be Created in a Will *by Implication*.

Thus a fee-simple is created by a devise to one without express limitation of any particular estate, upon trusts which require an estate in fee to carry them with certainty into effect, or subject to conditions which might impose a burden, instead of conferring a benefit, unless a fee-simple passed, as for example, to pay a sum in gross, or an annuity for a term other than the devisee's own life, not out of the rents and profits, but absolutely. (3 Lom. Dig. 383 & seq.; *Baddeley v. Leppingwell*, 3 Burr. 1542; *Frogmorton v. Holyday*, Id. 1623; *Andrew v. Southouse*, 5 T. R. 294 '5.) But if the property were given for some ascertained interest, as for the life of the devisee, the implication yields to what is expressed, and the devisee takes no more than the estate indicated. (*Baddeley v. Leppingwell*, 3 Burr. 1541; 3 Lom. Dig. 307.)

Again, although a devise be expressly for life of the devisee, yet if the devisee be by other clauses of the will permitted to use and to *dispose of the subject absolutely at his pleasure*, or if so much as may remain *undisposed of by him at his death* (which implies a power of unqualified disposition), be given over at his decease, the devisee is construed by a necessary implication of the testator's intention, to take a *fee-simple*. (*Robinson v. Dugate*, 2 Vern. 181; *Maskelyne v. Maskelyne*, 2 Ambl. 750 & n. (1); *Flanders v. Clark*, 1 Ves. Sr. 10; S. C. 3 Atk. 510; *Goodtitle v. Otway*, 2 Wils. 6, 7; *Sprange v. Bernard*, 2 Bro. C. C. 587 '8; *Wynne v. Hawkins*, 1 Do. 179, &c.; *Ido v. Ido*, 5 Mass. 500; *Gifford v. Choats*, 100 Mass. 343; *Jackson v. Bull*, 10 Johns (N. Y.), 19; *Jackson v. DeLancey*, 13 Johns. 537, 552; *Jackson v. Robins*, 15 Johns. 169; *Campbell v. Beaumont*, 91 N. Y. 464; *Shermer v. Shermer's Ex'ors*, 1 Wash. 266, 272; *Riddick v. Colhoun*, 4 Rand.

547, 550, &c.; *Burwell's Ex'ors v. Anderson*, 3 Leigh, 348, 355-'6; *Melson v. Cooper*, 4 Leigh, 408-'9; *May v. Joynes & als.* 20 Grat. 692; *Missionary Soc. v. Calvert*, 32 Grat. 363; *Corr v. Effinger*, 78 Va. 197; *Cole v. Cole* 79 Va. 253; *Hall v. Palmer*, 87 Va. 357 '8; *Bowen v. Bowen*, Id. 439-'40.) Thus, in the case of *May v. Joynes & als.*, the testator having devised real property to his wife *for her life*, proceeded afterwards to give her full power to sell the subject, and invest and use the purchase money *for any purpose she pleased*, and then directed that all that *remained at her death undisposed of* should go to the testator's children and grandchildren. It was held to vest a fee-simple in the wife. And in *Riddick v. Cohoon*, 4 Rand. 547, 550, &c., a devise to B and her heirs, and if she should die without issue living at her death, so much of the property *as may remain undisposed of by B*, to go to C, etc., was held to vest an *absolute* fee-simple in B. See *Tomlinson v. Dighton*, 1 P. Wms. 171.

But see *Smith v. Bell*, 6 Pet. 68; *Brant v. Va. Coal, &c. Co.* 93 U. S. 233; *Giles v. Little*, 104 U. S. 295, &c.; *Johns v. Johns*, 86 Va. 333; *Miller v. Potterfield*, 86 Va. 876. In all these cases the language used imported some qualification of the absolute power of disposal by the first taker. Thus, in *Johns v. Johns*, the power of disposal was not for the first taker's sole benefit, but also for that of her children; and in *Miller v. Potterfield*, a similar qualification existed. (*Bowen v. Bowen*, 87 Va. 440.)

2<sup>k</sup>. The Effect of *Precatory* Devises and Bequests.

The doctrine of *precatory* devises and bequests is founded upon the cardinal rule in the construction of wills, that the testator's intent, when ascertained, and found to be not contrary to law, is to be carried out, by whatever words conveyed. Hence, it has come to be well settled in such cases, that in order to effectuate the testator's intention, words of *request, recommendation and hope*, may be treated as imperative, and shall be so treated where the objects of the precatory language are certain, and the subjects contemplated are also certain, unless a *clear discretion or choice* to act or not to act be given, or the prior dispositions of the property import an absolute or uncontrollable beneficial ownership. (2 Stor. Eq. §§ 1068 to 1070; *Harrison v. Harrison's Adm'x*, 2 Grat. 13; *Ante*, pp. 250-'51.)

3<sup>k</sup>. An Express Estate in Fee-Simple may be *Reduced by Implication* to a Fee-Tail.

Thus a devise to R *and his heirs*, but if he dies without heirs, to *R's brother or other collateral kinsman*, clearly imports that the heirs of R contemplated by the testator are *heirs of his body*; for he cannot die without heirs, generally, whilst he has any collateral relatives; and, there-



fore, the express estate in fee-simple given by the first clause to R, is by the subsequent clause cut down to an estate-tail. (Fearn's Rem. 378, 467; 3 Lam. Dig. 366, &c.; 1 Th. Co. Lit. 547, n. (N.); Goodright v. Goodridge, Willes, 369; Morgan & ux. v. Griffith, Cowp. 234; Hatch v. Black, 6 Taunt. 488; Hill v. Burrow, 3 Call, 342.)

The student will always remember that, in Virginia, every estate in lands so limited that, as the law was on the 7th day of October, in the year 1776, such an estate would have been an estate-tail, shall be deemed an estate in fee-simple. (V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107, § 2421.)

4<sup>k</sup>. An Express Estate for Life may be *Raised by Implication* to a Fee-tail.

Thus, a devise to J. for his life, and if he die without issue, to T., has by implication the same meaning as a devise to J. for life, remainder to *his issue*, which, with the aid of the rule in Shelley's Case, creates an estate in fee-tail. (Tate v. Talley, 3 Call, 354; Bells v. Gillespie, 5 Rand. 273; See v. Craigen, 8 Leigh, 447; *Ante*, p. 456; 1 Th. Co. Lit. 547, n. (N).) But since the abolition of the rule in Shelley's Case in Virginia (V. C. 1887, ch. 107, § 2423), the effect would be to pass an estate to J. for his life, with a *contingent* remainder to the *heirs of his body*.

5<sup>k</sup>. A Devise to the *Testator's Heir* (but not to a Stranger), *after the Death of the Testator's Wife*, Vests a Life-Estate in the Wife.

. See 2 Bl. Com. 381, and n. (23).

4<sup>i</sup> Cross Remainders may be Created in a Will *by Implication*.

If A, seised in fee, devises land to B, C and D for their lives, whether in fealty or as tenants in common, with remainder, as they respectively die, and after their respective deaths, to the survivors or survivor, such remainders are denominated *cross-remainders*, and on the death of B his land will remain to C and D, as tenants in common; and on the death of C the whole will remain to D for his life. And so, under the doctrine of entails, if the devise had been to B, C and D, and the heirs of their bodies, as tenants in common, with remainder, in case any of them should die without issue, to the survivors or survivor, B's land at his death without issue, would remain to C and D as tenants in common *in tail*, and on the death of C, and failure of his issue, the whole would remain to D *in tail*. These, it will be observed, are instances of cross-remainders *express*, and in none of them would the next remainderman or reversioner be entitled to the land, until all the particular estates to B, C and D, and the remainders also to those parties were determined. (3 Lam. Dig. 369-70; Chadock



v. Cowley, 3 Cro. (Jac.) 695; Broadus v. Turner, 5 Rand. 308.)

In deeds, cross-remainders do not arise *without express limitation*, or at least without words clearly expressing an intention to give them; but in wills they may be freely created *by implication*, wherever it appears from the testator's language to have been his intention that the whole estate should go over to the ulterior remainderman, or, by way of reversion, to the heir at law together, and that no part of it should pass or descend to him till the happening of the particular event indicated, such as the failure of issue on the part of *all* the first takers. (3 Lom. Dig. 371 & seq.; Cooper v. Jones, 3 B. & Ald. (5 E. C. L.) 425; Pery & al. v. White, Cowp. 780-'81; Phippard v. Mansfield, Cowp. 800, 801.) Thus, where a man having two sons, devised part of his lands to one of them and his heirs, and the remaining part to the other and his heirs, adding, "I will that the survivor of them shall be heir to the other, if either of them die without issue," it was held that they were tenants in common in tail, with cross-remainders implied. (Chadock v. Cowley, 3 Cro. (Jac.) 695.) And so a devise "to my two daughters, E. and A., and their heirs, equally to be divided between them, and in case they happen to die without issue, then I give and devise all the said lands to my nephew," creates estates-tail in the two daughters with cross-remainders. (3 Lom. Dig. 371.) The implication, however, must be a *necessary one*, or else the cross-remainders do not arise. (Comber v. Hill, 2 Stra. 969; Davenport v. Oldis, 1 Atk. 579.)

It was at one time conceived that cross-remainders could not be implied between more than two persons, in consequence, it was said, of the confusion which would arise from the division of the estate among many, as by reason of the uncertainty which might exist whether the surviving shares should vest in the parties as joint-tenants, or as tenants in common, and for what estate; and also for the technical reason (merely feudal) to avoid the splitting of tenures, and consequently of services. (Gilbert v. Wiltz, 3 Cro. (Jac.) 655; Cook v. Garrard, 1 Saund. 185 a, n. (6); Pery v. White, Cowp. 780.) But this doctrine has been essentially modified for a century past, the true rule being, as was observed by Lord Mansfield, in Pery & al. v. White (Cowp. 780), that wherever cross-remainders are to be raised by implication *between two*, and no more, the presumption is in favor of cross-remainders; where they are to be raised between more than two, there the presumption is against cross-remainders. But this presumption may be answered by circumstances of plain and manifest intention either way. (Pery v. White, Cowp. 780; Phippard v. Mansfield, Id. 800; Atherton & als. v. Pye & ux. & als. 4 T. R. 713.)

Questions relating to the doctrine of cross-remainders are, in England, applicable for the most part (but not necessarily) to gifts of estates-tail. (3 Lom. Dig. 376, 14 Vest. Est. 95.) And since the statutes in Virginia abolishing estates-tail, by converting them into estates in fee-simple (*Ante*, pp. 95, 454 & seq.), *cross-remainders*—can any longer exist *as such* with us, where the devisees are construed to be what, as the law was on the 7th of October, 1776, would have been devisees of estates-tail. Until the 1st of January, 1820, the student will remember (*Ante*, p. 454) that all such limitations were utterly defeated (as coming after a fee-simple), together with every other ulterior remainder or reversionary interest, as happened in *Broadus v. Turner* (5 Rand. 314), as well as in other cases. But since the revival of 1819, which took effect 1st January, 1820, a cross remainder limited by will, upon an estate-tail, though void as as a remainder, may take effect as an executory limitation; and so, also, may an ulterior remainder, limited upon the dying of all the devisees without issue or heirs of the body, or the like; and even in case of a deed similar limitations would be sustainable as contingent or executory limitations. But it seems that, for reasons which will be presently apparent, such ulterior executory limitations, even amongst *devisees* in fee, must be *express limitations*, and cannot, like cross-remainders in wills, be *implied*. (3 Lom. Dig. 375 '36.)

Of course, devisees of real estate to several persons in fee-simple, to take as tenants in common, with a proviso that it should go over to some one else, in case *all of them* should die under a given age, or under any other prescribed circumstances, have always been liable to occur, and have sometimes happened; but it by no means follows that reciprocal executory limitations will be *implied* among such devisees in fee, because among devisees in tail, upon a corresponding limitation, there would have been an implication of cross-remainders. The diversity between the two cases is very marked. In case of a devise to several persons *in tail* (in England), assuming the intention to be clear that the estate is not to go over to the remainderman until *all the devisees* shall have died without issue, the effect of not implying cross-remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates-tail might be spent, while the ulterior devise could not take effect until the failure of *all*. But in case of a devise *in fee*, as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event, until, by the terms of the limitation, it is divested, a partial intestacy can never arise, for want of implying a limitation to the other co-devisees. On the contrary, to introduce cross-limitations by implication

amongst the co-devisees in such a case would be to divest a clear and unambiguous absolute gift, upon the mere conjecture that the testator designed it, when, if he has willed such a result, he has, at all events, not plainly signified it. Thus, if there were a devise to A and B as tenants in common in tail, and, if both should die without issue, to Z in fee, cross-remainders are mutually implied between A and B; because it is plain that the testator did not design the ulterior remainder to Z to take effect until the issue of both A and B failed; and if there were no such implication, then on A's dying without issue, living B, his estate-tail would have expired; and yet there would be no person provided by the will to take the property; and hence the testator would be, as to that interest, intestate, when it is manifest that he did not design to be so. On the other hand, if the devise were to A and B as tenants in common *in fee-simple*, and if both should die before attaining the age of thirty, to Z in fee, if A die under thirty, there is no need, in order to effectuate the testator's purpose, to suppose that A's part was designed to devolve on B; and as the testator has *expressly given* it to A in fee, liable only to be divested upon the death, not of A only, but of B also, under the age of thirty, it would be illogical to admit the implication of cross-limitations, as in the preceding instance; and accordingly, it is believed that A's part upon his death would devolve *upon his representative*, unless and until B also should die under the age prescribed. (3 Lom. Dig. 376-'7; 2 Jarm. Wills (5th Am. ed.), 556 & seq.)

This reasoning and explanation, therefore, will apply in Virginia to every estate so limited that, as the law was on the 7th of October, 1776, the same would have been an estate-tail, all such limitations being converted with us into estates in fee-simple (V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107, § 2421; *Ante*, p. 454); and the limitations thereon, which formerly would have been remainders, being expressly declared by statute to be good as executory limitations, if they would have been good as such if limited upon an original fee-simple. (V. C. 1873, ch. 112, § 10; V. C. 1887, ch. 107, § 2421; *Ante*, p. 454.)

Hence, a devise to A and B and the heirs of their bodies, to take as tenants in common (or, indeed, in Virginia, as joint-tenants), with remainder, in case they should both die without issue, to Z in fee, being with us a fee-simple in A and B, with an *executory limitation* over to Z in fee, to take effect upon the sole contingency that *both A and B shall die without issue*, there seems to be no reason to doubt that, if either A or B die without issue, his part would pass to *his heirs or devisees*, unless and until B also should die in like manner, without issue (3 Lom. Dig. 377).



And now, at length, we have reached the end of the discussion of the law touching real property; a title involving very important subjects of ownership; to the people of Virginia, and of the greater portion of these States, the most important, in the aggregate, of all others; whilst the principles which regulate it are amongst the most subtle and abstruse, and (having regard to the present state of society) are the most artificial with which the legal profession has occasion to deal.

The system of feuds has left upon this department of the law an impression so indelible, that he who would comprehend its genius and spirit must survey the large field which it embraces from a standpoint far removed in time from the present, and at least as far in respect of social organization. And hence arises much of whatever embarrassment besets the student's path in this portion of his course. Those doctrines which may appear arbitrary, and if not positively repugnant to reason, at least without its sanction, will commonly be found to be well justified by the circumstances of their origin, when we trace them back to those mediæval periods when the relation of *lord and vassal*, predominating over all other relations, moulded and colored both the interests and the sentiments of those nations whence we derive the bulk of our jurisprudence touching the subject of landed property.

The laws of every people are materially influenced by its disposition and character, and by the events which compose its history; but true as this proposition is in general, it is in a peculiar and emphatic sense true of the *land law* of England and her colonies; and an acquaintance with English history and manners prior to, and for six centuries after the Norman Conquest, will be found an effective auxiliary in acquiring a mastery of the doctrines which control the ownership and enjoyment of lands throughout the United States, and especially in Virginia.

It will be remembered that the outline, as it has been traced, of this copious topic, consists of only four great divisions, which have been successively explored, namely—

- (1), The nature and several kinds of real property;
- (2), The tenures whereby it is holden;
- (3), The estate or interest which may be had therein; and
- (4), The title thereto, and how acquired and lost.

These divisions we have followed in considerable detail into minute sub-divisions, so as to advert, in their proper connection, to most of the propositions which a practitioner of the law is likely to have special occasion for; or if any are omitted, the sources are for the most part indicated which afford the means of further investigation.

In a system so extensive, and, in many of its particu-



lars, so foreign to common observation, frequent and thoughtful reviews of the outline presented in the analytical table of contents, prefixed to this volume, are requisite, and the student is earnestly counselled by no means to pre-empt them.

Sir William Blackstone concludes his luminous, but very limited exposition of the subject of the law of real property with words which the present writer would fain adopt and make his own :

“I cannot presume,” says he, “that I have always been thoroughly intelligible to such of my readers as were before strangers even to the very terms of art which I have been obliged to make use of; though whenever those have first occurred, I have generally attempted a short explication of their meaning. These are indeed the more numerous on account of the different languages which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And, therefore, I shall close this branch of our inquiries with the words of Sir Edward Coke (*Præm. 1 Inst. xli.*): ‘Albeit the student shall not in any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself, but proceed; for on some other day, in some other place (or perhaps upon a second perusal of the same), his doubts will be probably removed.’ (2 *Bl. Com.* 383.)

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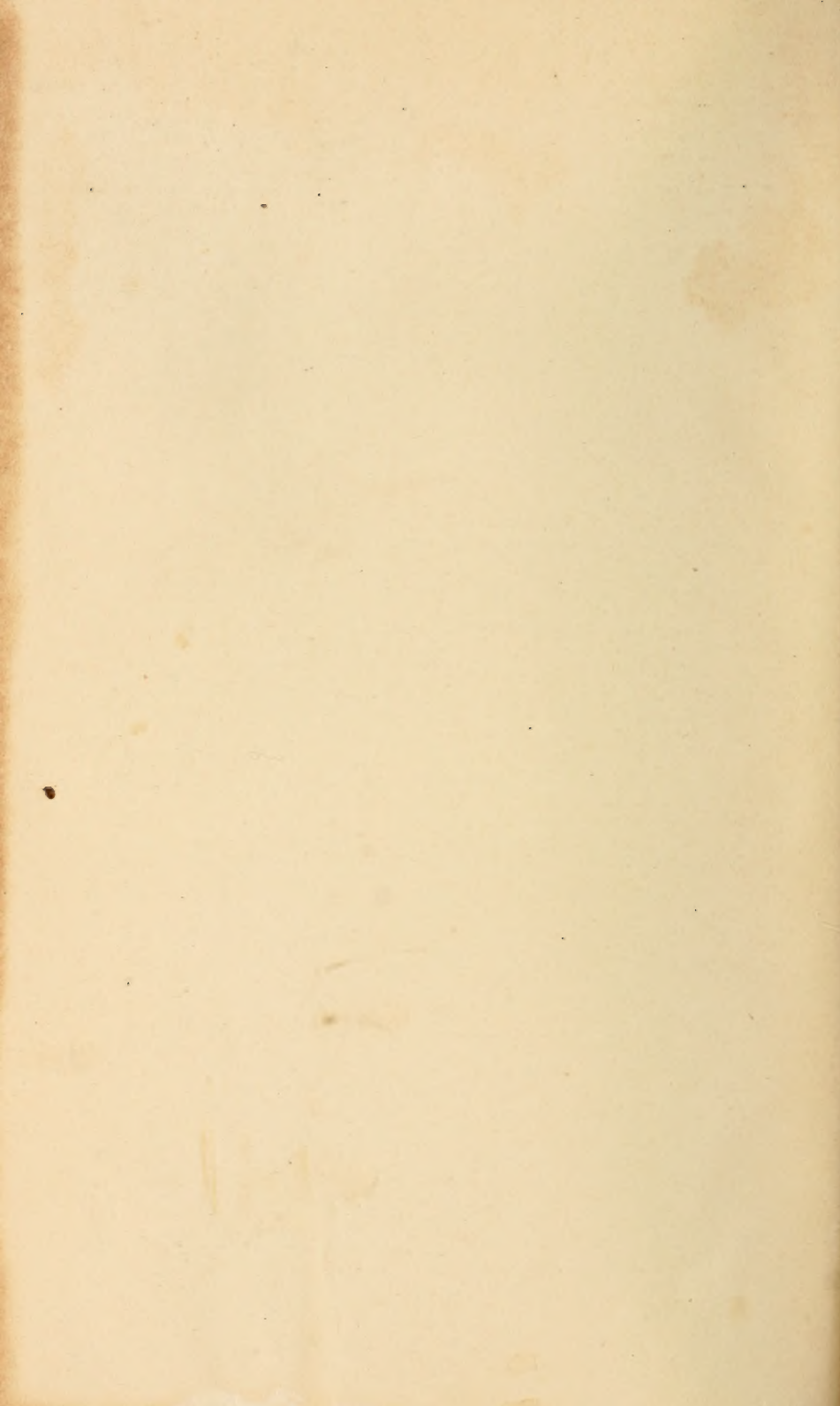












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